Upper Tribunal for Scotland

[2020] UT 18
Ref: UTS/AP/19/0050

DECISION OF SHERIFF PINO DI EMIDIO

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

in the case of

MR 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

FTT Case Reference UTS/AP/19/0050

Appellants: both personally present
Respondent: Ogilvy and personally present

20 March 2020

The Upper Tribunal:

1. Grants the appellants permission to appeal the decision of the First-tier Tribunal for Scotland dated 8 May 2019 so far as it related to the interpretation of clause 4.1(c) of the lease between the parties as set out in paragraphs 12 to 20 thereof;
2. Further, grants the appellants permission to appeal in respect of the said decision so far as it related to the appellant's complaint that the respondent had failed to comply

with the Repairing Standard with regard to the external pathway or paved way at Rossie Priory, Inchture, PH14 9SH as set out in paragraphs 32 to 42 thereof;

3. Grants the appellants permission to appeal the said decision as regards the interpretation of the expression "wind and watertight" in paragraphs 57 to 67 thereof;
4. *quoad ultra* refuses permission to appeal in respect of all other matters set out in the appellants' application for permission to appeal.
5. Refuses to allow the appellants to extend the proposed grounds of appeal in terms of the request made in their email dated 10 February 2020.

Introduction

[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] The appellants seek permission to appeal a decision of the First-tier Tribunal for Scotland ("FtT") dated 8 May 2019. The decision related to the lease of Rossie Priory, Inchture, PH14 9SH ("the property") by the respondent to the appellants. The property is a stately home with a large number of rooms. Other related proceedings have been heard in the First-tier Tribunal and this Tribunal. 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. The applications were conjoined. The FtT inspected the property and evidence was heard on 26 October 2018 and 4 February 2019. Both parties were represented and provided the FtT with written submissions. Parties supplied me with copies of their written submissions to the FtT which assisted me in understanding the FtT's decision. The

FtT decided that there was no evidence of any continuing failure to maintain the property at the Repairing Standard, as restricted by the terms of the lease between the parties. On 30 October 2019 the FtT refused the appellants permission to appeal to this Tribunal. The appellants now seek permission from this Tribunal. In the proceedings before the FtT the appellants had the benefit of legal advice and representation. They are conducting proceedings on their own behalf.

[3] The appellants' written application for permission to this Tribunal is very lengthy. Some parts of it are hard to follow. I decided, following my initial perusal of it, that there were certain aspects of it that required consideration at a hearing. I also note that the appellants requested a hearing. Therefore a hearing was fixed to consider the application. On 22 January 2020 a Notice of Directions was issued to parties in respect of the hearing. The parties complied with the terms of that Notice and I heard them on the application at Perth Sheriff Court on 31 January 2020.

Preliminary Issue

[4] The respondent's solicitor raised a preliminary issue at the hearing. He submitted, under reference to section 55 of the Tribunals (Scotland) Act 2014 ("the 2014 Act"), that the application was incompetent because it sought to appeal against the decision to refuse permission to appeal by the FtT rather than the decision to reject the appellants' complaints. I reject this argument which was based on a somewhat narrow reading of paragraph 3 of the application to this Tribunal for permission to appeal. On a fair reading of the application as a whole it is clearly intended to seek permission to appeal the FtT's decision of 8 May 2019.

Extension of Time

[5] The solicitor for the respondent accepted that the appellants had applied timeously to this Tribunal for permission to appeal.

Reasons for Decision

[6] Section 46(4) of 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 *H.M. Advocate* 2015 S.L.T. 610 at paragraph [9] together with the authorities cited there. 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.

[7] The missives of let are dated 28 and 30 April 2015. The offer contained the following clause 4.1(c): -

> "Throughout the duration of the Lease the Tenant is responsible for ensuring the subjects meet the Repairing Standard except that the Landlord shall be responsible for ensuring that the subjects meet the Repairing Standard in respect of the following only:
>
> (i) the Subjects are wind and watertight except that broken window panes will be replaced at the Tenant's expense;
> (ii) The structure and exterior of the Subjects (including drains, gutters and external pipes) are in a reasonable state of repair and in proper working order (having regard to the age, character and prospective life of the Subjects and the locality in which the Subjects are situated);"

There was as a result some derogation from the full terms of the Repairing Standard normally imposed on landlords under the 2006 Act. In particular only section 13(1)(a) and (b) were engaged to any extent.

