Upper Tribunal for Scotland

[2021] UT 6
UTS/AP/20/0024

DECISION NOTICE OF SHERIFF PINO DI EMIDIO

IN AN APPLICATION FOR PERMISSION TO APPEAL AGAINST
A DECISION OF THE FIRST-TIER TRIBUNAL FOR SCOTLAND

in the case of

MR BRYON WATTIE AND MRS KATHLEEN WATTIE, 23 Rosewell Park, Aberdeen, AB15 6HT

Appellants

and

MR TERRY THOMAS, PO Box 37 Sax 03630, Alicante, Spain, Spain
per Stonehouse Lettings,
Osborne House, 27-30 Carden Place, Aberdeen, AB10 1UP

Respondent

FTT Case Reference FTS/HPC/EV/20/0087

9 December 2020

The Upper Tribunal for Scotland Refuses the appellants' permission to appeal the decision of the First-tier Tribunal Housing and Property Chamber dated 9 October 2020 on the proposed grounds set out in the Form UTS-1 dated 20 November 2020.

Note of reasons for decision

[1] In this Note, unless the context otherwise requires, Mr Wattie and Mrs Wattie are referred to as "the first named appellant" and "the second named appellant" respectively. Mr Thomas is referred to as "the respondent".

Background

[2] The appellants seek permission to appeal against the decision of the First-tier Tribunal Housing and Property Chamber ("FtT") dated 9 October 2020 to make an order for ejection in respect of the three bedroom semi-detached house at 23 Rosewell Park, Aberdeen, AB15 6HT ("the property"). On 9 November 2020 the FtT refused permission to appeal.

[3] The respondent's agents have fixed an eviction to take place on 10 December 2020. As at 3 December 2020 this Tribunal declined to suspend the eviction order of the FtT. A hearing on the application for permission was fixed for today 9 December 2020. Due notice of that hearing was given to the parties. The hearing was arranged to take place by telephone conference call. Both parties have made written submissions which have been considered carefully. In particular emailed submissions by the first named appellant dated 20 November 2020 have been considered together with the terms of an email sent on 8 December 2020. The respondent has submitted written representations on 2 December 2020.

[4] The property is let under a lease between the respondent and the first named appellant dated 10 January 2014. The rent is £1,200 per month and has been paid up to date. The respondent does not rely on any breach of the terms of the lease but on a mandatory ground for possession, namely, that he requires the property to live there himself.

[5] The first named appellant only is named as a tenant in the lease. The application has been made by both the first named appellant and the second named appellant. However she is not a party to the lease. She does not have an interest as a tenant. In the correspondence with this Tribunal the first named appellant has taken the lead and has represented such interest as the second named appellant may have. The first named appellant has advised the Tribunal that his wife is very hard of hearing. The hearing was fixed on the basis that the first named appellant had stated that he spoke for both of them.

[6] On the afternoon of 8 December 2020 the first named appellant wrote to the clerk to the Tribunal and stated that he did not intend to participate in the hearing today. He did not state any reasons that suggested illness or incapacity that prevented him taking part. The clerk replied to him on my instruction advising him that the hearing would go ahead but that if he wished to put forward reasons why he was unfit to take part he was at liberty to do so. Nothing further was heard from him in correspondence. Although he had been given the dial in details he did not call in at the appointed time. The representative of the respondent did call in and asked that the hearing should proceed. The first named appellant had been given due notice of the hearing. He had advised the clerks some days ago that he would represent his interest and that of his wife. He had provided no reason why he could not take part today. I decided to proceed with the hearing and indicated that this decision would be prepared and issued later in the day.

[7] The case has a lengthy procedural history. The appellants failed to attend a case management discussion with the result that on 18 March 2020 a differently constituted FtT made an order for eviction. On 20 June 2020 that order was recalled. A fresh case management discussion took place in September and a hearing on the application by teleconference call took place on 9 October 2020.

[8] Section 46(4) of the Tribunals (Scotland) Act 2014 ("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 *HM Advocate* 2015 SLT 610 at para [9] together with the authorities cited there. The function of the Upper Tribunal is a limited one. An appeal under the 2014 Act is not an opportunity to rehear the factual matters argued before the FtT but rather to correct any errors of law that may have come into the decision of the FtT.

