Upper Tribunal for Scotland

2023UT36
Ref: UTS/AP/23/0023

DECISION OF

Sheriff I Fleming

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

Mr Kevin Morrison, Mrs Natalia Morrison, Flat 20, 1 Heron Place, Edinburgh, EH5 1GG

Appellant

- and -

Mr Vincent McColgan, 106 Avalon Gardens, Linlithgow, West Lothian, EH49 7PL

Respondent

FTS Case Reference: FTS/HPC/CV/22/2466

2 November 2023

Decision: Permission to appeal is refused.

[1] On 2 May 2023 an evidential hearing took place before the First-tier Tribunal (hereafter "the FTS") in respect of the action raised by Vincent McColgan (hereafter "the respondent") against Mr Kevin Morrison and Mrs Natalia Morrison (hereafter "the appellants"). The first named appellant and the respondent were present at the FTS hearing. The second named appellant was not. Having considered productions and

having heard evidence the FTS held that the respondent was entitled to recover arrears of rent validly due under and in terms of a written lease agreement in respect of the premises at 16/1 Avonmill Road, Linlithgow, West Lothian, EH49 7QX (hereafter "the premises").

[2] The case centred around a private residential tenancy which commenced on 15 January 2021. The rent stipulated in the written tenancy agreement was £775 per month. The lease agreement was signed electronically by both parties.

[3] Initially the appellants paid 6 months' rent and then continued to pay full rent from and including July 2021 to February 2022. Thereafter the appellants began to fall behind in respect of their legal obligations to pay the contractual rent and, as at the date of the hearing in respect of this matter on 2 May 2023, an order for payment was made in favour of the applicant (now respondent) in the sum of £1,004.31. Thereafter the appellants sought permission to appeal from the FTS, which application was refused on 6 June 2023. An appeal against the decision of the FTS of 6 June 2023 has been lodged with the Upper Tribunal.

[4] A permission to appeal hearing subsequently took place by Webex before the Upper Tribunal on 9 October 2023. All parties were present and represented their own interests.

[5] Initially, the Upper Tribunal was invited to exercise its discretion in terms of Rule 3(5)(b) of the Upper Tribunal for Scotland (Rules and Procedure) Regulations 2016 (hereafter the "the 2016 regulations"). It was noted that the appellants had lodged a notice of appeal against the decision of the FTS to refuse permission to appeal at the offices of the FTS rather than the Upper Tribunal's offices. Upon being advised of their error this was rectified. By the time the application reached the Upper Tribunal it was out with the period of 30 days specified within Rule 3(9) of the 2016 regulations. This application was opposed by the respondent principally and in terms of his email of 20 July 2023 wherein he catalogues the history of the case. The respondent's principal, although not exclusive, point in opposition was that the appellants had "a habit of waiting for the clock to run down on time to submit applications" and further he was of the view that their motive was to delay conclusion of proceedings.

[6] In terms of Rule 3(9) of the 2016 Regulations a person who intends appealing the FTS decision to refuse permission 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 said refusal of permission to appeal. In terms of Rule 3(5) (a) if an appellant lodges a notice of appeal later than the time required then 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. Unless the

Upper Tribunal extends the time for lodging the notice of appeal the Upper Tribunal may not admit the notice (Rule 3(5)(b). Having considered matters the Upper Tribunal extended the time period for the appellant to lodge the notice of appeal until 17 July 2023 in terms of Rule 5 (b) of the 2016 Regulations upon the basis that it was in the interests of justice to do so. The respondent's notice was late due to administrative error and no more. The application was only late by one day. It is in the interests of justice that the application seeking permission to appeal should be considered by the Upper Tribunal.

[7] The complaint of the appellants is the suggestion that Covid-19 restrictions which were in force as at January 2021 prevented a tenancy commencing at the time. The private residential tenancy agreement was entered into between the first appellant, the second appellant and the respondent. The FTS has found as a fact that there was nothing illegal in law nor was there any statutory provision which prevented the tenancy commencing. Indeed the FTS goes further. In terms of paragraph 16 of its decision not only did the FTS state that no valid legal defence was submitted on behalf of the now first appellant it held his evidence "to lack credibility and to be disingenuous."

[8] By disingenuous it is meant that the first appellant was not being candid or sincere by pretending that he knows less about something than he really did. This finding was drawn to the first named appellant's attention during the course of the hearing before the Upper Tribunal He indicated that he thought this was an unfair

observation because he felt that the conduct of the hearing before the FTS made him "uncomfortable". He indicated he was not expecting questions, he had not been advised of the questions in advance and he did not have answers to the questions. He was not provided with an opportunity to cross-examine the respondent. Further, his wife (the second named appellant) was not present and he was disadvantaged because she had various details about the family's financial administration within her knowledge whereas the first named respondent did not do so.

[9] In response the respondent indicated that he did not accept the categorisation of the conduct of the FTS hearing provided by the appellant and indeed advised the Upper Tribunal that his recollection of the circumstances was very different. The respondent indicated that as far as he was concerned the hearing by the FTS was long and detailed and documentation was referred to by the first named appellant.

