Upper Tribunal for Scotland

2023UT12
Refs: UTS/AP/22/0029 & UTS/AP/22/0030

DECISION OF

THE UPPER TRIBUNAL

Sheriff I Fleming

ON AN APPLICATION FOR PERMISSION TO APPEAL
(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND)
IN THE CASE OF

Mr David Hutcheson, 16 Hawthorn Way, Cambuslang, G72 7AF

Appellant

- and -

Mr Richard Russell, 34 2/4 Main Street, Cambuslang, Glasgow, G72 7ER

Respondent

FTS Case references: FTS/HPC/EV/22/1671 and FTS/HPC/CV/22/1672

10 APRIL 2023

Decision

Permission to appeal is refused; The respondent's motion for expenses is refused.

Introduction and reasons

[1] At a conjoined hearing of the First –tier Tribunal for Scotland Housing and Property Chamber (hereafter "the FTS") on 29 August 2022 a case management discussion (hereafter "the CMD") took place and following the hearing the FTS determined that an order for recovery of possession of the property at 16 Hawthorn Way, Cambuslang, Glasgow G72 7ER and an order for payment by the now appellant in the sum of £8,450.00 should be made in favour of the now respondent.

[2] The appellant sought permission to appeal from the FTS. Copies of the orders and decisions of the FTS of 29 August 2022 were sent to the appellant by the FTS's administration on 31 August 2022 and signed for by an individual by name of "Hutcheson" on 2 September 2022. Documentation to that effect was produced. This is of significance because when the appellant sought leave to appeal from the FTS his application was 20 days late. He also applied to the FTS on 17 October 2022 for recall of the decision in this case which application was 34 days late. The FTS refused both permission to appeal against its decision and permission to recall its decision of 29 August 2022 on 4 November 2022. This is an application for leave to appeal to the Upper Tribunal by the appellant who is the tenant against that decision of the FTS dated 29 August 2022. A hearing in respect of that application was assigned for 1 March 2023.

[3] On 28 February 2023 the appellant moved the court to discharge the hearing. He explained that his younger child had contracted chickenpox and he was unable to obtain childcare. The motion to discharge was opposed and refused. The hearing was due to take place by WebEx and as such it was not necessary for the appellant to leave his child alone. In fact, the appellant explained on the morning of 1 March 2023 that he had managed to obtain alternative care for his younger child.

[4] On 1 March 2023 the Upper Tribunal held the hearing by WebEx to determine whether leave to appeal would be granted. The appellant represented his own interests and the respondent was represented by Ms Grosvenor, solicitor. The respondent himself did not attend the hearing. He was not required to do so. This applications for permission to appeal were heard in conjunction with one another and accordingly this decision applies to Upper Tribunal cases references UTS/AP/22/0029 and UTS/AP/22/0030.

[5] At the hearing seeking permission to appeal the appellant presented very similar arguments to those which he had advanced before the FTS and which are contained within paragraph 10 of the FTS's decision of 4 November 2022. On behalf of the respondent it was indicated by Ms Grosvenor that the application for permission to appeal was opposed.

[6] The first basis of opposition to the application for permission to appeal was that the application is non-timeous. The respondent submits that the appellant's notice of appeal to the Upper Tribunal is out of time. His earlier application for recall and his application for permission to appeal to the FTS were both out of time and it is submitted that he has shown a disregard for the rules. It is argued that a failure to understand the rules of the Upper Tribunal is not a reason for excusal of his obligation to comply with the procedural rules. It is incumbent on the appellant to make himself aware of the procedural rules. The respondent also argues that the appellant has not argued why it is in the interests of justice for the time to be extended.

[7] Regulation 3(9) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 (hereafter "the 2016 regulations") stipulates that where the FTS sends a notice of permission or

refusal 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 a period of 30 days after the date of receipt by that person of the notice of permission or refusal of permission to appeal.

[8] The FTS's refusal of permission to appeal was dated 4 November 2022. I was advised that it was received by the respondent's agent by email on 8 November 2022. I worked on the assumption that the appellant would have received his documentation at a similar time. The appellant did not demur from that assumption. That being the case the time period for the appellant to lodge the notice of appeal to the Upper Tribunal expired on 8 December 2022, the date falling 30 days after 8 November 2022. A notice of appeal was lodged by the appellant on 12 December 2022 and is accordingly out of time it was argued.

