Upper Tribunal for Scotland

2023UT08
Ref: UTS/AP/22/0015

DECISION OF

Tony Kelly

ON AN APPEAL
IN THE CASE OF

Mr. Ganesh Ramanathan, 19 Spring Wynd, Glasgow, G5 0BF

Appellant

- and -

Dr Doli Patel, Flat 0/1, 44 St Ninian Terrace, Glasgow, G5 0RJ

Respondent

FtT Case reference: FTS/HPC/PR/22/2118

Glasgow, 25 January 2023

Decision

The Upper Tribunal upholds the appeal, quashes the decision of the First Tier Tribunal dated 11 July 2021 to reject the application and remits the case back to the First Tier Tribunal with the direction that the application be accepted.

Introduction

[1] This appeal called before me at the Tribunal Centre in Glasgow on 4 January 2023. Both the appellant and the respondent were present.

[2] At the outset of the hearing I canvassed with parties the terms of the First Tier Tribunal (FtT) decision and noted the ground upon which permission had been granted to appeal to the Upper Tribunal (UT) by decision dated 27 July 2022, namely:

> "The Tribunal ought not to have rejected the decision (*sic*) given the delay of one day beyond the 3 month period set out in Regulation 9(2) of the Tenancy Deposit Schemes (Scotland) Regulations 2011. The Tribunal ought to have taken into account the reasons for the delay."

Appellant

[3] The appellant in his submission explained in detail his efforts to secure legal advice, to ascertain the address at which service of the application could be made upon the respondent and the landlord registration number of the respondent. He had made enquiries with Shelter Scotland; Citizens Advice Bureau; the local authority and various tenancy deposit schemes.

[4] The appellant had endeavoured to secure an appointment with the Citizens Advice Bureau and had been unable to do so. He was concerned that he did not have all of the necessary information when the application was submitted. On 30 June 2022 he had submitted most of the paperwork but had omitted to send the application form. This was an oversight on his part; it was the one document that was not sent. The appellant confirmed that there was no further information obtained by him between the date of the submission of the material on 30 June 2022 and the submission of the application form on 1 July 2022.

Respondent

[5] The respondent took issue with certain matters mentioned in the course of the appellant's submission about the parties' communications. She ultimately came to accept that nothing turned upon this factual dispute for the resolution of the appeal. She fairly conceded that she was not privy to the material submitted to the FtT and could therefore not be said to be prejudiced by the delay in the submission of the application form. Nonetheless, the respondent aligned herself with the reasoning of the FtT and submitted that this was in accordance with law. The appeal ought to be refused.

First Tier Tribunal

[6] In its decision of 11 July 2022, the FtT narrates the material submitted by the appellant on 30 June 2022. There is no dispute between parties about what was recorded. Thereafter, there were communings between the FtT administration and the appellant (see paras 3, 4, 5, 6 and 7 of the FtT decision).

[7] The decision continues by noting the terms of the procedural rules empowering the FtT to reject an application, rule 8 of the First Tier Tribunal for Scotland Housing & Property Chamber Procedure Regulations 2017 (the 2017 rules); the regulations which govern the requirements of this application, namely, rules 5 and 103 of the 2017 rules and the terms of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (the 2011 regulations).

[8] In the concluding paragraphs, the FtT holds that the information required by rule 103 was not lodged until 1 July 2022 and was thus one day beyond the 3 month period provided for in

regulation 9 of the 2011 regulations. Referring to *R* v *North West Suffolk (Mildenhall) Magistrates Court* (1998) Env.L.R 9 the FtT decided the application was frivolous, misconceived and had no prospect of success. The application was rejected.

Decision

[9] There appears to be some doubt as to the basis of the FtT's decision. Although not stated as a separate or additional reason for rejecting the application, the FtT has decided that the application is time barred (see paragraphs 11 and 13). The FtT has not dealt with the substance or merits of the application.

[10] It is not clear that the FtT decision is based in whole or in part upon the question of time bar. In invoking rule 8 of the 2017 Rules, reliance appears to be placed solely upon sub-paragraph (1)(a) - that the application is frivolous or vexatious. The FtT is enjoined in terms of rule 8(2) of the 2017 Rules to state the reason for the decision. However, no reasons are provided in paragraph 14 to notify the appellant of the view taken by the FtT of the merits of his application.

