Upper Tribunal for Scotland

[2019] UT 16
UTS/AP/18/0008

DECISION BY SHERIFF DAVID BICKET
ON AN APPEAL

in the case of

MR ALAN TIMMINS, 36 Coney Drive, Motherwell, ML1 1AN Per Lay Representation Project, Birnie House, Caird Street, Hamilton, ML3 0AL

Appellant

and

MS SUSAN COYLE, c/p 121 Quarry Street, Hamilton, ML3 7DR

Respondent

FTT Case Reference: FTS/HPC/PR/18/0353

Hamilton 5 November 2018

Decision

[1] After consideration of the application, the submitted documents and correspondence, and having heard from Mr Clayson, the representative of the appellant, upholds the appeal against the decision of the First-tier Tribunal for Scotland dated 19th March 2018 (leave to appeal having been granted on 25th May 2018), and remits the matter back to the First-tier Tribunal for reconsideration.

Reason for the Decision

[2] The appeal hearing was held within the Civil building (Birnie House), Hamilton Sheriff Court, Hamilton Business Park, Caird Park, Hamilton ML3 0QA. The hearing had been notified to parties by the Operations Manager of the Upper Tribunal for Scotland, Mr Paul Stewart. Mr Clayson appeared to represent the appellant. There was no appearance on behalf of Ms Susan Coyle, the respondent. Being satisfied in terms of Rule 28(a) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016, it was decided to proceed with the hearing in her absence. The view was also taken that it was in the interest of justice to proceed with the hearing, given the time that had elapsed since the original decision.

[3] The background to the appeal as outlined by Mr Clayson was to the effect that an application had been submitted by the Lay Representation Project of the Citizen's Advice Bureau, Hamilton, on behalf of the appellant on 25th January 2018. That was sent by recorded delivery and acknowledged by the First Tier Tribunal on 8th February 2018. The last date for receipt of properly submitted paperwork was 17th February 2018. At the same time in support of the application, there was submitted a copy of the tenancy agreement, evidence relating to the end date of the tenancy, evidence relating to the appellant's payment of the tenancy deposit and a deposit protection certificate showing the date the tenancy deposit was lodged. The application lodged on the Appellant's behalf was unsigned by him.

[4] The documentation sent with the application confirmed that the deposit was paid by the tenant (the appellant) on 16th June 2014 and not lodged by the landlord until 8th November 2016. Also sent was a signed mandate authorising Citizen's Advice Bureau to act

on behalf of the appellant. The documentation lodged by the appellant indicates that the appellant has a prima facie case against the respondent.

[5] As per the statement of reasons given by the First-tier Tribunal, the application was considered by a member of the Tribunal on 20th February 2018 and by letter of 26th February 2018 further information was sought from the appellant, including being asked to provide a signed application. That letter requested that the information sought be supplied by 12th March 2018 failing which "the President may decide to reject the application".

[6] In the statement of reasons provided by First-tier Tribunal, it is advised that the application was held as pending awaiting this response.

[7] A response was submitted by the appellant's representative on 12th March 2018, when an electronic signed copy was sent with the original forwarded by first class post.

[8] A legal member of the Tribunal then went on to consider the application in terms of Rules 5 and 8 of the Chamber Procedural Rules.

Rule 5 provides:-

Requirements for making an application

> 5.- (1) An application is held to have made on the date that it is lodged if, on that date, it is lodged in the manner as set out in rules 43, 47-50, 55, 59, 61, 65, to 70, 72 75 to 91, 98 to 101, 103 or 105 to 111, as appropriate.
>
> (2) The Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, must determine whether an application had been lodged in the required manner by assessing whether all mandatory requirements for lodgement have been met.
>
> (3) If it is determined that an application has not been lodged in the prescribed manner, the Chamber President or another member of the First- tier Tribunal, under the delegated powers of the Chamber President, may request further documents and the application is to be held as made on the date that the Frist-tier Tribunal receives the last of any outstanding documents necessary to meet the required manner for lodgement.

(4) The application is not accepted where the outstanding documents requested under paragraph (3) are not received within such reasonable period from the date of request as the Chamber President considers appropriate.

Rule 8 provides:- Rejection of application

8.-(1) The Chamber President or another member of First-tier Tribunal under the delegated powers of the Chamber President, must reject an application if–

(a) they consider that the application is frivolous or vexatious;

(b) the dispute to which the application relates has been resolved;

(c) they have good reason to believe that it would not be appropriate to accept the application

(d) they consider that the application is being made for the purpose other than a purpose specified in the application; or

(e) the applicant had previously made an identical or substantially similar application and in the opinion of the Chamber President, or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, there has been no significant change in any material considerations since the identical or substantially similar application was determined.