[9] The appellant advised that he was unaware of the time limits. He was unfamiliar with the various legal terms which apply and had done his best to lodge the appeal timeously.

[10] What is clear is that when the original form UTS-1 was submitted by the appellant he requested an extension of time as he "believed the letter dated 8 November 2022 would be the start date for the 30 days". There is evidence of a communication by the appellant to the Upper Tribunal on 7 December 2022. In terms of regulation 5a and b of the 2016 regulations the Upper Tribunal has power to extend the time for lodging a notice of appeal. The Upper Tribunal in terms of regulation 5 may extend the time for lodging a notice of appeal provided an appellant has explained why the notice of appeal was not provided in time and has stated why it is in the interests of justice that the time be extended. The appellant has included a request for an extension of time and explained why the notice of appeal was not provided in time. He argues that he has met the interests of justice test on the basis that he maintains that there would have been a different outcome in court had the various matters that he wished to place before the FTS been considered. These are certain factors referable to the landlord refusing and delaying urgent repairs to the property which were paid for by the appellant, the poor state of repair of the property and various extensive repairs "amounting to thousands in costs". Had it been the case, the appellant maintains, that had he been allowed to" have his say" the FTS decision would be different.

[11] Upon that basis I refuse the respondent's submission that permission to appeal should not be considered because it is out of time. I take into account the fact that the appellant had a history of lodging documentation late. The appellant's original application for recall to the FTS was 34 days late. His application for permission to appeal to the FTS was 20 days late. That said, I was of the view that notwithstanding the history and the context the appellant should be entitled to have his application heard. He had contacted the Upper Tribunal within the statutory time period, albeit he did not formally lodge his appeal until 4 days after that period had expired. The tests set out within regulation 5 of the 2016 regulations are met and it needs to be recognized that the notice seeking permission to appeal was only 4 days late.

[12] Accordingly, the application for extension of time on behalf of the appellant is granted. This decision is fact specific and is determined in the particular circumstances which prevail in this case.

[13] Thereafter the Upper Tribunal required to consider the question of an error in law. The first point of this appeal was the fact that earlier in the procedure a CMD took place by telephone conference on 29 August 2022. The appellant did not attend. The FTS proceeded in his absence because it was clear from the paperwork that there was a certificate of intimation from sheriff's officers dated 26 July 2022 at 4 pm wherein it was stated that the documentation had been served upon the appellant personally. Service was carried out within his dwellinghouse at 16 Hawthorn Way, Cambuslang, being the subjects under consideration. The date, time and arrangements for the CMD were intimated to the appellant personally by sheriff's officer. The FTS proceeded in the absence of the now appellant, it having been explained that the appellant had received notification of the arrangements for the CMD by way of personal service by sheriff's officer. He was also notified that he should lodge any written representations by 13 August 2022. No written representations were received from the now appellant and he did not participate in the CMD on 29 August 2022. The FTS delayed the commencement of the CMD to allow an opportunity for the appellant to join late. The FTS then refused an application by the respondent to increase the sum sued for. Having heard from the respondent's solicitor that the pre action protocols had been engaged whereby two letters were sent to the appellant, that the appellant had not been in contact with the respondent, that rent arrears were continuing to increase and that the appellant continued to reside in the property the FTS proceeded to determine the application. It was the view of the FTS that the appellant had been properly and timeously notified of the hearing.

[14] It is the appellant's position that it was not he who was served with the documentation. He was questioned by the Upper Tribunal as to whether there were any others present within the house on whom the documentation may have been served but it was clear from answers received that it was only the appellant, his partner and two children who were resident within the property. The appellant maintains that he was working away and that the documentation was not served on him. He did not attend at the FTS and as such did not have an opportunity to present his case. His ground of appeal is that the FTS took the wrong approach to the case and made Findings in Fact without a basis in evidence. The appellant further argues that "the tribunal states it is acceptable to grant an appeal" if the appellant did not "show up" to defend himself.

[15] The appellant sought permission to appeal from the FTS. In considering the request for permission to appeal by the appellant the FTS considered whether a question of law arises. Copies of the orders and decisions of the FTS of 29 August 2022 were sent to the appellant by the FTS's administration on 31 August 2022 and signed for by "Hutcheson" on 2 September 2022. Documentation to that effect was produced. This is of significance because when the appellant

sought leave to appeal from the FTS his application was 20 days late. He also applied to the FTS on 17 October 2022 for recall of the decision in this case

[16] Before the FTS the appellant argued that it was not he or anyone on his behalf who signed for the documentation. He had been working away and was unaware of the proceedings which were taking place. He was not served with the documentation on 2 September 2022 he claimed.

