Upper Tribunal for Scotland

[2020] UT 29
UTS/AP/20/0002

DECISION NOTICE OF SHERIFF IAN H L MILLER

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

in the case of

MR BARRY JAMES PARKER, MRS AGNES DONIS PARKER, West Doura Farm, Craigie, Kilmarnock, Ayrshire, KA1 5NL

Appellant

and

MR IAIN STEPHEN TREHERNE, MRS ANN CHRISTINE TREHERNE, 7 Swanston Avenue, Edinburgh, EH10 7BU

Respondent

FTT Case Reference FTS/HPC/CV/19/0649

6 August 2020

Decision

The Upper Tribunal, having considered the written application of the applicants for a reconsideration of the decision of the Upper Tribunal dated 30 January 2020 which refused permission to appeal to the Upper Tribunal against a decision of the First-tier Tribunal for Scotland Housing and Property Chamber dated 14 October 2019, Reconsiders their application and, having done that, Refuses permission to appeal in respect that it discloses no point of law.

Introduction

[1] The stage which the applicants' case has reached is that of reconsideration of the Upper Tribunal decision dated 30 January 2020 (the UT decision) refusing them permission to appeal to the Upper Tribunal (UT) against the decision of the First-tier Tribunal for Scotland Housing and Property Chamber (the FtT) dated 14 October 2019 (the FtT decision).

[2] This case arises out of a Short Assured Tenancy between the parties in respect of the property at 41 Sorn Road, Auchinleck, Cumnock KA18 2LY which commenced on 20 May 2016 and ended on 1 May 2018. The case was presented under section 16 of the Housing (Scotland) Act 2014 and sought damages for an alleged breach of contract on the part of the respondents and for an alleged breach of their statutory repairing duty in respect of the property under the tenancy.

[3] The FtT heard the parties on the applicants' application at a hearing held on 2 July and 13 September 2019. Both parties attended the hearing and both were represented at it. The FtT, having heard from the parties and from their representatives, took time for consideration. Having done that it issued the FtT decision in which it determined the applicants' application for an award of damages in their favour and payable by the respondents in respect of the respondents' breach of contract and breach of statutory obligation under the tenancy to the extent it found them proved. The FtT awarded damages in favour of the applicants in the sum of £650 sterling and found no expenses due to or by either party in respect of the application.

[4] The second named applicant, bearing to act on her behalf as well as on behalf of her husband the first named applicant, sought leave to appeal against the FtT decision. The FtT refused that request on the basis that the application for leave indicated no point of law that

could be argued on appeal. That decision is dated 30 November 2019 (the FtT refusal). The FtT sent it to the applicants on 3 December 2019.

[5] The applicants then requested permission of the UT to appeal against the FtT decision. They did that by lodging their completed Form UTS-1. It is dated 31 December 2019 but was not received by the UT administration until after that date. It was therefore lodged later than the 30 days' period afforded by rule 3(9) of The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 (the 2016 Regulations). All references in this Decision to a rule are to those in the 2016 Regulations.

[6] The UT considered that request under and in terms of rule 3(6) albeit it was lodged late and refused it for the reason contained in the UT decision dated 30 January 2020, that the request did not specify a point of law that could form the subject matter of an appeal to the UT (the UT decision).

[7] It is against the UT decision that the applicants have requested the present exercise of reconsideration. They have done that timeously and in writing by e-mail to the UT dated 3 February 2020.

Grounds of appeal

[8] The applicants sets out their proposed reasons for appealing against the FtT decision in their Form UTS-1 and its accompanying two handwritten letters. The UT administration staff very helpfully transcribed the text of the letters into a typed text. In addition the applicants rely upon the terms of an undated document sent to the UT administration by Ayr Housing Aid Centre with an e-mail dated 23 July 2020 intimating that the Centre were now representing the applicants.