[11] The invoking of rule 8(1)(a) of the 2017 rules may not be appropriate in the circumstances of this case. The rule provides a limited sifting function to the Chamber President, or delegated member of the FtT, to reject an application in certain defined circumstances. It seems to me that a determination that an application to the FtT be rejected on the basis that it is frivolous involves an engagement with the merits of the application.

[12] The application may have been rejected on the basis that it was not made within the time limit stipulated in rule 9 of the 2011 regulations. The basis upon which it can be said that this in turn automatically renders the application frivolous is not immediately apparent. It may have been

more appropriate to reject the application – if that were a sound basis for so doing – on the basis of invoking rule 8(1)(c) - that there was good reason to believe that it would not be appropriate to accept the application. A good reason may be in circumstances that the time limit has not been complied with and therefore the application is not competently before the FtT.

Time Limit

[13] Rule 9(2) of the 2011 regulations (as amended by the Housing (Scotland) Act 2014 (Consequential Provisions) Order 2017) provides:

> "(2) An application under paragraph (1) [for an order that the landlord has failed to comply with a duty under the regulations] must be made no later than 3 months after the tenancy has ended."

[14] The requirements of an application under regulation 9 of the 2011 regulations are to be found in rule 103 of the 2017 rules:

> "**Application for order for payment where landlord has not paid the deposit into an approved scheme**
>
> 103. Where a tenant or former tenant makes an application under regulation 9 (court orders) of the 2011 Regulations, the application must—
>
> (a)state—
>
> (i)the name and address of the tenant or former tenant;
>
> (ii)the name, address and profession of any representative of the tenant or former tenant; and
>
> (iii)the name, address and registration number (if any) of the landlord;
>
> (b)be accompanied by a copy of the tenancy agreement (if available) or, if this is not available, as much information about the tenancy as the tenant or former tenant can give;
>
> (c)evidence of the date of the end of the tenancy (if available); and
>
> (d)be signed and dated by the tenant or former tenant or a representative of the tenant or former tenant."

[15] It was accepted by both parties that each of these requirements had been complied with save for (d), which remains in dispute.

[16] The FtT proceeded upon the basis that there was no discretion afforded to it to extend the time limit contained in Regulation 9 of the 2011 regulations. That appears to be correct. No such power is provided to the FtT in those regulations. When these sorts of applications were dealt with in the Sheriff Court, prior to the coming into force of the change brought about by the 2017 regulations referred to at [13] above, the relevant procedural rules may well have afforded a basis for a failure to comply with a time limit to be excused: rule 2.1, Ordinary Cause Rules 1993, as amended; rule 2.3, Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999. The 2017 rules provide for no such power.

[17] *SW v Chesnutt Skeoch Ltd* [2021] CSIH 11; 2021 S.C. 302 dealt with the requirements of an application for a payment order. Rule 70 of the 2017 rules mirrors rule 103 in the various matters that require to be submitted to the FtT in such an application. In looking to whether these procedural requirements had been satisfied, Lord Doherty delivering the opinion of the Court said this:

> "[25]….An application requires to be in writing, although it need not be on the form provided by the FtT (r 4). It must satisfy all of the requirements of r 70. We conclude that the submission did not satisfy r 70(c). It does not appear to have been signed and dated by the appellant. More fundamentally, it lacked another essential attribute. It did not describe itself as an application, and it was not otherwise clearly evident that it purported to be one. If it is not evident that a document is an application, the FtT cannot tell whether its obligation under rule 5(1) (to consider if an application complies with the requirements of the 2014 Rules, etc) is engaged; or whether it needs to exercise the power in rule 5(2) (to request further documents); or whether it should, as the case may be, give notice of acceptance of the application (r9), or reject it (r 8)."

[18] An application under regulation 9 of the 2011 rules need not be made on the form provided by the FtT – see also *Mann v Myles* [2019] UT 60 at [7]. In this case, the appellant made it clear that he was making application to the FtT – see his email of 30 June 2021: "I would like to apply for the tribunal to seek…..". The submission was dated.

[19] The FtT looked at the material submitted on 1 July 2021 and decided that the application was not lodged on time – see para 13. It ought to have asked whether the material submitted on 30 June 2021 was sufficient to satisfy the requirements rule 103. In failing to address this question it erred.