[8] 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 one and as a result over the currency of the lease the need for various repairs has arisen and the respondent has carried out repairs to the property. The written application for permission to appeal raises many matters that are plainly not within the scope of an appealable error of law having regard to the relevant statutory test. The decision of the FtT related three particular complaints made by the appellants in relation to specified parts of the property. Owing to the very wide ranging criticisms made of the FtT in the written application, it was difficult to be sure whether it was accepted that the FtT was correct in approaching matters in this way. At the hearing the appellants confirmed that the application related only to the three separate issues identified by the FtT for decision.

[9] I propose to deal with the application in the light of that clarification. First I will consider whether the FtT may have fallen into error in its approach to whether the question of whether the terms of section 13(1)(a) and (b) of the 2006 Act were imposed in their entirety on the respondent under the lease. After that I will consider each of the three specific complaints in turn as the FtT dealt with each complaint in a separate part of its decision.

Whether the lease provides for derogation from the landlord's obligations under section 13(1)(a) and (b) of the 2006 Act

[10] The appellants identify their concerns at paragraph 5.i. of their application to this Tribunal. The FtT has dealt with this complaint in paragraphs 12 to 20 of its decision. The FtT records at paragraph 18 that the appellants' solicitor made a submission that the extent

of the Repairing Standard applicable under this lease was in accordance with section 13(1)(a) and (b) of the 2006 Act. The FtT rejected that submission and expressly proceeded on the basis of its conclusion in relation to "preliminary issue 4" in its earlier decision dated 17 January 2017. Paragraphs 2 to 5 of the written submission prepared by the appellants' solicitor put before the FtT argued that the only qualification put on the respondent's obligations under section 13(1)(a) and (b) of the 2006 Act arose from section 13(3), that is, that regard was to be had to age character, prospective life and locality. That is a point of law as it goes to the interpretation of the statute and the terms of the lease. In the relevant part of the FtT's decision of 17 January 2017 it stated that "preliminary issue 4" was "whether the lease was determinable at the option of either party within three years of the start of the tenancy." The FtT decided that the lease was not so determinable. The FtT went on to express further views that the consequence of that conclusion was that the Repairing Standard applicable to the respondent was restricted. But that was not the issue determined in "preliminary issue 4". In so far as the FtT relied solely on its decision on preliminary issue 4 in its earlier decision, it is arguable that the FtT fell into an error of law in that it failed to address the submission made by the appellants' solicitor. Permission is granted to allow the appellants to argue that the interpretation placed on clause 4.1(c) of the lease by the FtT is erroneous in law. In consequence permission is also granted to a limited extent in relation to the complaints about the guttering and the dampness. If the FtT fell into error in its interpretation of the lease, it has not evaluated the evidence before it fully on these complaints because it proceeded on the basis that the lease contained effective derogations from the full Repairing Standard. If its decision on the interpretation of the terms of the lease is upheld, then the appellants do not have permission to seek to re-open the factual

inquiry by the FtT on these particular complaints other than as set out below in relation to the dampness complaint.

