



DECISION NOTICE OF SHERIFF IAIN FLEMING

in the case of

ERIC HAMILTON, Flat 0/2, 29 Eriboll Place, Glasgow, G22 6PA

Appellant

and

THE GLASGOW HOUSING ASSOCIATION LIMITED, YOURPLACE PROPERTY
MANAGEMENT LIMITED, Wheatley House, 25 Cochrane Street, Glasgow, G1 1HL;
Wheatley House, 25 Cochran Street, Glasgow, G1 1HL

per Wheatley Group, Wheatley House, 25 Cochrane Street, Glasgow, G1 1HL

Respondent

FTT Case Reference FTS/HPC/PF/18/3124

8 September 2020

Decision

The Upper Tribunal grants the appeal, sets aside the decision of the First-tier Tribunal and remits the case back to the First-tier Tribunal to hear the case before a differently constituted Tribunal.

Introduction

[1] The appellant is Mr Eric Hamilton. The respondent is The Glasgow Housing Association Limited. The appellant had raised a claim before the First-tier Tribunal

(hereafter “the FtT”) in relation to an alleged breach of the Code of Conduct for Property Factors. The FtT hearing took place on 19 March 2019 at the Glasgow Tribunal Centre, 20 York Street, Glasgow G2 8GT. The appellant represented himself and the respondents were represented by Mr David Adams, Solicitor. Shortly after the hearing began at 10.00 am on 19 March an issue arose as to the apparent entitlement of Mr Adams to act as a representative for the respondents. It would appear that the matter raised was of highly questionable relevance to the issue the FtT had to determine. That issue was not resolved until 12.10 pm. During the course of that resolution the appellant verbally interrupted proceedings on two separate occasions.

[2] The hearing continued and shortly before 1.00 pm there was another interruption from the appellant. The FtT Chair warned him against any further interruption. The FtT then adjourned the hearing for lunch and after the lunch interval the FtT Chair warned the appellant that if there were to be any further interruptions the FtT would require to consider excluding the appellant from the hearing.

[3] Later in the afternoon and during the course of a submission by Mr Adams there was a further interruption by the appellant. This was the fourth occasion upon which the appellant had interrupted the proceedings.

[4] The FtT took the view that the respondent’s representative was entitled to make submissions without interruption; *“their interest was for their case to be put forward in an uninterrupted fashion.”* The FtT noted that the appellant had indicated that he suffered from poor mental health and also noted that the appellant had *“endeavoured to control himself but had been unable to do so”*. The FtT determined that it could not deal with the case justly while having to deal with frequent interruptions from the appellant. In the circumstances, the FtT decided to exclude the appellant from presenting submissions or presenting arguments or

questioning witnesses in person. Further, it stated that this decision would apply to any future hearings. At the conclusion of the hearing the FtT issued the following interlocutor: “The Tribunal excludes the applicant from presenting submissions or arguments or questioning witnesses in person at any future hearing.” It is important to understand that the FtT was not excluding the appellant from being present at the hearing in the sense that he was not instructed to physically remove himself from the hearing. He was being excluded from direct participation in the hearing unless he was represented. He was being excluded from appearance as a party both in an immediate sense and at any future hearing. The FtT then adjourned the hearing to a date to be fixed to allow the appellant to “Find and instruct a representative in light of his exclusion from appearance as a party.” It is clear from the decision of the FtT that the appellant was being told that he could not participate further in proceedings without a representative.

[5] The appellant sought permission to appeal from the FtT. This was refused on 6 May 2019 upon the basis that the appellant had not identified any error by the FtT in its application of the law. The appellant thereafter applied to the Upper Tribunal seeking permission to appeal. By application dated 10 October 2019 and received by the Upper Tribunal on 17 October 2019 the appellant sought permission to appeal the decision of the FtT dated 6 May 2019, which refused permission to appeal against the FtT decision of 19 March 2019. It was noted by the Upper Tribunal that the application for permission to appeal by the appellant was not timeous. It ought to have been received by the Upper Tribunal within 30 days of receipt of the initial decision. Accordingly, by the time it was received by the Upper Tribunal it was over four months late.

[6] The Upper Tribunal considered the appellant’s request for an extension of the time limit for requesting permission to appeal. The respondents were given an opportunity to

make submissions in respect of the issue of late presentation of the application for permission to appeal and did so in terms of representations which accompanied a letter dated 7 November 2019. The Upper Tribunal in terms of its decision, dated 6 December 2019, determined that the appellant had failed to persuade the Upper Tribunal that he had provided the required detailed reasons for the lateness of his application. The appellant thereafter requested an oral hearing. The oral hearing took place before the Upper Tribunal on 3 March 2020. In terms of an email, dated 25 February 2020 the respondents indicated that it was not their intention to appear personally at the hearing. They relied upon their previous communication which was subsequently taken into account by the Upper Tribunal in considering the matter.

