



DECISION AND ORDER (NO 2) OF SHERIFF PINO DI EMIDIO

in the case of

BUSBY PROPERTY COMPANY LIMITED, Millworks, Field Road, Glasgow, G76 8SE

Applicant

and

FIRST-TIER TRIBUNAL FOR SCOTLAND HOUSING AND PROPERTY CHAMBER,
Glasgow Tribunals Centre, 20 York Street, Glasgow, G2 8GT;

and

ASHLIEGH WRIGHT, 16 Allandale Crescent, Greenloaning, FK15 0LR

Respondents

FTT Case Reference FTS/HPC/PR/18/0576

21 January 2019

The Upper Tribunal for Scotland **REFUSES** the Applicant's request for an extension of time to seek permission to appeal to the Upper Tribunal for Scotland against the decision of the First Tier Tribunal dated 15 May 2018, and **DISMISSES** the proceedings in whole for want of jurisdiction.

REASONS FOR DECISION

1) By letter dated 26 September 2018 Busby Property Co. Limited (hereinafter “the Applicant”) has responded to the Tribunal’s Order (No. 1) dated 20 September 2018 and has provided some further documentation. As a result it is clear that the Form UTS-1 dated 16 August 2018 relates to a request for permission to appeal the decision of the First Tier Tribunal for Scotland (“FTTS”) dated 15 May 2018 to the Upper Tribunal for Scotland (“UTS”). The applicant had ticked both boxes at the foot of page 1 of the Form UTS-1 so that it was not clear what the application related to. When completed properly the requirements of a notice of appeal as set out in the Rules of Procedure are likely to be complied with. The terms of the relevant Rules are set out in the Appendix for ease of reference along with those provisions of the Tribunals (Scotland) Act 2014 (“the 2014 Act”) which are referred to in this Decision. The Form UTS-1 is for use in two different circumstances. These are (a) when a party wishes to appeal a decision of the FTTS having first obtained permission to appeal from the FTTS or (b) when a party wishes to request permission to appeal from the UTS having been refused such permission by the FTTS.

2) The additional papers now received disclose that the applicant was refused permission to appeal by the FTTS on 21 June 2018. The applicant had completed part 6 of the Form UTS- 1 requesting an extension of time. The Form UTS-1 is treated as an application seeking both an extension of time to seek permission to appeal as well as permission to appeal.

3) The first question to be considered is whether the Applicant should be given an extension of time to bring a late application for permission to appeal. The second question that arises is whether, if the applicant is given an extension of time, it should be given permission to appeal.

4) Before considering the first question further it is useful to set out a chronology of the proceedings to date both in the FTTS and in the UTS, so far as this can be reconstructed from the papers made available to this tribunal.

- a. 7 March 2018 – the application to the FTTS was lodged by Ms Ashliegh Wright.
- b. 19 April 2018 – the application was notified to the applicant.
- c. 20 April 2018 – the applicant was given notification of a Case Management Discussion before the FTTS fixed for 15 May 2018.
- d. 15 May 2018 - the FTTS held a Case Management Discussion. The Applicant did not make written representations and did not attend the Case Management Discussion. The hearing proceeded and the FTTS issued its written decision in favour of Ms Wright on the same day. At the end of the written decision the FTTS stated that there was a right of appeal but that permission first had to be obtained from the FTSS.
- e. 7 June 2018 – the Applicant wrote to the FTTS explaining that there had been no appearance on 15 May 2018 due to pressing family matters and asserting that documentation had been sent to the FTTS in advance of the Case Management Discussion. This appears to be a reference to a copy letter of 3 May 2018 which has attached a blank style letter dated 30 March 2017.
- f. 21 June 2018 – The Legal Member/chair of the FTTS by written decision refused permission to appeal on the basis that no error of law was disclosed in the letter of appeal. This was in response to the Applicant's letter of 7 June 2018. It was noted that the Applicant had failed to disclose details of an error of law in the letter of 7 June 2018 and that in the circumstances recall or review may have been appropriate.

