



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

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

19 March 2020

Decision

Permission to appeal is granted.

Introduction

[1] The appellant is Mr Eric Hamilton. The respondent is The Glasgow Housing Association Limited. The First-tier Tribunal (hereafter “the FtT”) hearing took place on 18 January 2019 and 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 on 19 March an issue arose as to the entitlement of Mr Adams to act as a representative for the respondents. It would appear that that issue was not resolved until 12.10 pm that day. During the course of that resolution the appellant verbally interrupted proceedings on two 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 he was interrupted by the appellant. This was the fourth occasion during 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 appellant's interest was to put forward his evidence in support of his claims which related to a breach of the Code of Conduct for Property Factors. 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 remove himself from the hearing. He was being excluded from direct participation in certain aspects of 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.

[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. It was noted by the Upper Tribunal that the application for permission to appeal by the appellant was not timeous. 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 or be represented at the hearing. They relied upon their previous communication which was 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 appeal hearing the Upper Tribunal had regard initially to whether permission to appeal should be given standing the late intimation of the application for permission to appeal and thereafter the Upper Tribunal considered primarily the following interlocutor of the FtT; “The Tribunal excludes the applicant from presenting submissions or arguments or questioning witnesses in person at any future hearing.”

[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, the Upper Tribunal granted permission to appeal. The explanation tendered by the appellant for the late appeal is 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 anticipated by the FtT that the instructed representative could then make submissions or arguments, question witnesses and present the appellant’s oral evidence to the FtT.

[10] The appellant was entitled to form the view that without representation he would not be in a position to present submissions. Since he has 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. He had endeavoured to obtain assistance but without success. In addition the appellant had kept the Upper Tribunal administration advised as to his difficulties throughout the four month period. I readily acknowledge 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 was an exceptional case and the time frame is exceptional. It is fact specific in light of the terms of the interlocutor of the FtT.

[11] The Upper Tribunal then considered the substance of the appellant's application for permission to appeal. 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.

[12] 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.

[13] At this stage 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.

[14] In terms of the Overriding Objective and its Effect the FtT is obliged to ensure, so far as practicable, that the parties are on equal footing procedurally and are able to participate fully in the proceedings when exercising any power under the regulations. 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 without the benefit of representation.

[15] The Upper Tribunal had some sympathy for the FtT Chair. It rather appeared that much time had been spent upon a matter which was 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 did proceed and certain issues were resolved. While further difficulty was anticipated, the problems experienced earlier had not

[16] The Upper Tribunal did not have the advantage of hearing oral representations from the respondent in relation to this issue. 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 marshall 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. 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 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 also an option that does not appear to have been considered.

[17] The interlocutor and its impact raise a number of points of law, including the absence of an opportunity for the matter to be reviewed. The appropriate Rules which govern the FtT and its interlocutor applies have been identified. A point of law arises in relation to the appellant's contention that he had not had a fair chance to "put his case" and consequently whether "natural justice has been breached." Further, since it appears that the appellant did mention that he would "benefit" from representation in the course of his application to adjourn the proof permission to appeal on the ground that the FtT failed to adjourn the proof to allow the appellant to obtain legal representation is granted. Insofar as the appellant's remaining ground is concerned this raises no matter of law and permission to appeal on that ground is refused. There is no basis for the contention that the FtT took into account things which it should not have. There is no specification of the aforesaid "things."

[18] Permission to appeal is granted and parties should be allowed 30 days from receipt of this decision to make written representations.