(2) Where the Chamber President, or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, makes a decision under paragraph (1) to reject an application the First-tier Tribunal must notify the applicant and the notification must state the reason for the decision."

Rule 103 provides:-

Where a tenant or former tenant makes an application under regulation 9 (court orders) of the 2011 Regulations, the application must-

(a) State-

(i) The name and address of the tenant or former tenant
(ii) The name, address and profession of any representative of the tenant or former tenant; and
(iii) The name, address and registration number (if any) of the landlord;

(b) Be accompanied by a copy of the tenancy agreement (if available) or, if this is not available, as much information about the tenancy as the

tenancy or former tenant can give; evidence of the date of the end of the tenancy (if available); and

(c) Be signed and dated by the tenant or former tenant or a representative of the tenant or former tenant.

> The First-Tier tribunal went on to state "In terms of Rule 103(d) it is mandatory that the Application is signed. Accordingly, the mandatory requirements for lodgement were met when the signed Application was received. The signed Application (in electric form) was received on 12th March 2018. Notwithstanding the Application that bears the date 24th January 2018, in terms of Rule 5(3), the application is held to have been received on 15th March 2018".

[9] The application was then rejected on the basis that it was frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules. In doing so the Legal Member referred to the judgment of Lord Justice Bingham in R v. North West Suffolk (Mildenhall) Magistrates Court (1998) Env LR9, where at page 16 of his judgment he said

> "What the expression means in this context is, in my view, that the court considers the application to be futile, misconceived, hopeless or academic."

The Legal Member considered that the test had been met and gave reasons for it. In short the application was regarded as being time-barred.

[10] In my view the Legal Member was wrong to do so. As Mr Clayson pointed out, LCJ Bingham went on to say when referring to the expression "frivolous", that;

> "That is not a conclusion to which justices to whom an application is made will often or lightly come"

He submitted that that meant that such a decision should be made sparingly and that the Legal member had failed to consider the qualifying statement when applying the test for "frivolous".

[11] In my view Mr Clayson is correct in his submission on this matter. At the time the application was submitted with its supporting documentation a prima facie case was

revealed. The application was not signed but it was submitted timeously having been posted on 25th January and acknowledged as having been received on 8th February, that in itself being a surprisingly lengthy period after its posting. Even on 8th February, the time bar did not expire until 14th February at the earliest. Therefore at its date of submission it cannot be said that the application was frivolous. Had there been an indication given to the applicant when the application was acknowledged on 8th February, the position could have been rectified by him then, and Mr Clayson submitted that the First-tier Tribunal did not raise the issue of time bar when requesting further information, and that all further information requested by them was provided by the date specified. Having considered the terms of the letter of 26th February sent to him by the casework officer referred to in paragraph 4 hereof, that appears to be correct.

[12] I agree with Mr Clayson that this application has been rejected because of a legal technicality, and I also agree with him that the timescale within which the application was lodged offered sufficient time for corrections to be made. In my view therefore it cannot be said that the application lodged was frivolous and that in so stating and rejecting the application on that basis the Tribunal member who made this decision erred in law.

[13] Mr Clayson also made reference to Regulation 2 of the 2017 Regulations which states:-

> 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.

[14] In taking account of the overriding objective of the First-tier Tribunal, in the particular circumstances of this case, it does not seem to me to be just to reject this application, submitted by a representative, with supporting documentation revealing a prima facie case, submitted timeously albeit not signed, simply on the basis by a later date when information has been requested by the First-tier Tribunal and that information having been supplied by that date, the application is treated as time-barred when the impression had been given by correspondence that the information, including a signed application, had to be provided by 12th March. That in my view, is potentially misleading, and not therefore just.

[15] I accept Mr Clayson's submission that this was a relatively minor error in the circumstances of this case, that there were some other unexplained delays within the time frame and that this was a relatively new procedure. In doing so, I accept that the time limits are important but I take the view that the Tribunal Member erred in law in determining this application was frivolous, and in rejecting it as time-barred, taking account of the particular circumstances of this case, and of the overriding objectives of the First-tier Tribunal.

[16] I therefore have remitted the matter back to the First-tier Tribunal after upholding the appeal, so that they may reconsider their decision.

Appeal Provision

[17] 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 is 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 2014 what important point of principle or practice would be raised by a second appeal, or what other compelling reason there is that shows the appeal should be allowed to proceed.