



DECISION NOTICE OF SHERIFF CHRISTOPHER DICKSON

in the case of

CALUM NICOLSON, Carran, Kensaleyre, Isle of Skye, IV51 9XF

Appellant

and

FIRST-TIER TRIBUNAL FOR SCOTLAND (HOUSING AND PROPERTY CHAMBER),
4th Floor, 1 Atlantic Quay, Glasgow, G2 8JB

Respondent

FTT Case Reference PRHP/RP/16/0311

5 September 2017

DECISION

The Upper Tribunal dismisses the whole proceedings in terms of Rule 10(2)(a) of the Upper Tribunal for Scotland Rules of Procedure 2016.

REASONS FOR DECISION

Introduction

[1] Form UTS-1 is the form used for the following applications:

1. Submitting an appeal to the Upper Tribunal against a decision of the First-tier Tribunal for Scotland in terms of section 46(1) of the Tribunals (Scotland) Act 2014 (hereinafter referred to as "the 2014 Act"); and
2. Requesting permission from the Upper Tribunal to appeal a First-tier Tribunal for Scotland decision in terms of section 46(3)(b) of the 2014 Act.

The appellant requires to tick a box on Form UTS-1 to indicate whether the application is an appeal to the Upper Tribunal against a decision of the First-tier Tribunal (i.e. No 1 above) or a request for permission from the Upper Tribunal for Scotland to appeal a decision of the First-Tier Tribunal (i.e. No 2 above).

[2] By Application in Form UTS-1, dated 5 May 2017, the appellant ticked the box to indicate that he was making an application to appeal to the Upper Tribunal against a decision of the First-tier Tribunal. However, this was an error on his part. What had in fact occurred in the First-tier Tribunal was as follows:

1. On 3 March 2017 the First-tier Tribunal reached a decision determining that the appellant, as landlord of the property at The Corran, Kensaleyre, Portree, Isle of Skye, IV51 9XE, had failed to comply with the duty imposed by section 14(1)(b) of the Housing (Scotland) Act 2006 (hereinafter referred to as "the 2006 Act"), in respect of a defective hob, and subsequently made a Repairing Standard Enforcement Order (hereinafter referred to as "RSEO") in terms of section 24(2) of the 2006 Act.
2. On 6 April 2017 the appellant made an email application to appeal the above decision of the First-tier Tribunal. The email simply stated "I wish to appeal the above application". The heading on the email was "FW: The Carran, Kensaleyre, Portree PRHP/RP/16/0311". On 7 April 2017 the First-tier

Tribunal refused to give permission to appeal in terms of Rule 7 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2016 (hereinafter referred to as "the First-tier Rules"). The First-tier Tribunal correctly identified that an application for permission under section 46(3)(a) of the 2014 Act must be made in writing and must (a) identify the decision of the First-tier Tribunal to which it relates; (b) identify the alleged error or errors of law in the decision; and (c) state the ground or grounds of appeal (see Rule 6 of the First-tier Rules as they stood prior to 24 April 2017). The First-tier Tribunal refused permission to appeal on the basis that the email did not identify any alleged error or errors of law, in their decision of 3 March 2017, and did not state the ground or grounds of appeal.

[3] Given the above, the appellant therefore ought to have ticked the box on Form UTS-1 to indicate that he was requesting permission from the Upper Tribunal to appeal a First-tier Tribunal decision in terms of section 46(3)(b) of the Tribunals (Scotland) Act 2014. The appellant did not do so and stated in Form UTS-1 that permission to appeal had been granted when the opposite was in fact true. Part 6 of Form UTS-1 provides space for an appellant to set out their reasons for requesting an appeal I permission to appeal and makes clear that the an appellant must identify points of law on which they are in appealing. In the present case the appellant gave his reasons as follows:

"I believe the RSEO is incompatible with Protocol 1 Article 1 of the Human Rights Act (1998). I am a private citizen, and the property in question is my private residence. Also I am no longer a private landlord."

[4] The appellant did not enclose with Form UTS-1 the decision of the First-tier Tribunal, dated 3 March 2017, or the First-tier Tribunal's refusal of permission to appeal to the Upper

Tribunal, dated 7 April 2017. Form UTS-1 is clear that it was necessary to enclose both these documents.

The relevant law

[5] Section 46 of the 2014 Act provides:

"46 Appeal from the Tribunal

- (1) A decision of the First-tier Tribunal in any matter in a case before the Tribunal may be appealed to the Upper Tribunal.
- (2) An appeal under this section is to be made-
 - (a) by a party in the case,
 - (b) on a point of law only.
- (3) An appeal under this section requires the permission of-
 - (a) the First-tier Tribunal, or
 - (b) if the First-tier Tribunal refuses its permission, the Upper Tribunal.
- (4) Such permission may be given in relation to an appeal under this section only if the First-Tier Tribunal or (as the case may be) the Upper Tribunal is satisfied that there are arguable grounds for the appeal.
- (5) This section-
 - (a) is subject to sections 43(4) and 55(2),
 - (b) does not apply in relation to an excluded decision."