Complaint about a section of Guttering attached to the Eaves Overlooking the Courtyard Lying to the north of the House

[11] The FtT has dealt with this complaint in paragraphs 24 to 31 of its decision. The operative paragraph containing the reasoning of the FtT is number 31. The FtT did not evaluate the competing evidence presented to it in relation to this matter because they have approached the matter as one of sufficiency of evidence. They have had regard to a particular legal test, that is, whether the property remained wind and watertight. This was the test the FtT applied because it concluded that the obligation on the respondent to comply with the Repairing Standard had been restricted under the lease. The tribunal noted that it had heard no evidence to support a finding that the building was not wind and watertight as at the date of the hearing. The FtT, albeit briefly, indicated that it did accept that there was evidence that in the past the guttering at this location was not in good condition. In effect, it found that even if the appellant's evidence was accepted in its entirety, there was no basis for finding that the respondent had breached her restricted obligations. Assuming that the legal test applied by it was correct, the FtT was entitled to approach matters in this way even when the parties had led competing evidence. If the FtT did not apply the correct test then it has not explained what its conclusion would have been if the obligations in section 13(1)(a) and (b) of the 2006 Act applied more fully to the respondent. The appellants have not identified an arguable error of law in relation to the way in which the FtT dealt with this chapter of the case. Permission to appeal is refused to challenge the FtT's treatment of this

complaint in paragraphs 24 to 31 of its decision except to the extent stated at paragraph 10 above.

External pathway or paved way

[12] The appellants identify their concerns at paragraph 5.m. of their application to this Tribunal. The FtT has dealt with this complaint in paragraphs 32 to 42 of its decision. The operative paragraphs containing the reasoning of the FtT are numbers 38 to 42. I consider that it is arguable that the FtT fell into error of law because the reasons given for reaching the conclusion that there was no failure by the respondent to comply with the restricted repairing standard in relation to this company are inadequate. The FtT noted certain evidence of the appellants' expert at paragraph 38 but does not appear to say what it made of that evidence. It proceeds to take account of the age, character and prospective life of the property without stating what findings it made in relation to those matters. It is arguable that the FtT may have failed to explain what evidence it accepted and what evidence it rejected in relation to this chapter of the case. Permission to appeal is granted in this respect as the test of section 46 of the 2014 Act is met.

Dampness or water ingress on floor of main kitchen passageway within the property and on the lower wall of the pantry and the adjoining room

[13] The FtT has dealt with this complaint in paragraphs 43 to 67 of its decision. The operative paragraphs containing the reasoning of the FtT are numbers 53 to 67. The FtT considered the well-known line of authorities as to the meaning of "wind and watertight" as this was the extent of the restricted obligation of the respondent as landlord. The appellants criticise this at paragraph 7 of their application. In *Wolfson* v *Forrester* 1910 SC 675 the

Lord President (Dunedin) had stated that "wind and watertight" meant only against what may be called the ordinary attacks of the elements not against exceptional encroachments of water due to other causes". In *McGonagal* v *Pickard* 1954 SLT 62 the Lord Ordinary (Macintosh) had followed *Wolfson* and had concluded that dampness from the foundations would not amount to a failure to keep a leased property "wind and watertight". The appellants criticise the approach in the *Wolfson* line of authority as being out of date. The FtT expressly accepted that there were occasional water droplets on the flooring of the main passageway and that a wall in the pantry and adjoining room continue to be damp in certain areas. The FtT stated that it did not require to consider whether the property is "reasonably fit for human habitation" as that was not part of the respondent's obligation in terms of the restricted version of the Repairing Standard under the lease. The FtT was entitled to approach matters in this way only if its approach to the interpretation of clause 4.1.(c) was correct. Reference is made to paragraph 10 above. In so far as the FtT may have relied on the case of *McGonagal*, it is arguable that the FtT erred in law even it has construed clause 4.1.(c) of the lease correctly. Permission to appeal is granted in respect of the FtT's treatment of this complaint in paragraphs 43 to 67 of its decision

Other proposed grounds of appeal

[14] The appellants make lengthy criticisms of the chair of the FtT. They complain about many aspects of the process and of the handling of the hearing and inspection. The main criticisms appear in paragraph 5a. to d. and 5.f. to l. of the application The FtT, as a specialist tribunal with a qualified surveyor member, was entitled to conduct the earlier parts of the process, the inspections and the hearing in the way it saw fit so long as the parties had a fair hearing. This case related to a complex property which had many works ongoing as time

passed. The decision of the FtT addressed the three complaints that remained live at the time of the hearing. Permission is refused in respect of the various complaints about the way in which the FtT conducted the proceedings as no arguable error of law has been identified.

