Upper Tribunal for Scotland

2023UT13

Ref: UTS/AP/23/0005

DECISION OF

Sheriff Iain Fleming

ON AN APPLICATION FOR PERMISSION TO APPEAL

(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND)

IN THE CASE OF

Ms Dorothea Hinrichs, Mr Nesaraj Jeyaraj, Flat 1/2, 32 Craigie Street, Glasgow, G42 8NQ

per Govan Law Centre,

Orkney Street Enterprise Centre, 18-20 Orkney Street, Glasgow, G51 2BX

Appellant

- and -

Mr Nacerdine Tcheir, Flat 1/2, 295 Golfhill Drive, Glasgow, G31 2NZ

Respondent

FTS Case reference: FTS/HPC/PR/22/0953

14 APRIL 2023

Decision

Permission to appeal is refused.

Background

[1] This is an application seeking permission to appeal by tenants following decisions of the First Tier Tribunal for Scotland (hereafter "the FTS") of 14 June 2022 and following upon a request for review a further hearing of 16 September 2022.

[2] It is against the decision of the FTS of 16 September 2022 that the appellants seek permission to appeal.

[3] Following the case management discussion on 16 September 2022 the FTS issued a decision dated 11 October 2022. The appellants sought permission to appeal from the FTS, which application was refused on 9 January 2023.

[4] The appellants have now exercised their right to seek permission to appeal from the Upper Tribunal. A Webex hearing was convened in respect thereof upon 17 March 2023. The appellants were not personally present but were represented by their solicitor, Ms Simpson. The respondent was in attendance. Albeit the hearing took place by Webex the respondent was present only by means of his telephone and was unable to see either the appellants' solicitor or the Upper Tribunal judge. In advance of the hearing the Upper Tribunal noted the position and the respondent confirmed that he was happy to proceed on that basis.

[5] In a paper apart annexed to the form UTS1 the appellants set out their reasons for requesting permission to appeal. Reference is made to the case of *Advocate General for Scotland* v *Murray Group Holdings* 2016 C201 in which four categories of errors of law which may feature in an appeal against a tribunal determination were established by the Inner House; these are identified as:

i. A general error or law, for example the content of the rules.
ii. An error in applying the law to the facts of the case.
iii. Where the Tribunal has made a finding for which there is no evidence, which is inconsistent with the evidence or contradictory to it.
iv. A fundamental error with the Tribunal's approach to the case, for example by asking the wrong question, taking into account manifestly irrelevant considerations, or by arriving at a decision that no reasonable Tribunal could reach.

[6] It is the submission of the appellants that the FTS erred in law in applying the law to the facts of the case.

[7] This was a case in which the now appellants applied to the FTS under regulation 9 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 (hereafter "the 2011 regulations") seeking an order for payment as a result of the respondent's failure to lodge their tenancy deposit with a tenancy deposit scheme. An initial case management discussion took place on 14 June 2022. The respondent was not in attendance. Having heard evidence and addressed the relevant legislation the FTS determined to make an order for payment in the sum of £2,040 (being a sum equivalent to three times the deposit) in favour of the appellants against the respondent. Thereafter a request from the respondent for review of the earlier decision was made and granted. A further hearing took place on 16 September 2022. On this occasion the respondent was in attendance. The FTS heard evidence and representations from the respondent and representations from the solicitor on behalf of the appellants. Having heard evidence the FTS made Findings in Fact and Law which are set out in paragraphs 24 to 32 of its written decision. The FTS also determined to set aside its decision of 15 June 2022 and to re-decide the matter. Having done so it made an order for payment in the sum of £1,360 in favour of the appellants against the respondent.

[8] This appeal is brought by the appellants upon the basis that the FTS erred in law in applying the law to the facts of the case. The finding of the FTS after review and after hearing from the respondent was to award a sum which was equal to two times the deposit amount. It is submitted that the FTS "was dealing with the most serious level of case and so they did err in law by awarding a sum equal to two times the deposit amount; it is submitted that what should have happened was that an award equal to three times the deposit amount should have been awarded."

[9} In deciding this matter the Upper Tribunal took account of the detailed written submission which was lodged on behalf of the appellants, the supplementary oral submissions which were made on behalf of the appellants and the various authorities which were lodged for and on behalf of the appellants.

[10] There is a reference within the body of the application to "new evidence". It was accepted by the appellant that this was not something that the Upper Tribunal could take into account. An appeal against the decision of the FTS is not unrestricted. It is only available on a point of law. It is not a decision which is wrong in law because evidence existed which the appellants could have put before the FTS at the time it made its decision and did not do so. If new evidence which the appellants seek to rely upon there is a procedure available to the appellants. Such a procedure was not invoked in this case.

