



**DECISION OF
SHERIFF TONY KELLY
ON APPEAL
(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND)**

IN THE CASE OF

Mr Graham Devine, 4 Gailes Park, Bothwell, G71 8TS

Appellant

- and -

Mr Juan Martin Bailo, 0/2 159 Wellshot Road, Glasgow, G32 7AU

Respondent

FtT case reference Ref: FTS/HPC/PR/20/2199

6 May 2022

Decision

The Upper Tribunal quashes the decision of the First Tier Tribunal dated 11 March 2021 and remits the application to the First Tier Tribunal Housing and Property Chamber to proceed as accords.

Introduction

[1] By decision of 11 March 2021, the First Tier Tribunal (“FtT”) ordered the appellant to pay the applicant the sum of £700. The application related to an alleged failure on the part of the appellant to pay a tenancy deposit of £350 into an approved tenancy deposit scheme in

terms of the Tenancy Deposit Schemes (Scotland) Regulation 2011.

[2] The appellant sought permission to appeal to the Upper Tribunal (“UT”) from the FtT. By decision dated 31 March 2021 it refused permission to appeal. On 11 June 2021 the UT granted permission to appeal the ground of appeal centred upon the FtT’s decision to proceed with the hearing of 12 February 2021 in the absence of the appellant.

Procedure before FtT

[3] A case management discussion was convened by telephone conference on 5 January 2021. The appellant did not attend. The FtT identified issues in dispute, see paragraph 6 of its decision. There then followed an exchange between the FtT’s administration and the appellant which is narrated in full in the FtT decision (paragraphs 8 to 23). A hearing was assigned to take place on 12 February 2021.

[4] On 8 February 2021, the appellant requested that the hearing be conducted on an in person (“face to face”) basis. The FtT narrate in its decision the exchanges that followed thereafter at paragraphs 18 - 22.

Hearing: 12 February 2021

[5] On 12 February 2021 the hearing took place by telephone conference. The applicant was in attendance together with both a representative and a Spanish interpreter. The FtT considered a lengthy email from the appellant which is reproduced in full at paragraph 23 of its decision. This dealt with matters germane to the merits of the application. It repeated the appellant’s request for a face to face meeting or hearing. The FtT considered the terms of Rules 29 and 24 of the First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the 2017 regulations”) and decided that it was appropriate to proceed with the application in the absence of the appellant.

Appeal

[6] In a paper apart submitted with the UTS1 Form, the appellant reproduces paragraph 27 and 28 of the FtT's decision. Amongst other things, he complains of not receiving a decision from the FtT upon his application to have the case convened in person on 12 February 2021.

FtT Decision

[7] The FtT's reasoning appears to focus upon the provision enabling the hearing to take place, see paragraph 25 and its reference to Rule 29 of the 2017 regulations. At paragraph 28, the FtT refers to Rule 1 of the 2017 regulations and notes that the definition of "hearing" is broad enough to cover teleconference. It goes on to note that an in person hearing may be "preferable under normal circumstances". The FtT decision thereafter states that convening a hearing by telephone is provided for in the Rules "and it was appropriate in the circumstances of an ongoing pandemic". The overriding objective is mentioned with reference to the requirement to avoid delay. The FtT recognised the prevention of delay required to be "compatible with [a] proper consideration of the issues". It was anxious about the prospect of excessive delay and of the eventual hearing having to await the ending of the pandemic. In the FtT's consideration, delay to an unidentified date would not be in the interests of justice. In light of the applicant's language difficulties, he would be likely to suffer a greater inconvenience than the appellant. The FtT canvassed the matter with the applicant who wished to proceed. The FtT decided that it would proceed in the absence of the appellant.

Decision

[8] The overriding objective and its effect are provided for in rules 2 and 3 of the 2017 regulations:

"The overriding objective

2. —(1) The overriding objective of the First-tier Tribunal is to deal with the proceedings justly.

(2) Dealing with the proceedings justly includes —

(a) dealing with the proceedings in a manner which is proportionate to the complexity of the issues and the resources of the parties;

(b) seeking informality and flexibility in proceedings;

(c) ensuring, so far as practicable, that the parties are on equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of the party's case without advocating the course they should take;

(d) using the special expertise of the First-tier Tribunal effectively; and

(e) avoiding delay, so far as compatible with the proper consideration of the issues.