Decision

[9] The applicants makes their request under rule 3(7). It states the nature and scope of the hearing. It is "for the decision to be reconsidered at a hearing." That means that it is a restricted inquiry. It does not hear evidence about the facts of the case that was presented to the FtT. It deals only with the law. The focus of attention is on the FtT decision and whether it discloses that the FtT made a mistake in applying the law that governs the issue or issues raised by the case. The reconsideration aspect is whether the judicial member of the UT who gave the UT decision has overlooked any error of law in the FtT decision.

[10] I emphasise that the applicant is not permitted to present or give new evidence because they indicated in two e-mails sent to the UT administration on 9 March 2020 and one sent on 13 March 2020 that they wanted to use the oral hearing as the chance to do that. On learning of this I asked the UT administration to inform the applicant that they could not use the hearing for that purpose. The UT administration conveyed that information to them by e-mail dated 17 March 2020.

[11] The applicants have to comply with, and the hearing has to apply and work with, the requirements of rule 3(2). That obliges the applicants to identify (a) the decision of the FtT to which their appeal relates and (b) the alleged error or errors of law in that decision. The procedural demands of rule 3(2) are in their essentials a replication of section 46(2) of the Tribunals (Scotland) Act 2014 (the 2014 Act) which directs that an appeal of the present kind is to be made (a) by a party to the case, (b) on a point of law only. For both the procedural rules and the underlying statutory provision the fundamental legal requirement is that a notice of appeal must identify, state and support a point or points of law that an applicant asserts would justify the grant of leave to appeal. Once an applicant has done that it is then

for the UT to decide whether what the applicant contends satisfies the requirement that there are arguable grounds for the proposed appeal: section 46(4).

[12] The applicants have complied with rule 3(2)(a). The point at issue in this application is whether they have complied with rule 3(2)(b). Both the FTT and the UT have said that they have not.

[13] Before dealing with the merits of the applicants' request I want to say that I agree with the UT decision that the request for reconsideration should be entertained although it is out of time, and that for the reason stated there at paragraph [13].

[14] Both parties have agreed in their respective e-mails dated 4 August 2020 that I should make my decision on the application on the papers and that there is no need for an oral hearing.

[15] In reaching my decision I have had regard to (i) what the applicants have said in their Form UTS-1 with its accompanying two letters and (ii) the document from Ayr Housing Aid Centre. Only the former was before the UT member who made the UT decision.

[16] In respect of the terms of the Form UTS-1 and its accompanying two letters I have reached the same conclusion as did the UT member, and for the same reason, namely that the applicant has not identified and set out an error of law that could be a point of law that would support granting leave to appeal. My reasons for reaching that conclusion are the same as those of the judicial member of the UT as set out in paragraphs [14] to [17] inclusive of the UT decision which I gratefully adopt and apply here. It follows that I do not consider that the UT member overlooked an error of law in the FtT decision.

[17] Turning to the document from the Ayr Housing Aid Centre it raises 7 matters. I have concluded that none identifies an error of law and that for the following reasons.

[18] The first matter asserts that the FtT failed in the overriding requirement of fairness by its decision to limit the damages it awarded to the heads of inconvenience and loss of amenity. The FtT explains its reasoning for reaching that conclusion in the section of the FtT decision headed "**Damages**". There the FtT discuss the law contained in the authorities that the applicants put before it and indicate that it accepted the law and found it uncontroversial. It then explains the extent to which it applied that law to the facts of the case that it considered were relevant to the task of assessing the applicant's entitlement to damages, starting with Clause 17.1 of the lease, the Tenancy Agreement, between the parties and then covering the various heads of claim for which the applicants wished an award of damages. Having made that analysis the FtT concluded that all that the only two heads for which it could award damages were "the claim for loss based on inconvenience and loss of amenity".