Other matters: The appellants' email of 10 February 2020.

[15] Following the hearing, the appellants submitted by email a letter seeking to extend the matters to be dealt with in their application for permission to appeal to this Tribunal. The appellants who were legally advised at the time the decision was made, now wish to extend their application so that they may obtain permission to appeal the decision of the FtT dated 17 January 2017 as regards "preliminary issue 4". The appellants pointed out that they were not legally qualified and if they had realised that they might seek permission to appeal on this point they would have done so as they considered the decision of 17 January 2017 to be unjust. They gave a number of detailed reasons as to why they took this view.

[16] It is a matter for my discretion whether to allow the application for permission to appeal to be extended to cover a further point of law which was not part of the original application to this Tribunal. I am not prepared to extend the application in this way. The application to extend the permission application comes very late given that I have had a hearing on the matters which were listed in a very lengthy and detailed application. The issue determined by the FtT in 2017 as "preliminary issue 4" is described at paragraph 10 above. Some of the reasoning for its decision appears doubtful but I consider that the conclusion on the stated issue of whether the lease was determinable within 3 years is correct. Even if I had been willing to allow the application for permission to be extended, I would have refused permission on this point.

Case Management concerns: Extent of documents submitted by appellants

[17] The appellants have submitted extensive documents to the Tribunal. Many were copies of documents previously submitted. Others were irrelevant. I understand that at an earlier stage in proceedings before the FtT the appellants were restricted to submitting one email a day to the clerks. There was a danger in the time prior to the hearing on 31 January 2020 that the clerks to this Tribunal would be overwhelmed by the sheer volume of material being sent in to them. This had the consequence that I also had to be sent it and required to read it all. Virtually all of the material involved failed to advance matters to any extent. Much of it had already been submitted on at least one occasion. As a result, I instructed that a note of warning be sent that if this practice continued I would consider making an order to manage the submission of further written material. The appellants, in fairness, did exercise restraint after that was done. It is important that parties exercise appropriate restraint and only submit material that is new and relevant to the issues under consideration.

Further Observations

[18] The appellants raised a wide variety of matters in their lengthy application to this Tribunal. Some of them do not, strictly speaking, give rise to matters that could properly fall within the scope of such an application but they highlight some matters of concern that might affect the confidence that parties can have in the decisions of the FtT. For this reason I have added the following observations.

Observation 1: The need for accuracy of expression in decisions

[19] The appellants are aggrieved that at various points in its decision the FtT referred to Mrs Dymoke as "the Tenant's wife". This matter is dealt with at length in paragraph 5.e. of their permission application to this Tribunal. The FtT commenced by defining the expression "the Tenant" as relating to both Dr Dymoke and Mrs Dymoke. The definition was accurate because both of them were tenants under the lease. It is regrettable that the term was not used consistently throughout the decision. I have considerable sympathy with the appellants, and particularly Mrs Dymoke who might reasonably have thought that she was not being treated as a party to the proceedings. However having read the decision of the FtT with care, I do not consider that the FtT fell into error of law on account of its failure to follow the convention that it had set out at the start of its decision.

Observation 2: the need for intimation of decisions on all parties to the application

[20] An issue about extension of time arose the appellants sought permission to appeal from the FtT. At paragraph 4 of its decision of 1 October 2019 the FtT stated that if it had taken the view there was any merit in the application, it would have considered extending the period for bringing an appeal. I interpret this as meaning that the FtT were prepared to extend the time to submit an application for permission to appeal. The decision of 8 May 2019 was not intimated to the second named appellant at all but merely to the first named appellant. There may have been a degree of confusion because the appellants were in the course of changing solicitors in relation to other related proceedings then pending before the Upper Tribunal at the very time when the decision of the FtT in these conjoined cases was being issued. For the avoidance of doubt, the Housing and Property Chamber

administration ought to be intimating such decisions to all individual parties. There should be no assumption that intimation to one of two applicants is sufficient.