Upper Tribunal for Scotland

[2020] UT 14
UTS/AP/19/0031

DECISION NOTICE OF SHERIFF CHRISTOPHER DICKSON

ON THE APPELLANTS' APPLICATION FOR PERMISSION TO APPEAL TO THE UPPER TRIBUNAL

in the case of

CLIVE MANSFIELD AND HILDA MANSFIELD

Appellant

and

EDWIN THOMSON

Respondent

FTT Case Reference FTS/HPC/CV/18/2636

7 August 2019

DECISION

The Upper Tribunal, not being satisfied that there are arguable grounds for appeal, refuses permission to appeal to the Upper Tribunal.

REASONS FOR DECISION

Introduction

[1] This is an application by the appellants (who were the respondent and tenant before he FTT) for the Upper Tribunal (hereinafter referred to as "UT") to give permission to appeal a decision of the First-tier Tribunal (hereinafter referred to as "FTT"), dated 5 May 2019. The

issues considered by the FTT were: (1) whether the appellants were entitled to withhold two rental payments as a result of the respondent's (who was the landlord) failure to disclose a neighbouring garage operation, which was owned and let by their landlord; (2) whether a rent reduction had been agreed between the parties until the neighbouring garage operation issue was resolved; and (3) whether rent was due by the appellants to a date specified in the Notice to Quit or an earlier date when the appellants moved out in circumstances where the Notice to Quit stated that the appellants had to quit the property "by" the date specified). The FTT, after hearing evidence, decided: (1) that the appellants were not entitled to withhold the two monthly rental payments; (2) that a rent reduction had been agreed between the parties between April and August 2018; and (3) that the rent was only due up to the date when the appellants had moved out of the property. The FTT decision of 5 May 2019 determined that the respondent was entitled to payment from the appellants of the sum of £1,695 in respect of the two monthly rent payments that had been withheld. The appellants sought permission from the FTT to appeal to the UT on a number of purported points of law. However, the FTT, by decision dated 25 June 2019, refused to give the appellant permission to appeal to the UT.

[2] The appellant has now applied to the UT for permission to appeal to the UT on the following single purported point of law:

> "The legal member (who refused permission to appeal) states that 'at no point during the hearing did the respondents [who are now the appellants] produce a laptop containing their evidence' in this case. In our response to the application (dated 28 November 2018) we stated that we had video and audio evidence. The legal member never looked at our evidence (which is vital to this case). This is a violation of legislation. We even sent DVD-ROM discs to the tribunal."

The relevant law

[3] Section 46 of the Tribunals (Scotland) Act 2014 (hereinafter referred to as "the 2014 Act") provides:

> "**46 Appeal from the Tribunal**
>
> (1) A decision of the First-tier Tribunal in any matter in a case before the Tribunal may be appealed to the Upper Tribunal.
>
> (2) An appeal under this section is to be made-
> (a) by a party in the case,
> (b) on a point of law only.
>
> (3) An appeal under this section requires the permission of-
> (a) the First-tier Tribunal, or
> (b) if the First-tier Tribunal refuses its permission, the Upper Tribunal.
>
> (4) Such permission may be given in relation to an appeal under this section only if the First-tier Tribunal or (as the case may be) the Upper Tribunal is satisfied that there are arguable grounds for the appeal.
>
> (5) This section-
> (a) is subject to sections 43(4) and 55(2),
> (b) does not apply in relation to an excluded decision."

[4] Rule 3 of The Upper Tribunal for Scotland Rules of Procedure 2016 (hereinafter referred to as "the 2016 Rules") provides:

> "(6) The Upper Tribunal may, where the First-tier Tribunal has refused permission to appeal-
> (a) refuse permission to appeal;
> (b) give permission to appeal; or
> (c) give permission to appeal on limited grounds or subject to conditions;
> and must send a notice of its decision to each party and any interested party including reasons for any refusal of permission or limitations or conditions on any grant of permission.
>
> (7) Where the Upper Tribunal, without a hearing-
> (a) refuses permission to appeal; or
> (b) gives permission to appeal on limited grounds or subject to conditions,
> the appellant may make a written application (within 14 days after the day of receipt of notice of the decision) to the Upper Tribunal for the decision to be reconsidered at a hearing.

> (8) An application under paragraph (7) must be heard and decided by a member or members of the Upper Tribunal different from the member or members who refused permission without a hearing.
>
> (9) Where the First-tier Tribunal sends a notice of permission or refusal of permission to appeal to a person who has sought permission to appeal, that person, if intending to appeal, must provide a notice of appeal to the Upper Tribunal within 30 days after the day of receipt by that person of the notice of permission or refusal of permission to appeal."

[5] Section 46 of the 2014 Act makes clear that the appellant can only appeal to the UT on a point of law (section 46(2)(b) of the 2014 Act) and that permission to appeal to the UT can only be granted if the UT is satisfied that there are arguable grounds for appeal. Rule 3(6) of the 2016 Rules makes clear that the UT is entitled to: refuse permission to appeal; give permission to appeal on all grounds sought; or give permission to appeal on limited grounds. The question therefore, at this stage, is whether the UT is satisfied that the purported point of law, identified by the appellants, set out arguable grounds for appeal.

