Upper Tribunal for Scotland

2022UT12
Ref: UTS/AP/21/0003

DECISION

of Upper Tribunal Judge Pino Di Emidio

in an application for review of the refusal of an Appeal against a

Decision of the First-Tier Tribunal for Scotland (Housing and Property Chamber)

in the case of

Mr John Paul Floyd, 5E Raeburn Place, Aberdeen, AB25 1PP

Appellant

and

Mr Geoffrey George Gettka, 27 Watson Street, Aberdeen, AB25 2QB

Respondent

FTS Reference FTS/HPC/PR/19/3024

4 April 2022

The Upper Tribunal for Scotland, on the application of the appellant, having reviewed its decision dated 30 November 2021 to refuse the appeal against the decision of the First-tier Tribunal for Scotland Housing and Property Chamber dated 23 September 2020:

1. sets aside said decision dated 30 November 2021,
2. re-decides the appeal,
3. grants the appeal and quashes the decision of the First-tier Tribunal for Scotland Housing and Property Chamber dated 23 September 2020, and
4. makes an order for payment of the sum of £1,399.13 by the respondent to the appellant.

Note of reasons for decision

[1] The point at issue is whether a payment received by the respondent from the appellant was a premium paid in connection with the grant of a protected tenancy. The same abbreviations are used as in the decision dated 30 November 2021.

Background

[2] The appellant has applied for review of the decision to refuse the appeal. The power to review is set out in section 43(1) of the Tribunals (Scotland) Act 2014 ("the 2014 Act"). The power to set aside and re-decide is as set out in section 44(4) of the 2014 Act.

[3] I did not find it necessary to fix a hearing in this appeal. The appellant has now set out his position in a rather fuller written submission. The respondent was given an opportunity to respond. The ground of appeal was in the following terms:

> "(1) The Tribunal errs in law in finding that charges arising from a tenant's "own use and occupation of the property" are not caught by the definition of premium in s. 90(1) of the Rent (Scotland) Act 1984 (as amended) ("the Act"). Specifically, the Tribunal errs in finding that the sum of £1399.13 paid by the Applicant was not a "premium" on a proper construction of s. 90(1) of the Act."

[4] In what I hope is a fair reading, the application for review raises three separate points which I summarise as follows and will deal with in turn.

a. Failure to deal with the provisions of section 82(2) of the 1984 Act.
b. Failure to deal critically with the factual findings of the FtT.
c. Failure to deal with an argument that the FtT has "blind-sided" the appellant.

[5] *Point a*. The appellant submits that the Decision being reviewed only quoted from section 82(1) of the 1984 Act. It should have also made reference to section 82(2) which provides:

> "Any person who, in connection with the grant, renewal or continuance of a protected tenancy, receives any premium shall be guilty of an offence under this section… "

[6] I accept that I overlooked the need to consider section 82(2) separately from section 82(1). The appellant argues that this subsection is of wider application than section 82(1) under reference to the leading case of *Farrell v Alexander* [1977] AC 59. That case concerned section 85 of the Rent Act 1968 the first two subsections of which contained broadly similar language to

section 82(1) and (2) of the 1984 Act. He refers to two passages in particular. First, this passage in the speech of Viscount Dilhorne at page 80B-D:

> In Woods v. Wise [1955] 2 Q.B. 29 , 57, Romer L.J. pointed out that a landlord did not infringe section 2 (1) by receiving a premium which had not been required by him as a condition of granting or renewing or continuing a tenancy. This no doubt led to the substitution of a new subsection in place of section 2 (1) ten years later. The Rent Act 1965 by section 37 and Schedule 5 enacted that the following subsection should be substituted for section 2 (1):
> "A person shall not - (a) as a condition of the grant, renewal or continuance of a tenancy to which this section applies, require the payment of any premium; or (b) in connection with such a grant, renewal or continuance, receive any premium; in addition to the rent."
> The fact that in paragraph (b) the words are "in connection with" and not as in paragraph (a) "as a condition of" may have been intended to secure that paragraph (b) applies to cases where it could not be established that the receipt of the premium was a condition of the grant.

Second, the following passage in the speech of Lord Edmund-Davies at 96F-H:

> "If that conclusion is right, the excess part of the £4,000 paid by the appellants is recoverable by them and it is not strictly necessary to consider whether the respondent also comes within subsection (2) of section 85 . It is a separate provision and its construction is not interlocked with that attributed to subsection (1); that is to say, although a landlord may well be caught by both subsections, a person may be within subsection (2) who is outside subsection (1). In my judgment, this subsection is, if anything, even clearer that subsection (1) and there is no room for doubt that the respondent did receive a "premium" of £4,000 "in connection with the grant... of a protected tenancy" of the Little Venice flat to the appellants. The wording of the subsection could scarcely be more widely or clearly expressed, and it fits the facts of this case like a well-made glove."

