Upper Tribunal for Scotland

[2021] UT 4
UTS/AP/20/0021

DECISION NOTICE OF SHERIFF FRANCES McCARTNEY

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

in the case of

MR STEWART COWAN, Laight, Bowling Green Road, Stranraer, DG9 8AS
per Pollock & McLean Solicitors, 41 Castle Street, Dumfries, DG1 1DU

Appellant

and

MRS ANONA SOMASUNDARAM, 140 Scrabo Road, Newtonards, County Down, BT23 4NN
per McAndrew & Richardson Solicitors, 44 Hanover Street, Stranraer DG9 7RP

Respondent

FTT Case Reference FTS/HPC/EV/20/0640

8 December 2020

Decision

The Upper Tribunal refuses permission to appeal.

Introduction

[1] This is a decision on an application for permission to appeal the decision of the First Tier Tribunal ("FTT") of 31 July 2020. By that decision, an order for recovery of possession of the property rented by the Appellant was granted. The Appellant unsuccessfully sought

permission to appeal that decision from the FTT. Permission was refused by the FTT on 3 September 2020. The Appellant then sought permission to appeal from the Upper Tribunal. The Appellant drafted those grounds himself, but by the time of the hearing on permission to appeal, he was represented by Ms Raymond.

[2] The Respondent makes much in opposition to the granting of permission that the Appellant is now raising matters not raised before the FTT. The written application, drafted by the Appellant himself, sought permission on (i) there was a verbal agreement that the Appellant could stay in the property whilst the Respondent's mother was alive and (ii) that the FTT found in fact that the ish date of the tenancy was reached, and the FTT were wrong in the conclusion they reached. By the time of the hearing on permission, and with Miss Raymond now instructed, the focus of the application for permission had changed. Miss Raymond sought permission on the following grounds (i) that the FTT assumed it had no discretion to grant the eviction, but in fact, under a proper application of the Coronavirus (Scotland) Act 2020 ("the 2020 Act"), the FTT did have discretion and (ii) reliance on incorrect ish date. Miss Raymond indicated she was no longer seeking permission on question of whether there was a verbal agreement between the parties regarding the period that the Appellant could stay in the property. She conceded that neither matter was before the FTT in respect that either issue was the subject of detailed argument. However, she sought permission on the basis that the FTT made findings in fact on both matters, and as the Appellant was at that stage unrepresented, some latitude should be allowed.

[3] At the hearing on permission to appeal, Miss Raymond sought permission on two grounds. Firstly, it was her submission that the FTT considered it had no discretion in making the order for eviction, and secondly, that the FTT erred in the ish date that applied to the tenancy. Miss Raymond did not seek permission on the grounds relating to whether

there was an agreement between the parties that the Appellant could remain in the property whilst the Respondent's mother was alive.

[4] Permission was opposed by Ms Richards. Neither of these matters were properly canvassed before the FTT. Accordingly the appeal on either ground was no competent. It was a delaying tactic by the Appellant. But moreover there was no merit on either point. There had been a previous case before the FTT. The Appellant was well aware the FTT had given an obiter indication of the ish date in those proceedings. If leave to appeal were to be granted, it would not be a proper exercise of the appeal function of the Upper Tribunal.

Grounds of appeal

[5] Permission is now sought on two grounds. Firstly, that the FTT erred in the ish date that applied to the tenancy, and secondly that the FTT erred by assuming that the repossession was mandatory rather than discretionary, due to the 2020 Act.

Discussion

[6] Before considering the proposed grounds of appeal that arise in this case, it is important to reiterate the purpose of the UT. The UT has a remit to determine appeals from the FTT. That does not equate to a rehearing of the case, or a second hearing considering the same matters. It is not the function of the UT to retake a lawful decision of the FTT, simply because the FTT might have come to a different decision better suited to the losing party. It is the role of the FTT to make the determination on the relevant facts of the case, and those are the facts that govern any consideration of the case by the UT, unless an Appellant can show that the findings in fact made by the FTT should not, in law, have been made. That

only arises in very particular circumstances, where, for example, an Appellant can show that there was no evidence or information before the FTT that supports a particular finding.

[7] In order to obtain leave to appeal, an Appellant must show that there are arguable grounds of appeal (s 46 (4) of the Tribunal (Scotland) Act 2014). Whilst this, or a similar phrase has been considered on a number of cases (see for example, the summary of such phrases and their application in paragraph 9 of *Czerwinski* v *HMA* 2015 SLT 610) in a practical sense the Appellant must show a real issue for the UT to grapple with.