[6] Section 55 of the 2014 Act provides:

"55 Process for permission

- (1) The Scottish Ministers may by regulations specify a time limit within which the permission required by section 46(3) or 48(3) must be sought.
- (2) A refusal to give the permission required by section 46(3) or 48(3) is not-
 - (a) reviewable under section 43, or
 - (b) appealable under section 46 or 48."

[7] Rule 3 of the Upper Tribunal for Scotland Rules of Procedure 2016 (hereinafter referred to as "the Upper Tribunal Rules") provides:

"3. - Notice of appeal against a decision of the First-tier Tribunal

- (1) A person may lodge with the Upper Tribunal a notice of appeal against a decision of the First-tier Tribunal.
- (2) A notice of appeal must -
 - (a) identify the decision of the First-tier Tribunal to which it relates; and
 - (b) identify the alleged error or errors of law in the decision.
- (3) The appellant must provide with the notice of appeal a copy of -
 - (a) any written record of the decision being challenged;
 - (b) any separate written statement of reasons for that decision; and
 - (c) the notice of permission to appeal or alternatively notice of refusal of permission to appeal from the First-tier Tribunal.
- (4) [...]
- (5) [...]
- (6) The Upper Tribunal may, where the First-tier Tribunal has refused permission to appeal-
 - (a) refuse permission to appeal;
 - (b) give permission to appeal; or
 - (c) give permission to appeal on limited grounds or subject to conditions; and must send a notice of its decision to each party and any interested party including reasons for any refusal of permission or limitations or conditions on any grant of permission.
- (7) Where the Upper Tribunal, without a hearing-
 - (a) refuses permission to appeal; or
 - (b) gives permission to appeal on limited grounds or subject to conditions, the appellant may make a written application (within 14 days after the day of receipt of notice of the decision) to the Upper Tribunal for the decision to be reconsidered at a hearing.
- (8) An application under paragraph (7) must be heard and decided by a member or members of the Upper Tribunal different from the member or members who refused permission without a hearing.
- (9) Where the First-tier Tribunal sends a notice of permission or refusal of permission 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 30 days after the day of receipt by that person of the notice of permission or refusal of permission to appeal."

[8] Rule 9 and 10 of the Upper Tribunal Rules provide:

"9.- Failure to comply with rules etc.

(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or an order, does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or an order, the Upper Tribunal may take such action as it considers just, which may include-

- (a) waiving the requirement;
- (b) requiring the failure to be remedied; or
- (c) exercising its power under rule 10 (dismissal of a party's case).

10.- Dismissal of a party's case

(1) The Upper Tribunal must dismiss the whole or a part of the proceedings if the Upper Tribunal--

- (a) does not have jurisdiction in relation to the proceedings or that part of them; and
- (b) does not exercise its power under rule 7(3)(1)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(2) The Upper Tribunal may dismiss the whole or a part of the proceedings if -

- (a) the appellant has failed to comply with an order which stated that failure by the appellant to comply with the order could lead to the dismissal of the proceedings or part of them;
- (b) the appellant has failed to co-operate with the Upper Tribunal to such an extent that the Upper Tribunal cannot deal with the proceedings fairly; or
- (c) in proceedings which have been transferred from the First-tier Tribunal, the Upper Tribunal considers there is no reasonable prospect of the appellant's case, or any part of it, succeeding.

(3) The Upper Tribunal may not dismiss the whole or a part of the proceedings under paragraph (1) or (2) without first giving the appellant an opportunity to make representations in relation to the proposed dismissal.

Procedure in the Upper Tribunal

[9] On 1 June 2017 the Upper Tribunal issued an order noting that the appellant had failed to comply with the Upper Tribunal Rules by:

1. Failing to provide a written record of the decision of the First-Tier Tribunal being challenged (see Rule 3(3)(a) of the Upper Tribunal Rules)

2. Failing to provide any separate written statement of reasons for that decision (see Rule 3(3)(b) of the Upper Tribunal Rules);
3. Failing to provide the notice of refusal of permission to appeal from the First-tier Tribunal (see Rule 3(3)(c) of the Upper Tribunal Rules); and
4. Failing, with sufficient precision, to identify the alleged error or errors of law in the decision of the First-tier Tribunal (see Rule 3(2)(b) of the Upper Tribunal Rules).

The Upper Tribunal ordered that the appellant remedy the above four failures by 16 June 2017 (see Rule 9(2)(b) of the Upper Tribunal Rules) and noted that failure to comply with the order could, and would be likely to, lead to the dismissal of the proceedings (see Rule 10(2)(a) of the Upper Tribunal Rules). The appellant did not respond by 16 June 2017.