[7] It is important to appreciate that all five law lords in *Farrell* gave speeches in the case as it gave rise to wider issues about statutory interpretation and the state of the English authorities at the time. Furthermore the passage just quoted from Lord Edmund-Davies is strictly *obiter dictum* (i.e. something said in passing) in that his Lordship based his conclusion on the first subsection of the section under consideration there. Notwithstanding that, I consider that the appellant is correct in his submission as to the significance of the passages relied on to the facts as found by

the FtT in this case. It was regrettable that I failed to take full account of them in my decision of 30 November 2021.

[8] I now propose to look at the FtT's decision further. The FtT grouped its findings in fact and law together in paragraphs 8 to 14 of its decision. The finding in paragraph 12 was in the following terms:

> "The Respondent was liable to make payment of council tax to the local authority in terms of section 76(3) of the Local Government Finance Act 1992 ["the 1992 Act"] and Section 3 of the Schedule to The Council Tax (Liability of Owners) (Scotland) Regulations 1992 ["the 1992 Regulations"]."

This is a finding in both fact and law. Paragraph 3 of the Schedule to the 1992 Regulations prescribes the following class:

> "A dwelling occupied, or which could be occupied, by persons who do not constitute a single household and which is occupied by one or more persons each of whom–(a) is a tenant of, or has a licence to occupy, part only of the dwelling;…"

One has to look a little further to understand the statutory scheme. Regulation 2 of the 1992 Regulations provides:

> "The classes of dwelling specified in the Schedule to these Regulations are prescribed for the purposes of section 76(1) of the Act."

Section 76(1) of the 1992 Act provides

> "Subsections (3) … below shall have effect in substitution for section 75 above in relation to any chargeable dwelling of a class prescribed for the purposes of this subsection."

Section 76(3) of the 1992 Act provides:

> "Where on any day this subsection has effect in relation to a dwelling, the owner of the dwelling shall be liable to pay the council tax in respect of the dwelling and that day."

[9] When read together the provisions identified in the finding at paragraph 12 of the FtT's decision impose an obligation on the landlord to pay the council tax for the property when the property falls within the scope of paragraph 3 of the 1992 Regulations. It provides an important foundation for the argument of the appellant. He submits that my decision failed to understand the importance of this finding because it reflects the obligation that was imposed on the respondent to make payment of council tax. The appellant had no such obligation because the property was a house in multiple occupation. The appellant is correct to point out that I erroneously stated at paragraph [9] of the decision of 30 November 2021 that the obligation was on him and not the respondent.

[10] The finding in the FtT's paragraph 13 states:

> "The sum of £1399.13 was not paid by the Applicant to the Respondent as a condition for the grant, continuance or renewal of the tenancy between the parties and does not fall within the definition of a premium under 90(1) of the 1984 Act."

On closer examination I have some difficulties with this finding. It addresses the subject matter of section 82(1) but not of section 82(2) in that it is directed to what had been made a condition of the grant of the lease. As the appellant has submitted, that provision which I have quoted above is broader in its terms. I am persuaded that the passages quoted above from *Farrell v Alexander* explain properly the wider application of section 82(2) of the 1984 Act. I have also proceeded on the basis that it is not disputed that the tenancy is a protected tenancy as defined in section 1 of the 1984 Act.

[11] In its finding at paragraph 8 the FtT found that the appellant had entered into a short assured tenancy agreement which commenced on 1 November 2017. The FtT explained that it was only in the currency of the lease that there emerged a problem about payment of council tax. The appellant had expected to be exempt but the local council insisted that the respondent had to pay it. It is clear that the statutory obligation and liability for the council tax falls on the respondent. The appellant has paid him the equivalent sum. The respondent's submission was

that section 82 is not intended to strike at a contractual condition of the kind in this case. On reconsideration, I have concluded that this is not a sound argument. In the circumstances the appellant is well founded in his submission that the payment he made was in connection with the grant of the tenancy and caught by section 82(2). On the facts as found by the FtT the respondent has fallen foul of the prohibition in section 82(2), albeit perhaps inadvertently.

[12] It is appropriate that I deal with another point made in the application seeking review of the decision of 30 November 2021. The appellant stated that he has repeatedly emphasised the importance of the Scottish Government Policy Note of October 2012 concerning The Rent (Scotland) Act 1984 (Premiums) Regulations 2012. The Regulations are Scottish SI 2012/329 and provide that any payments towards energy efficiency improvements under a green deal plan within the meaning of chapter 1 of the Energy Act 2011 are not to be treated as a premium for the purposes of Part 8 of the Rent (Scotland) Act 1984. He submits that both the FtT and this Tribunal have turned a "blind eye" to this document which states very clearly what the purpose of the legislation is.