Powers of the Upper Tribunal

[20] Section 47 of the Tribunals (Scotland) Act 2014 provides that:

> "**47 Disposal of an appeal**
>
> (1)In an appeal under section 46, the Upper Tribunal may uphold or quash the decision on the point of law in question.
>
> (2)If the Upper Tribunal quashes the decision, it may—
>
> (a)re-make the decision,
>
> (b)remit the case to the First-tier Tribunal, or
>
> (c)make such other order as the Upper Tribunal considers appropriate.
>
> (3)In re-making the decision, the Upper Tribunal may—
>
> (a)do anything that the First-tier Tribunal could do if re-making the decision,
>
> (b)reach such findings in fact as the Upper Tribunal considers appropriate.
>
> (4)In remitting the case, the Upper Tribunal may give directions for the First-tier Tribunal's reconsideration of the case.
>
> (5)Such directions may relate to—
>
> (a)issues of law or fact (including the Upper Tribunal's opinion on any relevant point),

(b)procedural issues (including as to the members to be chosen to reconsider the case).

[21] In deciding to remake the decision I am mindful of the considerable delay experienced by parties since the submission of the material to the FtT, its rejection of the application and in the fixing of a hearing of the appeal. In light of the issues between parties it is appropriate that some expedition is applied to the case rather than returning matters to the FtT to decide afresh whether the application should be accepted. Further, a determination of this issue will not involve the consideration of any further evidence. Parties have agreed the factual matrix, and, in particular, what was submitted to the FtT on 30 June 2021.

[22] The issue about whether the requirements of rule 103 were satisfied by the submission of the material on 30 June 2021, relates only to rule 103(d). Was it satisfied at that point in time? As both *SW* (at [25]) and *Mann* (at [10]) note, the application does not have to be made upon, or accompanied by, the Tribunal's form. The appellant made it clear that he was making application to the FtT, a matter noted by the Court in *SW* to be "an essential attribute". The submission of the material was dated.

[23] The email of 30 June 2021 that had attached to it material which otherwise satisfied the terms of rule 103, came from the appellant and included his name in the body of the email. In deciding whether the application was "signed" by the appellant, I note that the terms of the Coronavirus (Scotland) Act 2020 remained in force on 30 June 2021. This provided for, among other things, electronic submission of documents by parties and the processing of orders in Tribunals and Courts electronically. Of particular relevance are the terms of Schedule 4:

"1 Electronic signatures and transmission of documents

(1) An electronic signature fulfils any requirement (however expressed and for whatever purpose) that—

(a) a document of a type mentioned in sub-paragraph (4)

…

(4) The types of document referred to in sub-paragraphs (1) are …—

…

(c) any document that an enactment requires be given to a person in connection with, or in order to initiate, proceedings.

….

7(c) "electronic signature" is to be construed in accordance with section 7(2) of the Electronic Communications Act 2000, but includes a version of an electronic signature which is reproduced on a paper document"

[24] An applicant may electronically sign a document seeking to initiate proceedings. Is the appearance of the applicant's name on the email submitting the material on 30 June 2021 an electronic signature for the purposes of Section 7(2) of the Electronic Communications Act 2000? This provides:

"(2) For the purposes of this section an electronic signature is so much of anything in electronic form as–

(a) is incorporated into or otherwise logically associated with any electronic communication or electronic data; and

(b) purports to be used by the individual creating it to sign."

[25] Recently, the Court of Appeal in *Hudson v Hathaway* [2022] EWCA Civ 1648 reviewed the authorities on whether an email could constitute a signature for various purposes. Lewison LJ concluded that:

"67. There is…..a substantial body of authority to the effect that deliberately subscribing one's name to an email amounts to a signature. Given that so much correspondence takes place nowadays by email rather than by letters with a "wet

> ink" signature, it is, in my judgment, entirely appropriate that the law should recognise that technological developments have extended what an ordinary person would understand by a signature."

[26] The definition in section 7(2) of the Electronic Communications Act 2000 of "electronic signature" encompasses the appellant's name on the email as a signature for the purposes of schedule 4, paragraph 7(c) of the 2020 Act. The application was signed on 30 June 2021 and the terms of rule 103 were satisfied on that date. The application was submitted timeously.

[27] In terms of section 47(2)(a) of the 2014 Act, I remake the decision. The application ought to be accepted. I shall remit the case back to the FtT with that decision having been made in order that it may then deal with the application as it sees fit.

Conclusion

[28] The application submitted on 30 June 2021 complied with the provisions of rule 103 of the 2017 rules and was then timeously made. The FtT ought to have accepted it. The FtT decision of 11 July 2021 to reject the application is quashed. The UT remakes that decision. The application should be accepted.

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission 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 Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*