[17] The FTS in a detailed statement sets out its position in terms of a decision of 4 November 2022. It concluded that the appellant had the opportunity to defend the proceedings at the appropriate time but failed to do so. The FTS was not persuaded that the appellant was unaware of the orders granted against him at the CMD on 29 August 2022. It specifically indicated, "The respondent has not produced any evidence of the date he states he was away from home." The FTS refused to grant permission to appeal upon the basis that the appellant had not lodged his application timeously. In terms of regulation 2(1) of the Scottish Tribunals Time Limit Regulations 2016 (hereafter "The Time Limit Regulations") the application for permission to appeal must be received by the tribunal within the period of 30 days beginning with the relevant date. The relevant date was 31 August 2022 being the date the decisions with statement of reasons was sent. The 30 day period expired on 30 September 2022. The appellant's application was 20 days late.

[18] In terms of regulation 2(2) of the Time Limit regulations on cause shown the FTS may extend the 30 day period if it considers such an extension to be in the interests of justice. The FTS refused to extend the 30 day period and permission to appeal was refused. The appellant also lodged a minute of recall. That was non-timeous. The FTS concluded that cause had not been shown for the FTS to extend the time for the appellant to apply for recall. The FTS also indicated that it did not consider it would be in the interests of justice for the application for recall to be granted and accordingly refused same.

[19] In terms of section 46(2)(a) of the Tribunals (Scotland) Act 2014 and rule 37(2)(b) of the First-tier for Scotland Housing and Property Chamber (Procedure) Regulations 2017 Procedure Rules (hereafter " the 2017 Rules") an appeal must be on a point of law.

[20] The FTS is created by statute and has the function of deciding legal rights by reference to the facts it finds established. The decision-making process is limited to the powers and jurisdiction conferred on the FTS, the underlying law which it must apply, and the facts as it has found them. In terms of rule 3(6) of the 2017 Rules, where the FTS has refused leave to appeal, the Upper Tribunal may give permission to appeal if "the Upper Tribunal is satisfied that there are arguable grounds for the appeal", in terms of section 46(4) of the Tribunals (Scotland) Act 2014. Nowhere in the statute or secondary legislation is the phrase "arguable grounds for the appeal" defined. Case law in other situations is of limited assistance. For example, in Czerwinski v HM Advocate 2015 SLT 610, the court was formulating the appropriate test for the grant of

leave to appeal in an extradition case in the absence of statutory guidance. After reviewing several potential schemes or tests, it settled on adopting the test applicable to criminal appeals: "do the documents disclose arguable grounds of appeal", in terms of section 107 of the Criminal Procedure (Scotland) Act 1995. On that ground of appeal it said this: "Arguable in this context means that the appeal can properly be put forward on the professional responsibility of counsel"

[21] In *Wightman v Advocate General for Scotland* 2018 SC 388 Lord President Carloway (at paragraph [9]) observed that arguability and statability were synonyms. That was said to be a lower threshold than "a real prospect of success", the test applicable in deciding whether to grant permission for an application to the supervisory jurisdiction to proceed, in terms of section 27D(3) of the Court of Session Act 1988, as amended, see [2] – [9].

[22] *Advocate General for Scotland v Murray Group Holdings Ltd* [2015] CSIH 77; 2016 SC 201 (affirmed by UKSC in [2017] UKSC 45; 2018 SC (UKSC) 15) concerned an appeal from the Tax & Chancery Chamber of the First Tier Tribunal under section 13 of the Tribunals, Courts & Enforcement Act 2007. An appeal to the Upper Tribunal was available "on any point of law arising from the decision made by the First Tier Tribunal". The appeal thereafter to the Court of Session is "on any point of law arising from a decision made by the Upper Tribunal". It was in this context that the Inner House examined what was meant by "a point of law". It identified four different categories that an appeal on a point of law covers: (i) General law, being the content of rules and the interpretation of statutory and other provisions; (ii) The application of law to the facts as found by the First Tier Tribunal; (iii) A finding, where there was no evidence, or was inconsistent with the evidence; and (iv)An error of approach by the First Tier Tribunal, illustrated by the Inner House with examples: "such as asking the wrong question, or by taking account of manifestly irrelevant considerations or by arriving at a decision that no reasonable tax tribunal could properly reach." ([41]-[43])