[8] Despite the submission from the respondent, it is competent for leave to appeal to be granted on grounds not argued before the FTT (see *Advocate General for Scotland* v *Murray Group Holdings Limited* 2016 SC 201 at paragraph 39). However, as Lord Drummond Young set out, the UT should be slow to allow such an appeal, particularly where additional findings in fact are required, and should not do so if unfairness results.

[9] With that in mind, I now turn to the issues arising in this case.

[10] Miss Raymond was realistic when seeking permission on the basis of an error in the ish date. It was not a matter that was argued before the FTT. The Respondent's application to the FTT referred to bringing the tenancy to an end on 4 February 2020. The FTT made a finding in fact that the tenancy terminated on 4 February 2020 (finding in fact 4). Mr Cowan did not seek to raise any issue regarding the ish date before the FTT. It is difficult to see that in those circumstances any appeal can arise, given that in particular, the question of the operation of the correct ish date is fact specific. Agents were agreed that the calculation of the correct ish date rests on the calculation of the correct commencement date of the lease. That depends on the particular wording of the lease. The FTT made a finding regarding the ish date. The correct ish date in any particular lease is fact specific. Miss Raymond was not able to point to a specific error by the FTT in its interpretation of the lease.

[11] Whilst I accept that an appeal on the issue of the ish date could be competent (it not having been argued before the FTT), even if there was an error by the FTT that gives rise to an error in law and arguable grounds before the UT, the UT would be likely to require further findings in fact. I am not persuaded that there is any merit in the appellant's arguments regarding the ish date. I am also not persuaded it would be fair to the respondent, given that the ish date is a fact sensitive matter, and it would be likely that further evidence would be required to determine the matter.

[12] Permission is therefore refused on the ground sought relating to the ish date.

[13] That leaves the issue as to whether or not the FTT had discretion to grant the eviction. I appreciate that Mr Cowan did not seek to persuade the FTT as to the impacts of the 2020 Act on his specific circumstances. But it is clear to me that the FTT worked on the basis that there was no discretion arising in their decision. At paragraph 5 of its decision, the FTT noted that there had been a discussion regarding the legal effect of section 33 and its mandatory nature, noting the FTT "explained to the Respondent by the Tribunal, that, provided the requisite notices had been served correctly, the Tribunal had no discretion over whether or not to grant the order." Further paragraph 7 states:

> "Section 33 of the Act provides that the Tribunal shall make an order for possession if it is satisfied that the short assured tenancy has reached its finish and that tacit relocation is not operating….. in the circumstances, the Tribunal must grant the order sought."

[14] Accordingly, it is clear the FTT determined the matter before it on the basis it had no discretion but to grant the eviction.

[15] Ms Raymond argues that the effect of the 2020 Act is to give the FTT discretion as to whether to grant the eviction. Paragraph 3 (4) of Schedule 1 to the 2020 Act amends section 33 of the Housing (Scotland) Act 1988 by making mandatory grounds for

repossession of a tenancy discretionary. However, such a modification is subject to paragraph 3 (1), which reads:

> "3(1) The Housing (Scotland) Act 1988 applies, in relation to a notice served on a tenant under section 19 or 33(1)(d) of that Act while this paragraph is in force, in accordance with the modifications in this paragraph."

[16] The notice to quit was dated 26 July and served on the Appellant on 27 July 2019. It appears his position is that he did not receive it, but position appears to have been rejected by the FTT who made a finding that the notice to quit was served on 27 July 2019 (finding in fact 2). The notice to quit sought possession on or before 4 February 2020.

[17] For the Appellant's argument to succeed, it must be that the notice to quit is served during the currency of the 2020 Act. The Scottish Parliament passed the legislation on 1 April 2020 and received Royal Assent on 6 April 2020. The notice was served over 6 months prior to the 2020 Act coming into force. Whilst there may have been room for argument about whether "a notice served" might include the period in which a tenant is warned of the recovery of possession (ie the notice period itself), there can be no room for ambiguity in this case. The notice to quit expired on 3 February 2020. Under any meaning of the phrase "a notice served" it cannot be argued that the modifications to Housing (Scotland) Act 1988 apply. The notice had expired and the landlords were entitled to recover possession of the tenancy. The Appellant not being willing to leave voluntarily, an application was lodged with the FTT in or around 21 February 2020. Accordingly, there are no prospects of success in relation to the second of the Appellant's arguments for leave to appeal, and leave is refused.

Conclusion

[18] Neither proposed ground of appeal is arguable. Permission to appeal is refused on both grounds as sought by the Appellant.