[6] The appellant, at this stage, in order to satisfy the UT that there are arguable grounds for appeal, requires, in my view, to point to a material error of law, which could result in the decision of the FTT being quashed in terms of section 47(1) of the 2014 Act. An error of law would include: (i) an error of general law, such as the content of the law applied; (ii) an error in the application of the law to the facts; (iii) making findings for which there is no evidence or which is inconsistent with the evidence and contradictory of it; and (iv) a fundamental error in approach to the case: for example, by asking the wrong question, or by taking account of manifestly irrelevant considerations, or by arriving at a decision that no reasonable tribunal could properly reach (see *Advocate General for Scotland* v *Murray Group Holdings* 2016 SC 201 at paras 42 to 43).

[7] The decision to grant permission to appeal is discretionary. Permission may be refused if a mistake by the FTT did not affect the outcome. In *R* v *Secretary of the State for*

Social Services exp Connolly [1986] 1 WLR 421 the English Court of Appeal was concerned with a refusal of permission by a Commissioner. In that case Slade LJ stated at p432:

> "If an applicant presents... an arguable, even substantially arguable, point of law, it may still, in some circumstances, be open to the commissioner to refuse leave in the proper exercise of his discretion, for example, if he is satisfied that the point of law will have no effect on the final outcome of the case."

The FTT's refusal of permission to appeal, dated 25 June 2019

[8] The FTT decision of 25 June 2019, amongst other things, considered the appellants purported point of law and responded in the following terms:

> "Items 7 and 8: The decision [the FTT decision of 5 May 2019] sets out the procedural history of this matter. However, at no point during the hearing, which happened over two days, did the Respondents produce a laptop or state that this was available and had been brought to the hearing. The only format in which digital evidence was ever produced was the DVD evidence rejected by the Tribunal's administration. At the case management discussion on 11 December 2018 the Respondents were asked to produce the evidence in the form of a memory stick. This was never submitted. The internet guidance on evidence for the First tier Tribunal states:
>
> > '**Can I send video or audio evidence?**
> >
> > At this point in time, we are unable to accept video or audio evidence. We do not have the facility to share evidence submitted as video or audio files to the other parties and the Tribunal.
> >
> > If a party wishes to submit video or audio evidence they should notify the office in writing, explaining the nature of the recording. This submission will be sent to the Tribunal and the other party, and the evidence should be brought along to the Hearing. At the Hearing the Tribunal will hear the views of the parties on whether the evidence should be accepted, and make a preliminary decision on this issue. In the event that the Tribunal accept the evidence, the party submitting it should bring with them the means of playing the recording - for example a tablet or laptop computer. Personal mobile devices like smartphones are not suitable for use to present evidence.'
>
> Unfortunately during the hearing the Respondents at no point produced the audio or video evidence and a laptop. They only referred to this evidence existing in their written submissions and oral evidence. They did not provide it in the format of a memory stick, which could be virus checked on a Tribunal laptop. The Tribunal considers that the content of the DVD evidence as set out in the description would not have affected the material outcome of the case as the Tribunal accepted as fact the operation of a garage next door and the agreement for rent reduction. The

> Respondents in their correspondence with the Applicant stated repeatedly that the rent was being withheld for a specific purpose. This purpose could no longer be achieved once the Respondents moved out. The Tribunal considered that the materially relevant issues to be determined were fully covered in oral and photographic evidence by the Respondents and Applicant."

Discussion

[9] The appellants have alleged that the "legal member never looked at our evidence (which is vital to this case). This is a violation of legislation". The appellants have, however, failed to identify the legislation that they allege has been contravened. The FTT decision of 25 June 2019 makes clear that the appellants were asked to produce their digital evidence on a memory stick. The appellants did not produce a memory stick and did not follow the internet guidance on submitting video or audio evidence. At the two day hearing the appellants did not produce any audio or video evidence and only made reference to it during written submissions and oral evidence. In the circumstances the FTT were unable to consider the digital evidence because the appellants: (1) failed to produce the digital evidence to the FTT in the format required; and (2) did not produce any video or audio evidence at the two day hearing. In all the circumstances I do not consider that there is any information to suggest the FTT have acted contrary to the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 or any other relevant legislation and am unable to detect any error of law in the approach of the FTT to the digital evidence. In any event, the FTT have made clear that they accepted: (1) the neighbouring property was operating as a garage; and (2) there was an agreement to reduce the rent between April and August 2018; and are of the view that content of digital evidence would not have affected the outcome of the case. In such circumstances, even if the appellants had

identified an arguable point of law (which they have not), I would have refused leave on the basis that it would have had no effect on the final outcome of the case.

Disposal

[10] In all the circumstances I am not satisfied that the purported point of law, advanced by the appellants (which is set out at para 2), amounts to arguable grounds of appeal and I refuse permission to appeal to the UT in respect of it.

Reconsideration

[11] The terms of Rule 3(7) of the 2016 Rules have been set out at para 4 above. Given that permission to appeal to the UT has been refused, the appellants, if unhappy with this decision, may, in terms of Rule 3(7) of the 2016 Rules, make a written application (within 14 days after the day of receipt of the notice of this decision) to the UT for the decision to be reconsidered at a hearing made up of a different member, or members, of the UT.