[23] The threshold of arguability is therefore relatively low. An appellant does, however, require to set out the basis of a challenge from which can be ascertained a ground of appeal capable of being argued at a full hearing. This is an important qualification or condition on appealing which serves a useful purpose. If no proper ground of appeal is capable of being formulated then there is clearly no point in wasting further time and resources in the matter proceeding. The respondent in a hopeless appeal ought not to have to meet any further procedure in a challenge with no merit. It is in the interests of justice that an appeal which is misconceived and is incapable of being articulated such that it cannot be characterised as arguable is not allowed to proceed.

[24] The appellant argues that had he been entitled to present his case at the CMD the outcome would have been different. He argues that notwithstanding the execution of service he did not receive this application. The respondent argues that the FTS were entitled to find that the appellant had been properly and personally served with the applications and given the

executions of service from sheriff's officers the FTS was entitled to proceed with the CMD. The appellant was personally served with the application by sheriff's officers. An execution of service was before the FTS. As such the FTS was entitled to proceed upon the basis that the appellant knew of the proceedings. In my view the FTS was neither obliged nor entitled to look behind the sheriff's officers' execution of citation in the circumstances of this case in which there was no manifest error. The FTS was entitled to treat the execution of service at face value.

[25] Secondly, the appellant states that the appeal should be granted in circumstances where a party is not present to defend themselves. Reference is made to rule 17(4) of the 2017 rules which provide that the FTS may do anything at a CMD which it may do at a hearing, including making a decision. The FTS competently exercised its power under the said regulation at the CMD on 29 August 2022.

[26] Paragraph 4 of the FTS decision of 4 November 2022 was drawn to the appellant's attention. Therein it is acknowledged by the FTS administration that the appellant had stated he was away from home on the date when it is alleged the documentation was served upon him by sheriff's officers, namely 26 July 2022. He was requested to provide evidence by the FTS administration but has thus far produced no evidence of same. At the Upper Tribunal hearing on 1 March 2023 he had no evidence of his absence from home upon that date. In these circumstances it cannot be concluded that there was an error in law. No point of law has been identified by the appellant. The absence of a party from attendance at a CMD at which a decision was granted does not necessarily represent a compelling basis for appeal. It is not the case, as the appellant submits, that the FTS or the Upper Tribunal will necessarily or automatically grant an appeal in the event that a party does not appear. Each case is considered on its own merits. In this case the FTS proceeded in the absence of the appellant.

[27] What the FTS was obliged to do firstly was to consider whether all reasonable efforts have been taken to serve the appellant with notice. The appellant had been personally served by a sheriff's officer setting out the details of the CMD and the procedural requirements. The appellant was served with the documentation and orders at his home. Again, in the absence of evidence the FTS is not entitled or obliged to look behind that execution of service. The power to dispose of proceedings in the absence of a party is not designed to punish a party for its mistakes. The FTS was required to balance the interests of both parties in doing justice between them in accordance with the overriding objective, which included dealing with the case in ways which were proportionate to the complexity or importance of the issues and ensuring that the case was dealt with expeditiously and fairly. The FTS requires to exercise discretion whether or not to proceed in the absence of a party, which discretion must then be exercised having regard to all the circumstances of which the FTS is aware and having regard to the overriding objective and the effect of the overriding objective as described in rules 2 and 3 of the 2017 rules. It is clear from the decision that although not specifically expressed the FTS did exercise its discretion and in the face of a sheriff's officers' execution of service and no engagement from the appellant the

FTS was entitled to proceed as it did. No error of law arises. In the circumstances permission to appeal is refused.