- g. 25 June 2018 – the FTTS wrote to the Applicant advising that the tribunal had decided to refuse the request for permission to appeal and enclosed a copy of the Legal Member’s decision.
 - h. 5 July 2018 – the FTTS acknowledged receipt of a letter from the Applicant dated 4 July 2018 (copy not provided to this tribunal).
 - i. 6 July 2018 - the FTTS wrote to the Applicant advising that if it wished to dispute the decision of the FTTS to refuse permission to appeal this would have to be done via the UTS.
 - j. 10 July 2018 – the Applicant wrote to the FTTS stating it wished to appeal the decision of the FTTS. It noted that permission to appeal had been refused by the FTTS and that this was intimated to the Applicant on 25 June 2018.
 - k. 7 August 2018 – the Applicant wrote to the UTS stating it wished to appeal the FTTS’s decision.
 - l. 16 August 2018 – the Applicant submitted Form UTS-1.
- 5) A person seeking permission to appeal from the UTS following a refusal of such permission by the FTTS must provide a notice of appeal to the UTS within 30 days after the day of receipt by that person of the notice of refusal of permission to appeal. The Applicant’s first approach to the UTS was on 7 August 2018 when it wrote a letter purporting to appeal. That letter did not comply with the requirements of the relevant rule as to notices of appeal. The Applicant submitted a Form UTS-1 on 16 August 2018 which came closer to compliance with the requirements for a valid notice of appeal. With regard to the reason for requesting an extension of the time limit the Form UTS-1 contained the following statement:

“On holiday from 13 July. Returned to office 7th August.”

There is no indication given as to why the Applicant did not submit the Form UTS-1 or otherwise comply with the necessary requirements of a notice of appeal prior to going on holiday on 13 July 2018 or upon returning to business on 7 August 2018. It took until 16 August 2018 for the Form UTS-1 to be submitted by the Applicant. The Applicant required to state why it was said to be in the interests of justice that the time be extended. Other than the explanation about being on holiday from 13 July to 7 August no explanation was provided. There was no information as to why during the period of absence on holiday the Applicant's business could not be carried on in such a way as to allow the necessary notice of appeal to be submitted on time.

6) The chronology above sets out the correspondence trail that has passed with the Applicant. There have been failures to comply with the requirements of the rules of procedure and apparent confusion on the part of the Applicant (which is a business entity) as to what was required for it to engage appropriately with the process both of the FTTS and the UTS.

- a. The Applicant did not inform the FTTS in advance that it was not attending the Case Management Discussion on 15 May 2018.
- b. The applicant ignored an invitation of the FTTS (in its decision of 21 June 2018 refusing permission to appeal) to apply for a review of the decision of 15 May 2018.
- c. The explanation given for the delay in seeking permission to appeal from the UTS covers only a part of the period from the date when refusal of permission by the FTTS was intimated (25 June 2018).
- d. The Applicant's letter of 10 July 2018 addressed to the FTTS ignored the clear advice given on 6 July 2018 that it required to approach the UTS.

- e. The Applicant tried to appeal to the UTS without lodging a notice of appeal that complied with the requirements of the rules. This might have been done by use of the form UTS-1 which is designed to elicit all the necessary information for the application to proceed or in other writing that complied with the applicable requirements.
- f. The Form UTS-1 when eventually submitted was inaccurate and it was necessary for this tribunal to issue Order (Number 1) to seek clarification so as to try to understand what exactly was being sought.

The impression gained is that the Applicant has made little effort to comply with the requirements of the tribunal process and that this case has been treated in a rather casual and dilatory manner. Even now the Applicant has not produced the lease that is relied on for the argument it wishes to make.

7) In all these circumstances I do not consider that it is in the interests of justice that the time be extended. In the exercise of my discretion, I have decided to refuse to allow an extension of time to make the application for permission to appeal as it has not been demonstrated that it is in the interests of justice to do so.

8) Permission to appeal is a condition precedent to the UTS having jurisdiction to hear an appeal.¹ The function of the permission requirement is to filter out cases that are frivolous or unmeritorious by scrutinising the grounds of dissatisfaction to see if they have sufficient merit.² It operates as a protection for applicants who make ill-informed attempts to bring an appeal. The material submitted by the Applicant discloses no arguable error of law made by the FTTS. The FTTS proceeded on the basis of the material to which it referred in its

¹ *Re Taylor (A Bankrupt)* [2007] Ch. 150 at [56]

² Hale LJ in *R v Secretary of State for the Home Department ex p. Saleem* [2001] 1 W.L.R. 443 at 459.

decision. It is obvious that the FTTS did not consider any documents said to have been submitted in advance by the Applicant

9) It might have been more appropriate for the Applicant to have requested a review by the FTTS instead of trying to overturn the decision of the FTTS on appeal. The FTTS itself in its decision of 21 June 2018 expressly stated that it may have been appropriate for the Applicant to seek a review of the decision of 15 May 2018. The Applicant has chosen not to request a review which would have provided an opportunity to have the FTTS re-consider its decision in the light of further information or evidence. It is difficult for the Applicant to say how the FTTS erred in its decision of 15 May 2018 given that the Applicant did not attend the hearing and the FTTS expressly proceeded on the basis of the papers and evidence it discussed in its written decision. Therefore even if I had been willing to allow an extension of time for submitting the appeal, I would have refused to grant permission to appeal as I am not satisfied that there are arguable grounds for the appeal. The Applicant has not provided sufficient material upon which the UTS can be satisfied that there is an arguable ground for the appeal. I refer to the last sentence of paragraph [6] above.