[10] On 28 July 2017 the Upper Tribunal issued an order noting that the appellant had failed to comply with the order of 1 June 2017 and that it therefore proposed to dismiss the proceedings on 25 August 2017. The appellant was provided with the opportunity to make representations in relation to the proposed dismissal and was given a deadline of 5pm on 18 August 2017 in order to do so (see Rule 10(3) of the Upper Tribunal Rules).

[11] On 19 August 2017 the appellant sent an email (this was the only communication sent by the appellant since the order of 1 June 2017) to the Upper Tribunal enclosing, amongst other things, the following:

1. The decision of the First-tier Tribunal, dated 3 March 2017
2. An incomplete copy (page 1 only) of the First-tier Tribunal's refusal of permission to appeal to the Upper Tribunal, dated 7 April 2017.

The appellant's email of 19 August 2017 was in the following terms:

"Please see attached in response to the order of the Tribunal of 1 June 2017. The attached answers points 1, 2 and 3. These documents could have been received from the First-Tier Tribunal who share the same floor as Upper Tribunal at 1 Atlantic Quay.

Point 4. The First-Tier Tribunal decision is an interference with the peaceful enjoyment of my possession, in this case my home. This protection comes from Article 1 of the First Protocol (Human Rights Act 1998) : Protection of Property.

I respectfully ask that the Upper Tribunal uphold my appeal."

Discussion

[12] Rule 9 of the Upper Tribunal Rules entitles the Upper Tribunal to waive a failure to comply with both a requirement in the said Rules or an order of the Upper Tribunal, if it is just to do so. In this case the appellant has incorrectly appealed under section 46(1) of the 2014 Act (it is not competent to appeal a refusal of permission to appeal - see section 55(2) of the 2014 Act) and has failed to comply with the basic requirements of Rule 3 of the Upper Tribunal Rules. The appellant, by way of the order of 1 June 2017, was given an opportunity to rectify those failures and was informed that failure to comply with that order could, and was likely to, lead to the dismissal of the proceedings. The appellant failed to comply with the order of 1 June 2017 and did not respond. By order of 28 June 2017 the appellant was informed of the proposed dismissal and was given the opportunity to provide representations in relation to the proposed dismissal by 18 August 2017. The appellant failed to comply with that order. On 19 August 2017 the appellant sent the email and enclosures set out at para 11 above. That email provided partial compliance with the order of 1 June 2017 some months after that order was made. However, the email did not, in my view, add sufficient precision to identify the alleged error or errors of law in the decision of the First-tier Tribunal, dated 3 March 2017. Nor did the email provide any explanation for the complete failure to comply with the order of 1 June 2017.

[13] I have considered whether I should use the powers in Rule 9 of the Upper Tribunal Rules to waive all of the failures appellant's failures and go on to consider whether or not the Upper Tribunal should give permission to appeal to the Upper Tribunal. In the circumstances, and standing the opportunity already given to the appellant to remedy the failures, I do not consider it just to do so and consider that it is just for the Upper Tribunal to exercise its discretion to dismiss the whole proceedings. The whole proceedings will therefore be dismissed in terms of Rule 10(2)(a) of the Upper Tribunal Rules.

[14] Had I been prepared to waive the appellant's failures I would not, in any event, have been satisfied that there were arguable grounds for appeal. The appellant has had ample opportunity to set out the alleged error or errors of law in the decision of First-tier Tribunal, dated 3 March. The appellant asserts that that decision or the subsequent RSEO was somehow incompatible with Article 1 of the First Protocol. Despite being asked for further precision in identifying the alleged error or errors of law, the appellant has failed to do so. All that the appellant has added, in the email of 19 August 2017, is that there has been interference with the peaceful enjoyment of his home but that, even if correct, would not, of itself, result in there being a violation of Article 1 of the First Protocol. Therefore the alleged error of law is simply a bald assertion that there has been a violation of Article 1 of the First Protocol with no specification as regards how the decision of the First-Tier Tribunal, dated 3 March 2017, resulted in such violation. In the circumstances, I would not have been satisfied that there were arguable grounds for appeal and would have refused permission to appeal to the Upper Tribunal in terms of Rule 3(6) of the Upper Tribunal Rules.

APPEAL PROVISIONS

[15] If the appellant is aggrieved by this decision he may seek permission to appeal to the Court of Session on a point of law only. To do so the appellant must seek permission to appeal within 30 days of receipt of this decision. Any request for permission to appeal 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 2014 Act what important point of principle or practice would be raised or what other compelling reason there is that shows the appeal should be allowed to proceed. Further guidance can be found on the Scottish Courts and Tribunals Service website.