[19] The applicants do not dispute that the FtT applied the relevant law to the task of assessing entitlement to damages or assert that its analysis of the facts was flawed or that it was so unreasonable that no reasonable tribunal acquainted with the whole facts and circumstances could have reached it. Instead it asserts that the applicants consider that the FtT "effectively dismissed" the oral evidence presented in relation to damages. What the applicants consider is the position has to be supported by facts from which it can be inferred that the FtT acted in a way that amounts to an error of law. The applicants present no facts to support this assertion. I can discern nothing in the full terms of the section of the FtT decision that supports their assertion. The reference to rule 70 does not assist them. The FtT reached a decision by applying the law to the facts. It was a decision that the FtT were entitled to make. The applicants have been unable to identify an error of law in the FtT decision on the heads of damages.

[20] The second matter is the contention that the FtT failed to consider alternative methods of quantification of damages. The applicants advance this point while accepting that their representative before the FtT had suggested that chosen method to the FtT. The assertion made is that "it does not follow that it was the only method which could be used."

[21] The FtT exercises a judicial function. As such it is called upon to decide a case such as the present one on the basis of what the parties to the action choose to put before it. That is because the procedure is fundamentally adversarial in nature and not inquisitorial. It forms no part of the duty or responsibility of the FtT to go beyond what is placed in issue before it and reach a decision on a ground of law or on a set of facts that the parties did not put in issue before it. The decision to which the FtT came is one that it was enjoined to make in light of the submissions made to it. The applicants do not assert that it was a decision which the FtT either could not or should not have reached on the facts and law presented to it. The decision is one that it was entitled to make. The applicants have been unable to identify an error of law in its making. Furthermore and in any event, I consider that I must observe that it comes ill from the applicants to try to obtain a review of the method of calculation when their own representative presented it to the FtT as a method to use.

[22] The third matter is that the FtT "could have directed the applicants to provide further evidence of loss linked to each of the established landlord breaches". For the reasons given in the preceding paragraph the FtT was required to work with the material and the submissions on it that the participants chose to present to it. The applicants do not assert that it was a decision which the FtT either could not or should not have reached on the facts and law presented to it. The applicants have been unable to identify an error of law in its making.

[23] The fourth matter is that the FtT should have given guidance under rule 2(2) of the 2017 rules on the issue of damages beyond inconvenience and loss of amenity. For the reasons given in the penultimate preceding paragraph the FtT was required to work with the material and the submissions on it that the participants chose to present to it. Furthermore and in any event, the issue of damages lay at the heart of the dispute between the parties before the FtT. The applicants were represented before the FtT. What to place before the FtT and how to place it was a matter for that representative to determine, not the FtT. There was no obligation on the FtT to do what the applicants assert and indeed it would have been concerning if the FtT had taken it upon itself to do what they urge because it would have run the risk of departing from the necessary and fundamental requirements that such a tribunal act independently of the parties and be impartial in the conduct of business before it. On this matter the applicants have been unable to identify an error of law.

[24] The fifth matter states that the FtT "did not adequately take into account the level of disruption and inconvenience suffered by the applicants. This point raises a matter of fact. The determination of the facts, what to take into account and what inferences to make and conclusions to draw from facts it holds proved are all issues for the FtT to decide. To say no more than the applicant's assertion, that the FtT did not adequately take certain asserted facts into account, does not support the conclusion that the FtT decision was flawed to the extent of being an error of law. The decision on the facts was one that the FtT had to make. The applicants have been unable to indicate that the decision was so unreasonable as to amount to an error of law.

[25] The sixth matter relates to matters of fact concerning gas and electrical matters and the toilet. As already stated, the establishment of matters of fact is a task for the FtT. The

applicants have been unable to support the conclusion that the decision was so unreasonable as to amount to an error of law.

[26] The seventh states that the FtT "has given inadequate reasons for the decision and has not adequately addressed relevant issues provided in the appellant's (sic) submission". This contains no detail or content on which I could make an informed and proper decision. As stated it does not identify an error of law.

Conclusion

[27] In respect that the application of the applicants has been unable to identify a point of law that could be argued at an appeal hearing before the UT against the FtT decision, their request for permission to appeal to the UT falls to be refused.