[13] The Policy Note was issued by the Scottish Government Directorate for Housing, Regeneration, Commonwealth Games and Sport. Courts and tribunals are increasingly willing to take account of material of this kind when dealing with the interpretation of ambiguity in legislation (See Daniel Greenberg (editor) – Craies on Legislation: A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation (12th ed. 2020) at paragraph 27.1.8). I do not regard this particular Policy Note of assistance in the present case. At paragraphs 5 to 9 it records that some confusion exists in practice on the operation of section 82. Some conflicting representations have been made to the Scottish Government by certain interested parties calling for the position to be clarified. The Policy Note expressly relates only to the 2012 Regulations which made a very specific provision relating to Green Deal payments. The content of the Policy Note is not of assistance in construing the terms of section 82. Paragraphs 5 to 9 of the Note stray well beyond the terms of the 2012 Regulations to which it purportedly relates. Even then, it does

no more than note that certain interested parties consider there is some confusion in practice in the operation of the statutory prohibition. I am not persuaded that the only permissible exceptions to the prohibition in section 82 are those expressly provided for in the 1984 Act.

[14] It follows from what is stated above that portions of paragraphs [9], [10], [12], [13] and [14] of the decision of 30 November 2021 cannot stand, so far they are inconsistent with what is stated here. Similarly the references to section 82 of the 1984 Act in paragraphs [7] to [11] should be read as relating to section 82(1) only. I regret that I did not address separately the provisions of section 82(2) in my earlier decision.

[15] Although the above is sufficient for the determination of this application for review it is appropriate that I should say something about the other points made in that application for review.

[16] *Point b.* As stated in the decision dated 30 November 2021 the FtT proceeded on the basis that the facts were not in dispute. In the decision of 30 November 2021 a short narration of the findings of the FtT was set out at paragraph [5] as context for further discussion and analysis. The ground of appeal on which the FtT granted permission does not include a challenge to the factual findings of the FtT. In any event the facts as found were sufficient for the appellant to succeed if the FtT had agreed with him on his interpretation of the relevant sections of the 1984 Act. He did not require to disturb any factual findings in order to succeed if his legal argument was correct. The appellant complains of a failure to deal critically with the factual findings of the FtT but he did not specify the basis on which he challenged them in the ground of appeal on which the FtT granted permission. This argument is rejected on the basis that the appellant does not have permission to appeal on the point. Indeed he has succeeded on the point of statutory interpretation that he has focused more fully in his application for review which was within the scope of the permission granted by the FtT.

[17] *Point c.* The appellant states the following in his application seeking review:

> "The UTS errs in failing to address the issue of whether the FtT effectively helped the respondent to make his case contrary to Rule 2(2)(c) of The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017."

The appellant sought to argue in his submission to this Tribunal that the FtT had advanced on the respondent's behalf an argument that had not been put to him during the proceedings. This argument is rejected on the basis that it does not come within the scope of the ground of appeal on which the FtT granted permission to appeal. The 2017 Rules of Procedure require the FtT to deal with the proceedings justly. Rule 2(2)(c) provides that dealing with the proceedings justly includes:

> "ensuring so far as practicable, that the parties are on an equal footing procedurally and are able to participate fully in the proceeding, including assisting any party in the presentation of the party's case without advocating the course they should take."

The FtT, of necessity, has considerable latitude in the conduct of the proceedings. The way in which a written decision may ultimately be formulated may involve some development beyond points that were made in submissions at a hearing. There may be occasions where after a hearing, as a matter of fairness, the FtT may wish to invite further submissions from the parties. For instance, it may discover a seemingly binding precedent determinative of the issue in dispute which was not referred to in the hearing by either party. However such a course of action is likely to be taken rarely. There has to be some finality to the process of making submissions. This argument is rejected as the appellant has not put forward a specific basis for suggesting that the FtT did not act fairly in this case.

Conclusion

[18] For the reasons stated above, after review, I have concluded that the FtT erred in law. In consequence I propose to re-decide this appeal, set aside my previous decision and allow this appeal. I also require to consider whether the case should be remitted to the FtT or whether I can proceed to re-make the decision by reference to the FtT's findings in fact (see *TA (Sri Lanka) By*

her litigation friend, AB v Secretary of State for the Home Department [2018] EWCA Civ 260 *per* Kitchin LJ at paragraph 7). The appeal has succeeded on a point of statutory interpretation. No further factual inquiry of the kind that might merit a remit to the FtT is required. Therefore the appropriate course of action is to grant the appeal, quash the decision of the FtT dated 23 September 2020 and make an order for payment of the sum of £1,399.13 by the respondent to the appellant.

Appeal provisions

[19] A party to this case who is aggrieved by this decision to set aside the previous decision of the Tribunal and re-decide the appeal 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.

Sheriff Pino Di Emidio
Member of the Upper Tribunal for Scotland