[9] The Form UTS-1 states the following grounds of appeal

> "NONE OF THE EVIDENCE WAS CONSIDERED WOULD NOT LISTEN AN EARLIER DECISION BY [a differently constituted FtT] SAID ANOTHER DISCUSSION WAS NEEDED HOWEVER THIS NEVER HAPPENED PAPERS SERVED ON [the first named appellant] WERE FORGERIES PAPERS SERVED ON [the second named appellant] WERE MANUFACTURED BY [a named representative of the respondent's letting agent] AS SHE DID NOT HAVE ANY REAL DOCUMENTS FOR [the second named appellant] – THIS DOCUMENTS WERE USED BY [the FtT chair] TO FORM THE EVICTION
> [The representative of the respondent's letting agent] ADMITTED AT ANOTHER HEARING ON THIS THAT PAPERS SERVED ON [the second named appellant] WERE NOT REAL SHE MADE THEM UP. …
> [The second named appellant] IS DEAF AND THIS WAS DISREGARDED."

[10] These grounds were expanded on at considerable length in the written submissions referred to above.

[11] The principal reasons for the FtT's decision are set out in the following paragraphs:

> "27. While [the first named appellant] was clearly wishing the Tribunal to conclude that the lease was a forgery, that is not a decision the Tribunal could make. The Lease is a probative document. It has been signed and witnessed. It has been executed in accordance with the terms of the Requirements of Writing (Scotland) Act 1995. In the event that it is suggested that it is invalid in any way, it is for a Court, rather than this Tribunal, to declare such and to reduce the deed. That had not been done;

> 28. There was no information before the Tribunal, other than [the first named appellant]'s bald assertion that the lease was a forgery, to enable the Tribunal to reach such a conclusion in any event, even if it had power to do so. There was no information which would allow the Tribunal to disregard the presumption contained within s3 of the Requirements of Writing (Scotland) Act 1995;
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> 29. Given the history of the case, the Tribunal did not consider it appropriate to adjourn the Hearing further to allow any proceedings to be taken in relation to reduction or setting aside of the lease document. Firstly, the [first and second named appellants] had had ample time to raise such proceedings if so advised. Secondly, if it is was the intention of the [first and second named appellants] to pursue such a course there can be no certainty as to the likely timescales for the same. Thirdly, having regard to the overriding objectives to deal with cases fairly, justly and within a reasonable time, it is not appropriate to adjourn the case further for an uncertain period when no steps had been taken of that nature since the proceedings had been raised;"

[12] The grounds of appeal have to be considered in the context of the stated reasons for decision. The claim of forgery was made to the FtT and was addressed by that tribunal. The FtT found that the lease was a probative document and that there was no evidence before it that entitled it to reach any other conclusion. There is no error of law in those conclusions on the facts found. The first named appellant had made serious allegations of forgery both in respect of the lease and other documents but had taken no steps whatsoever over many months to seek to obtain a finding in court to that effect. The first named appellant claimed that the respondent's representative had conceded that it was a forgery but the FtT does not record any such concession. In his submission to this Tribunal the respondent denies any such concession was made.

[13] It is not clear whether the first named appellant asked the FtT to adjourn or sist the proceedings before it so he could do so. The FtT considered at paragraph 29 quoted above whether it should adjourn the proceedings but in the exercise of its discretion it concluded that it should not do so. It took relevant factors into account in reaching that decision.

[14] At paragraph 13 of its decision, the FtT noted that it had proceeded on the basis that the first named appellant was speaking for the second named appellant. Once they had satisfied themselves that he had authority to do so, they were entitled to proceed on that basis. There is no tenable basis for concluding that they disregarded the issue.

[15] In essence the FtT considered that it had to proceed on the basis that the lease was a probative document in respect of which no attempt had been made to challenge its validity. It also concluded that proceedings should not be adjourned to allow the question of reduction to be pursued in another forum. It was entitled to reach both conclusions and no error of law has been identified let alone an arguable one.

[16] Both the first and second named appellants have been convened as parties in the FtT proceedings and both have made the application to this Tribunal for permission to appeal. The first named appellant is the tenant under an *ex facie* valid lease. As a result he is the party who truly has title and interest as tenant to challenge the decision to the FtT. In his case permission is refused on the basis that the proposed grounds of appeal do not disclose any arguable error of law by the FtT. In the case of the second named appellant permission is refused for the additional reason that she has no title to bring an appeal because she is not the tenant under the Lease.