[10] Although the second named respondent did not participate in the FTS process she did participate before the Upper Tribunal. She was present with the first appellant throughout the hearing. She did indicate that she wished to contribute and advised that she did not think it was correct that she should have to pay rent for a property which was unoccupied. She contended that she did not live in the property she should not have to pay rent in respect of it.

Decision

[11] In order to succeed the appellants require to address section 46(4) of the Tribunals (Scotland) Act 2014 ("hereafter the 2014 Act") which provides permission to appeal is to be granted where "the Upper Tribunal is satisfied that there are arguable grounds for the appeal."

[12] In approaching the terms of section 46(4) I have had regard to the decision of the Lord Justice-Clerk (Lord Carloway) in *Czerwinski* –v- *HM Advocate* 2015 SLT 610 at paragraph 9 together with the authorities cited there. In terms of rule 3(6) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016, 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 (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. Of that test it said this: "Arguable in this context means that the appeal can properly be put forward on the professional responsibility of counsel"

[13] In *Wightman v Advocate General* 2018 S.C. 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 threshold of arguability is therefore relatively low. An appellant does, however, require to set out the basis of a challenge from which can be divined 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 or additional procedure in a challenge with no merit. It is in the interests of justice that a ground of appeal which is misconceived, is stopped in its tracks.

[14] *Advocate General for Scotland v Murray Group Holdings Ltd* [2015] CSIH 77; 2016 SC 201 (affirmed by UKSC in [2017] UKSC 45; 2018 S.C. (UKSC) 15) concerned an appeal from the First Tier Tribunal, Tax & Chancery Chamber 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]). In essence, therefore, the task of the Upper Tribunal is to ascertain, with reference to the material submitted, whether the appellant has identified in the proposed ground of appeal an error of law that is capable of being stated or argued before it at a hearing. That is a low bar.

[15] The function of the Upper Tribunal is a limited one. An appeal under the 2014 Act is not an opportunity to re-hear the factual matters argued before the FTS but rather to correct any errors of law that may have come into the decision of the FTS.

[16] Essentially what has happened in this application for permission to appeal is a restatement by the appellants of the position which was advanced before the FTS. That position was not accepted. The first appellant's position was observed to be lacking credibility and disingenuous in terms of paragraph 16 of the FTS decision. Further,

paragraph 16 then amplifies the reasons behind the conclusion which the FTS reached. Before the FTS could consider the legal position as advanced by the first named appellant it is incumbent upon it to determine questions of reliability and credibility. They did so. Even if the first named appellant had presented a compellingly correct legal proposition, if the factual matrix upon which it is based is not accepted, the appellants' position cannot be accepted. That issue did not appear to have been recognised by the first named appellant in particular which is why I specifically raised it with him during the course of the hearing. He then proceeded to criticize the conduct of the hearing, which issue I address below.

[17] For the avoidance of doubt, notwithstanding that it is not strictly speaking necessary to address the legal argument of the first and second named appellant, I consider that the FTS was entirely correct in concluding that it was not an accurate statement of the law.

[18] The hearing of the case before the Upper Tribunal is not an opportunity for the respondents to air matters which have previously been considered and rejected by the FTS. As Lord Radcliffe remarked in *Edwards* -v- *Bairstow* 1956 AC 14 "The court is not a second opinion, where there is reasonable ground for the first." Such an observation is entirely apposite to the circumstances in this case. The Upper Tribunal is disentitled to grant permission to appeal where no error of law has been identified. The FTS rejected

the appellants' factual and legal position. It was legally entitled to do so and therefore no error in law can arise.

[19] The appellant sought to introduce an argument about the conduct of the hearing before the FTS. Such an argument had not been foreshadowed in the appellant's original application seeking permission to appeal. Its factual matrix was disputed by the respondent. The Upper Tribunal therefore relies upon the account of the hearing provided by the FTS in its decision. The procedure followed by the FTS is clear therefrom. Each of the parties were initially asked questions in order to identify material facts. Each party was given an opportunity to give additional evidence and indeed it is clear that the first named appellant was then afforded the opportunity of an adjournment to marshall his thoughts and to reflect before making his final submissions. The FTS has a wide and significant discretion in determining the conduct of hearings before it. Having considered the procedure adopted by the FTS no unfairness to the appellant is apparent and no question of law arises.

[20] The appellant invites the Upper Tribunal to reduce the lease between the parties as being unlawful. Such a remedy is not open to the Upper Tribunal as the proposed course lies out with its jurisdiction.

[21] The appellants made an application to the FTS seeking permission to appeal under rule 37 of the First-tier Tribunal for Scotland Housing and Property Chamber

(Procedure) Regulations 2017. The said application was refused by the FTS upon the basis that no arguable error of law has been identified. That situation remains. No point of law having been identified permission to appeal is refused.