10) By this written decision the UTS has refused the Applicant an extension of time to seek permission to appeal. This means it may not appeal the decision of the FTTS of 15 May 2018 as the Applicant does not have permission to appeal from either the FTTS or the UTS. This present decision of the UTS has been made without a hearing. Had I agreed to grant an extension of time and then refused permission to appeal, the Applicant, as a party which has been refused permission to appeal late, would have been entitled under Rule 3(7) to make a written application to the UTS within 14 days of receipt of the notice of this decision for this decision to be reconsidered at a hearing. Any such application must be heard and decided by a member or members of the UTS different from the member who refused permission

without a hearing. I appreciate that I have not heard argument on the point but I conclude that I cannot construe Rule 3(7) as being applicable to this decision. Furthermore I had concluded that section 55(2) of the Tribunals (Scotland) Act 2014 does not apply to this decision. As I am refusing to extend the time to seek permission to appeal from the UTS, and the FTTS having already refused such permission, the UTS does not have jurisdiction. Therefore I have dismissed the proceedings under rule 10(1)(a).

Appeal Provisions

11) If the Applicant is aggrieved by this decision it may seek permission to appeal to the Court of Session on a point of law only. To do so the Applicant must seek permission to appeal within 30 days of receipt of this decision. Any request for permission to appeal must be in writing and must: (a) identify the decision of the Upper Tribunal to which it relates; (b) identify the alleged error or errors of law in the decision; and (c) state in terms of section 50(4) of the 2014 Act what important principle or practice would be raised or what compelling reason there is that shows that the appeal should be allowed to proceed. Further guidance can be found on the Scottish Courts and Tribunal website.

12) The Applicant was sent a draft of this decision and afforded an opportunity to make representations in relation to the proposed dismissal before the making of this order.

APPENDIX

Excerpts from the relevant provisions of the 2014 Act and the Rules of Procedure referred to above are as follows:-

Tribunals (Scotland) Act 2014 Section 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.

Section 55 Process for permission

- 1) The Scottish Ministers may by regulations specify a time limit within which the permission required by section 46(3) or 48(3) must be sought.
- 2) A refusal to give the permission required by section 46(3) or 48(3) is not—
 - a) reviewable under section 43, or
 - b) appealable under section 46 or 48.

The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 (2016 no. 232) Rule 3

Notice of appeal against a decision of the First-tier Tribunal

- 1) A person may lodge with the Upper Tribunal a notice of appeal against a decision of the First-tier Tribunal.
- 2) A notice of appeal must —
 - a) identify the decision of the First-tier Tribunal to which it relates; and
 - b) identify the alleged error or errors of law in the decision.
- 3) The appellant must provide with the notice of appeal a copy of—
 - a) any written record of the decision being challenged;
 - b) any separate written statement of reasons for that decision; and
 - c) the notice of permission to appeal or alternatively notice of refusal of permission to appeal from the First-tier Tribunal.
- 4) When the Upper Tribunal receives a notice of appeal it must send a copy of the notice and any accompanying documents to each respondent and interested party (if any).
- 5) If the appellant lodges the notice of appeal with the Upper Tribunal later than the time required by paragraph (9)—
 - a) the notice of appeal must:
 - i. include a request for an extension of time;
 - ii. explain why the notice of appeal was not provided in time; and
 - iii. state why it is said to be in the interests of justice that the time be extended; and
 - b) unless the Upper Tribunal extends the time for lodging a notice of appeal the Upper Tribunal may not admit the notice of appeal.
- 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.

10.— Dismissal of a party's case

1) The Upper Tribunal must dismiss the whole or a part of the proceedings if the Upper Tribunal—

- a) does not have jurisdiction in relation to the proceedings or that part of them; and
- b) does not exercise its power under rule 7(3)(1)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

- 2) The Upper Tribunal may dismiss the whole or a part of the proceedings if —
 - a) the appellant has failed to comply with an order which stated that failure by the appellant to comply with the order could lead to the dismissal of the proceedings or part of them;
 - b) the appellant has failed to co-operate with the Upper Tribunal to such an extent that the Upper Tribunal cannot deal with the proceedings fairly; or
 - c) in proceedings which have been transferred from the First-tier Tribunal, the Upper Tribunal considers there is no reasonable prospect of the appellant's case, or any part of it, succeeding.
- 3) The Upper Tribunal may not dismiss the whole or a part of the proceedings under paragraph (1) or (2) without first giving the appellant an opportunity to make representations in relation to the proposed dismissal.