Effect of the overriding objective

3. —(1) The Chamber President and the First-tier Tribunal must seek to give effect to the overriding objective when —

(a) exercising any power under these Rules; and

(b) interpreting any rule.

(2) In particular the Chamber President and the First-tier Tribunal must manage the proceedings in accordance with the overriding objective.

(3) The parties must assist the Chamber President or the First-tier Tribunal to further the overriding objective.”

[9] The FtT decided not to accede to the request received from the applicant to postpone the hearing on the basis of the extent of any delay being unascertainable. This was an important consideration and one the FtT was enjoined to have regard to in terms of the overriding objective. However, it notes the overriding objective provides that when having regard to the requirement to avoid delay, it ought to do so compatibly with the proper consideration of the issues.

[10] The appellant was aware of the hearing of 12 February 2021. He did not want it to

proceed in the fashion which it did. He made a number of requests to postpone it and referred to several bases as to why it ought not to proceed by teleconference. Faced with an application to postpone on the basis that the mode of the hearing was said to be inappropriate for one party, when there was no alternative envisaged in the short or even the medium term, the FtT was placed in a difficult position. The FtT's consideration of the application to postpone considered only the issue of delay. It was of the view that there was no alternative to it other than to conduct the hearing at the telephone. Such a course was sanctioned by the 2017 regulations. It had to avoid delays. There was no indication when an alternative would be introduced.

[11] It was not sufficient for the FtT to proceed as is outlined in paragraph 28: to consider that it had to avoid delay and then to consider only the prospect of inconvenience to the applicant when English was not his first language. The FtT failed to give proper consideration to the reasons put forward by the appellant as to why the hearing ought not to proceed at the telephone. This was not only the basis of convenience for the appellant. On one view it appears to touch upon the FtT's fact finding function and its ability to determine disputed questions of fact without parties being personally present. The appellant refers to body language being important. It may be that the appellant was concerned that, in arriving at a determination upon competing accounts as to fact, the FtT would not have the benefit of assessing the witnesses' demeanour. It may also be the case that the appellant was of the view that he would have been in a better position to give a fuller and superior account of his position in person. In person or face to face hearings have many facets – not simply bearing upon the court's ability to reach a view upon a witness's testimony.

[12] The FtT, however, did not deal with any of the bases put forward by the appellant as to why the hearing ought not to proceed. It left out of account why the appellant wanted the

matter to be postponed. The appellant remains in the dark as to what the FtT made of those various reasons he put forward to postpone the hearing. It failed to have regard to the overriding duty, in particular to deal with the case justly, to ensure that parties were on equal footing procedurally and able to participate fully in the proceedings. It failed to explain how, absent the appellant, the case could still be dealt with justly.

[13] In deciding whether to proceed in the face of an application to postpone it is likely that the FtT will have regard to the reason put forward by a party together with the nature of the dispute and whether that may be adjudicated upon fairly absent one of the parties. When delay is recognised as inevitable (in the event of acceding to the application to postpone) the FtT may have to assess what effect that will have upon the determination and what prejudice will be suffered by parties. If either or both parties are legally represented that may have a bearing on the assessment. Parties' ability to deal with the proposed means of convening the hearing (here at the telephone) will have to be weighed in the overall evaluation of whether to proceed or not. That will inevitably involve an assessment of what is said by parties about how they would react to telephone or video hearings. The scope of the hearing and how it is envisaged that the matter will be resolved – for example, with reference to oral testimony alone - may well be a relevant consideration. Documentary material including witness statements may well go some way to resolving, or assisting in the resolution of, disputed issues. The availability of alternative means of convening the hearing and informed estimates about when those may be accessed by the FtT may affect whether the application to postpone may be given effect to. These sorts of considerations may well have been relevant to the FtT's decision to postpone. The FtT decision is silent on what it made of these other factors, aside from delay, in the exercise of its discretion.

Conclusion

[14] In leaving out of account relevant considerations, and, in particular failing to deal the appellant's reasons for seeking a postponement of the hearing, the FtT fell into error in deciding to proceed in his absence. Its decision must be quashed and the application remitted to the First Tier Tribunal in terms of section 47(2)(b) of the Tribunals (Scotland) Act 2014.

Sheriff Tony Kelly

Member of the Upper Tribunal for Scotland

Notice to Parties

*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.*