Grounds of Appeal

[7] The appellant sought permission to appeal the decision of the FtT as he felt “*natural justice had been breached*” because each party must be given a fair chance to “put their case.” He also claimed that the FtT took into account things “which it should not have” and that it failed to adjourn the hearing to allow the appellant to obtain legal representation. When the hearing called the appellant was personally present. He attended in the company of his brother, Mr Ian Hamilton, who provided support to him.

[8] At the hearing on 3 March 2020 the Upper Tribunal had regard initially to whether permission to appeal should be granted standing the late intimation of the application for permission to appeal and thereafter the Upper Tribunal considered the following interlocutors of the FtT; Firstly, “The Tribunal excludes the applicant from presenting submissions or arguments or questioning witnesses in person at any future hearing.” and

secondly, the requirement that the appellant “Find and instruct a representative in light of his exclusion from appearance as a party.”

[9] The first issue the Upper Tribunal considered was the fact that the original application for permission to appeal to the Upper Tribunal was over four months late. The Upper Tribunal had regard to the explanation tendered by the appellant and also to the representations made by the respondents. The appellant amplified his written application and provided further information verbally. Further, regard was had to the decision of the Upper Tribunal of 22 October 2019. Having also considered the Form UTS1, the decisions of the FtT dated 19 March 2019 and 6 May 2019 together with the representations made by the appellant and respondent, the Upper Tribunal granted permission to appeal. The explanation tendered by the appellant for the late appeal was that he was unable to obtain representation. The interlocutor of 19 March 2019 states that the appellant is “*excluded.*” from presenting submissions or arguments or questioning witnesses at any future hearing. It is clear from the written decision of 19 March 2019 that the FtT had determined in terms of paragraph 31 that if submissions and arguments were to be presented at a future hearing the appellant would require to have a duly authorised representative. It was clearly anticipated by the FtT that the instructed representative could then make submissions or arguments and question witnesses before the FtT.

[10] The Upper Tribunal concluded that the appellant was entitled to form the view that without representation he would not be in a position to present submissions. Since he had been unable to obtain representation he explained that he was labouring under the misapprehension that he could not lodge the application for permission to appeal until he had obtained such representation. In view of the interlocutor of the FtT the appellant was entitled to conclude that he was prohibited from taking any further part in proceedings until

he had secured representation. Even by the time of the appeal hearing he had been unsuccessful in obtaining representation. He had endeavoured to obtain assistance but without success. In addition the appellant had kept the Upper Tribunal's administration department advised as to his difficulties throughout the four month period. It is readily acknowledged that the appeal is more than four months late. That is a significant period. The Upper Tribunal had some concerns at the length of time which had expired. However, having considered the arguments presented in the context of the exclusion The Upper Tribunal was prepared to hear the appellant's appeal, although late, and although he did not have representation. This case is fact specific in light of the terms of the interlocutor of the FtT.

[11] The Upper Tribunal granted the appellant's application for permission to appeal. The appeal process was directed to take place on the basis of written submissions only. The applicant has not provided any further information in support of the appeal and has made no written submissions. The respondents have adopted a "*neutral*" stance and state that they neither consent to nor oppose the appeal.

[12] As a preliminary it is necessary to identify the statutory source of any power to exclude the appellant from proceedings. The FtT is a creature of statute. The statutory source is found in Rule 34 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017(No 328) (hereafter "*the regulations*")

Exclusion of persons disrupting proceedings

34(1) Without prejudice to any other powers it has, the First-tier Tribunal may exclude from any hearing or part of it any person (including a party, a representative or a supporter) –

- (a) whose conduct has disrupted the hearing or is likely, in the opinion of the First-tier Tribunal, to disrupt the hearing; or
 - (b) whose presence is likely, in the opinion of the First-tier Tribunal, to make it difficult for any other person to make representations or present evidence necessary for the proper conduct of the hearing.
- (2) In deciding whether to exercise the power conferred by paragraph (1) the First-tier Tribunal must, apart from other considerations, have regard to—
- (a) the interests of the parties; and
 - (b) in the case of the exclusion of a party or a representative of a party, whether the party will be adequately represented and whether alternative measures could be put in place.
- (3) If the First-tier Tribunal decides to exclude a party it must allow the representative of that party sufficient opportunity to consult the party.