[11] The substance of this application for permission to appeal is that the evidence before the FTS was such that it should have regarded the failure by the respondent as being a case at" the most serious end of the scale" and as such should have awarded a sum being three times the amount of the deposit. Reference was made to the decision of the Upper Tribunal of *Rollett* v *Ms Julia Mackie* 2019 UT 45 wherein Sheriff Ross (now Sheriff Principal Ross) found that "the level of penalty requires to reflect the level of culpability". Thereafter reference was made to paragraph

14 of that decision in which various factors which might be construed as categorising a case at the most serious end the scale could be prayed in aid.

[12] Paragraph 9 of the said decision of Sheriff Ross, however, provides as follows:

> "the decision under regulation 10 is highly fact-specific to each case. Accordingly, awards in other cases, even if the breach is described as 'serious' or similar, are of limited assistance and do not establish any underlying principle. Each case has to be examined on its own facts, upon which a discretionary decision requires to be made by the FtT."

Thereafter the case of *Rollett* v *Mackie* proceeds to declare that assessment of what amounts to a "serious" breach will vary from case to case. It is the factual matrix, not the description, which is relevant.

[13] An appeal against the decision of the FTS is not unrestricted. As is recognised it is only available on a point of law in terms of section 46(2)(b) of the Tribunals (Scotland) Act 2014. It is not available simply because the losing party might disagree with the FTS's assessment of the facts.

[14] This is a case in which the FTS heard from the respondent. Having heard from the respondent and the solicitor on behalf of the appellants it made Findings in Fact and Law. It thereafter provides at paragraphs 35 to 41 its reasons for the decision. Further, in terms of its decision of 9 January 2023 wherein the FTS refused the request for permission to appeal within paragraph 11 the FTS sets out the relevant factors that it weighed up when reaching its decision. It clearly balanced aggravating factors and mitigating factors before reaching a conclusion.

[15] The attention of the appellant's solicitor was drawn to the case of *Tenzin* v *Russell* (2015) CSIH 8A during the course of the hearing. Therein the Court of Session considered an appeal that set the sanction at three times the level of the deposit. It was claimed this was excessive. The court could find no fault with the sheriff's reasoning in applying the maximum penalty in that case but stressed that an appellate court would only interfere if the court at first instance had not exercised its discretion at all, had taken into account irrelevant considerations or failed to take into account relevant considerations. In this case it is clear that the FTS had exercised its discretion, it has taken into account the evidence which was before it and there is no evidence that it has failed to take into account relevant considerations. One aspect of the application for permission to appeal proceeded upon the basis that the weight or importance which was placed by the FTS upon the fact that the landlord had stated that he had more than one property rather than multiple properties was one which no reasonable tribunal acting properly could have applied. The difficulty which the appellant has is that the FTS made a Finding in Fact and Law at paragraph 31, "That the respondent owns another property on the same street as the property that he also lets out". Although reference was made by the solicitor on behalf of the appellants to other properties that is not within the Findings in Fact and Law as made by the FTS. I am unable to determine that undue weight, in the sense of such weight being manifestly excessive, was placed on a particular aspect of the evidence.

[16] The FTS addressed the question of the respondent's credibility and although it had certain misgivings about his position it clearly felt in a position to make Findings in Fact and Law. The FTS had the benefit of hearing from the respondent and thereafter made Findings in Fact and in Law. The FTS having heard the respondent is in the unique position of being able to assess his evidence. That is its function. Included in that function is also an assessment of the evidence led and thereafter having regard to the gravity of the breach and the purpose of the 2011 Regulations to impose a fair, proportionate and just sanction in the particular circumstances of the case.

[17] I agree with the conclusion in *Rollett* v *Mackie* that each case has to be examined on its own facts. This was a discretionary decision made by the FTS. The fact that the FTS originally imposed a sanction which was three times the amount of the deposit and then after review altered that to twice the level of the deposit does not mean that the FTS fell into error or that there is necessarily a point of law. Indeed, on the contrary, having had the opportunity to hear from the respondent and accepted certain facts which he put before the FTS as being mitigatory it appears that the FTS weighed up the various factors and reached a decision which was well within its competence and its discretion. I do not consider that the FTS has made an error in law. It is only in exceptional cases that a discretionary decision is interfered with by an appellate court. It is quite clear that the aggravating and mitigating factors were balanced by the FTS and I cannot conclude that it is arguable either that there has been an error in law or that the FTS's decision was so unreasonable that no reasonable tribunal could have made it. This is not an exceptional case which would justify interference by the appellate court.

[18] The FTS heard oral evidence from the respondent. It was entitled to accept aspects of his evidence and reject others. While the appellant may disagree with the Findings in Fact made the assessment of evidence is entirely within the province of the FTS. That is a different consideration from a decision being influenced by an irrelevant factor. The approach taken by the FTS does regard the particular breach of the regulations by the respondent as serious and the FTS recognised that the more serious the breach the greater the penalty that is appropriate. The decision to make an award which is the equivalent of two times the original deposit is reflective of the fact that the FTS took a serious view of the matter. In my view there is no argument that it erred in law and permission to appeal falls to be refused.