[28] Insofar as the decisions of the FTS to refuse the appellant permission to appeal are concerned again no error of law is apparent. The FTS was fully entitled to refuse the appellant permission to appeal. The appellant claimed that he was unaware of the outcome of proceedings on 29 August 2022. It is clear that the documentation which followed upon the CMD of 29 August 2022 was sent to the appellant by recorded delivery post on 31 August 2022 and was signed for by an individual named "Hutcheson" at the appellant's home on 2 September 2022. The appellant claimed that it was not him who signed for the documentation. The FTS concluded that the post office delivery was signed for by an individual within the appellant's home who had the same name as the appellant and was perhaps a family member. The appellant claimed that he was unaware of the orders until 7 October 2022. The time limit for lodging the application seeking permission to appeal would have expired on 30 September 2022. The FTS was not "persuaded" by the appellant's explanation and held that he had not shown cause nor that it was in the interests of justice for the FTS to extend the 30 day time limit for applying for permission to appeal. On the basis of the information presented to the FTS, which was not as detailed as that information presented to the Upper Tribunal, the FTS was entitled to hold that the time limit should not be extended and that no point of law had been identified by the appellant. The FTS was fully entitled to reach its decision on the information that was available to it and no point of law arises.

[29] The FTS also refused an application for recall of its decision of 29 August 2022. It did so because in terms of regulation 30(4) of the 2017 regulations the application for recall requires to be made within 14 days of the original decision. The appellant's application should have been received by 12 September 2022 but was not received until 17 October 2022. While rule 30(5) states that the FTS may on cause shown extend the 14 day period again the FTS was not persuaded by the appellant's explanation that he had not received the documentation and determined that he had not shown cause for the FTS to extend the 14 day time limit. The FTS has carefully considered the application for recall and its decision not to extend the 14 day time limit does not disclose an error in law. Again the FTS was "not persuaded" that cause had been shown in terms of rule 30(4) of the 2017 rules. A simple assertion by the appellant in the absence of any other evidence is not necessarily sufficient to justify the grant of an extension to the time period within which to lodge an application for review. Having considered the reasoning of the FTS it took into account the appropriate considerations and was entitled to hold that cause had not been shown to extend the time period. No question of law is raised.

[30] The respondent sought the expenses of the appeal as taxed. Attention was invited to regulation 12(1) of the 2016 regulations which provides that the Upper Tribunal may make an order for expenses as taxed in proceedings on appeal from the FTS if the FTS had the power to make an award of expenses and only on the basis on which the FTS had the power to award the expenses.

[31] Regulation 40 of the 2017 rules allows the FTS to award expenses as taxed against a party only where the party through unreasonable behaviour in the conduct of the case has put the other party to unnecessary or unreasonable expense. It is claimed that such a situation applies here.

[32] It is argued that the appellant's behaviour in the conduct of the appeal has been unreasonable on account of the substantive merits of the appellant's notice of appeal and lack of regard to the rules of the FTS and Upper Tribunal. It is maintained that the appellant's notice of appeal had no real prospects of success and was being used by the appellant as a means to delay enforcement of the orders granted by the FTS against him in favour of the respondent. As a consequence this has caused the respondent to incur unreasonable expense in legal fees to respond to the appellant's notice of appeal together with cancelled sheriff officers' fees. The latter aspect is referable to an eviction which was cancelled. The appellant opposed the motion for expenses.

[33] I decline to make any award of expenses. While it is the case that the appellant has been unsuccessful in as much as permission to appeal has not been granted, I cannot categorise his conduct as unreasonable such that it has put the other party to unnecessary or unreasonable expense. It is important that those parties who decide to exercise their rights in terms of the rules and regulations are not in way dissuaded from doing so by the prospect of a significant award of expenses being made against them. The appellant was entitled to seek to appeal the original decision of the FTS. He was also entitled to make an application for recall. Both of these having been unsuccessful the appellant was then entitled to make application to the Upper Tribunal seeking permission to appeal. During the currency of proceedings the respondent elected to seek to invoke the decree which had been granted in his favour and sought an eviction. It would appear, at least by the time of the second proposed eviction, that the respondent would have been aware of the application by the appellant to the Upper Tribunal.

[34] I take account of the expense of cancelled evictions but as against that it is nevertheless important that those in the position of the appellant are able to seek to assert their rights without the prospect of an award of expenses against them. It needs to be remembered that the order that is being sought was to evict the appellant and his young family from their family home and on any view such a matter requires to be considered with considerable care. Given his personal circumstances one can hardly blame the appellant for seeking to exert his rights. It is alleged by the respondent that the appellant through unreasonable behavior in the conduct of the case has put the appellant to unnecessary or unreasonable expense. In my view the appellant has sought to exert his rights in terms of the 2016 regulations and the 2017 rules and as such, while ultimately unsuccessful, it has not been demonstrated that his conduct of the case has been unreasonable. In the circumstances the respondent's motion for expenses is refused.