[13] The FtT also requires to have regard to the Overriding Objective as stated within Rule 2 and the Effect of the Overriding Objective as stated in Rule 3, of the regulations;

The overriding objective

- 2(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 so far as compatible with the proper consideration of the issues

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.

[14] It is also important to draw attention to Rule 25 of the regulations. Although this was not specifically referred to by the FtT in its written reasons certain of its terms are relevant to the disposal of this appeal.

Duties of chairing member at a hearing

- 25 The chairing member must take reasonable steps to —

- (a) introduce to the parties the members of the First-tier Tribunal conducting the hearing;
- (b) explain the purpose of the hearing; and
- (c) ensure that the parties to the hearing—
 - (i) understand; and
 - (ii) can participate in,the proceedings.

[15] In terms of the Overriding Objective and its Effect the FtT is obliged to ensure, when exercising any power under the regulations, so far as practicable, that the parties are on an equal footing procedurally and are able to participate fully in the proceedings. The appellant explained to the FtT that he had mental health difficulties. It appeared to the FtT that the appellant “had endeavoured to control himself but was unable to do so.” It was the perception of the FtT that the appellant was unable rather than unwilling to control himself. The effect of the order of the FtT is to prevent the appellant from participating in any future hearing in any fashion without the benefit of representation.

[16] The Upper Tribunal has considerable sympathy for the FtT Chair. It rather appeared that much time had been spent upon matters which are not germane to the issues before the FtT. The appellant had repeatedly interrupted and had frustrated the disposal of the case. Properly, the FtT warned the appellant that if his conduct continued it would require to consider excluding him from the hearing. However, despite the repeated interruptions by the appellant it is clear that the hearing was proceeding and issues were being resolved. While further difficulty was anticipated the problems experienced earlier had not prevented some measure of progress being made.

[17] The Upper Tribunal did not have the advantage of hearing written or oral representations from the respondent who has adopted a neutral stance. However, the decision to exclude a party is one which should be taken with considerable restraint and discretion. While no criticism can be made of the FtT's decision to admonish the appellant about his repeated interruptions, it rather appears that at no time prior to the decision to exclude the appellant was any enquiry made as to whether the appellant would have benefited from regular breaks in proceedings, or whether a supporter for the appellant could be obtained. There does not appear to have been enquiry into whether a short break in proceedings to allow the appellant to marshal his equilibrium such that he could have briefly absented himself before being invited back into the hearing room and enquiry made as to whether the hearing could continue without further interruption. Further, no enquiry appears to have been made as to whether there were any alternative ways in which the appellant could participate. For instance, video or telephone conferencing does not appear to have been considered, nor was the possibility of written submissions in respect of some or all of the issues. In addition, it appears that adjourning the hearing until a later date to allow the appellant to recover his composure was an option that does not appear to have been considered.

[18] In terms of Rule 34(2)(b) the FtT is obliged to consider whether alternative measures could be put in place in deciding to exercise the power of exclusion. It would have been in keeping with the terms of Rule 34 for the FtT to have allowed for the alternative possibility of revisiting the position with regard to the appellant's participation once he had an opportunity to reflect upon his behaviour and the warnings given by the Legal Chair. The result of the interlocutor is that unless the appellant obtained representation he would not be able to participate in the hearing at all. His role was to be reduced to one of a spectator,

as he was excluded from appearance as a party. The appellant did indicate to the FtT that he would benefit from representation but it would appear that despite efforts he had been unable to obtain representation of any form. That situation persisted when the case called before the Upper Tribunal which serves to point up the difficulty with the import of the interlocutor. In terms of Rule 34(2)(b) the FtT is obliged to consider whether alternative measures could be put in place in deciding to exercise the power of exclusion. That does not appear to have been done. The hearing was proceeding, albeit not without difficulty. The FtT ought to have had regard to alternative measures and considered whether the exclusion resulted in the appellant being adequately represented. It was incumbent upon the FtT to consider whether the excluded party would be adequately represented in the event of exclusion and whether alternative measures could be put in place to allow to allow the hearing to continue, even if that continuation were not on the 19 March 2019.

[19] The element of the FtT decision referable to whether consideration was given to whether the party would be adequately represented and able to participate fully in the hearing as a result of the exclusion states that the hearing was adjourned to allow the appellant to find and instruct a representative. Two bodies were identified who “*may be able to assist*” by the FtT within the decision. I am conscious that there is no provision within the regulations for the appointment of representatives to assist parties. The decision to exclude appears to be predicated upon an assumption that the appellant would be able to obtain representation. Such an assumption is incorrect. Representation is not always necessarily available and indeed in this case even by the stage of the case calling before the Upper Tribunal the appellant had not been successful in obtaining representation. The FtT accepts that the appellant was “excluded from the hearing as a party.” In adopting the approach

which it did the FtT was not taking reasonable steps to ensure the participation in the proceedings of the appellant in terms of Rule 25 of the regulations.

[20] In terms of section 25(c)(ii) of the regulations it is a duty of the chairing member to “ensure” that parties understand and can participate in the proceedings. To consign the appellant to the role of a spectator without considering alternative methods of participation unless representation was obtained does not discharge that duty in terms of participation. Where the FtT excludes a party it is important that the FtT does its utmost to minimise the disadvantage.

[21] Rules 34 and 25 must be interpreted in terms of the Overriding Objective and the Effect of the Overriding Objective. The FtT must manage the proceedings in accordance with the Overriding Objective. The FtT is required to “deal with proceedings justly.” Included in the amplification of the term “justly” is an obligation to ensure, as far as practicable, that parties are able to participate fully in the proceedings. The FtT also required to give effect to the Overriding Objective when exercising any power under the Rules. The appellant explained to the FtT that he had mental health difficulties. It appeared to the FtT that the appellant “had endeavoured to control himself but was unable to do so.” It appears to be the case that the appellant was unable rather than unwilling to control himself. The effect of the order of the FtT is to completely prevent the appellant from participating in any future hearing without the benefit of representation, for reasons that may not have been of his own making. There is a tension between the Overriding Objective Paragraph 2(2) (c) which includes within the definition of “justly” the concept of a party being able to participate “fully” and Rule 25 which states that the FtT Chair must take reasonable steps to ensure parties can participate in the hearing. The word “fully” is not included. That tension is not

relevant to this decision since the effect of the exclusion was effectively to prevent any participation at all unless representation was obtained.

[22] There is an overriding duty on the FtT to ensure that parties have a fair opportunity to present their case. I recognise that on occasions this is a right that mischievous parties may hide behind. That is not to say that a party should be afforded every opportunity to present his or her case, rather that a reasonable opportunity, within limits, is to be given. It is recognised that if unacceptable behaviour continues there is a duty upon the FtT to ensure that proceedings are conducted fairly and expeditiously. It is, however, clear that there is a continuing duty on the FtT to consider and review whether it is in the interests of justice in considering a case in the absence of a party or where a party's participation has been restricted. The Upper Tribunal considered the question of the exclusion of the appellant not only on the day of the hearing but also from making submissions and presenting arguments in person in relation to all future hearings. No opportunity for review of the decision by the appellant was provided. No opportunity was given to the appellant to ameliorate his behaviour and thereafter to ask the FtT to withdraw the order to exclude. Issues may emerge that cannot really be dealt with fairly in the absence of the party. In such circumstances an initial decision to proceed in the absence of a party's participation may have to be reconsidered. (*KO v SSWP (ESA)* [2013] UKUT 554 (AAC)). When the FtT determined that the appellant should be excluded in the fashion indicated the FtT had a continuing duty to review the position. To determine, without allowing the appellant recourse to review, that the hearing would proceed to its conclusion absent participation by the appellant unless he obtained representation does not adhere to the Overriding Objective.

[23] In the circumstances of a misbehaving party the crucial task for the Legal Chair is to consider and devise an approach within the Rules which best reconciles the divergent interests of parties. I readily appreciate that such a task is not straightforward and often presents challenges. Parties cannot be allowed to abuse proceedings. The FtT is obliged *inter alia* to enforce both the statutory rules of procedure and to adhere to fundamental principles of natural justice. The behaviour of the appellant before the FtT was sustained, disruptive and clearly worthy of sanction. The FtT hearing could not have proceeded without intervention from the Legal Chair. However, the regulations have been devised to deal with those who frustrate the progress of hearings. In the circumstances of this hearing the FtT appears not to have had regard to whether the appellant was adequately represented in light of the exclusion, failed to have regard to alternative measures and provided no opportunity for review of its decision. The conclusion which must be reached when considering these circumstances is that the Legal Chair did not take reasonable steps ensure that the appellant could participate in the hearing, in terms of Rule 25 of the regulations. In the circumstances, the appeal is granted. The Upper Tribunal sets aside the earlier order that; "The Tribunal excludes the applicant from presenting submissions or arguments or questioning witnesses in person at any future hearing." and orders that the FtT recommence before a differently constituted FtT. For the avoidance of doubt the Upper Tribunal did not hear argument from the appellant in relation to the other aspects of the appeal and makes no decision thereon.