[2019] UT 42
UTS/AP/19/0004

DECISION NOTICE OF SHERIFF PINO DI EMIDIO

on an appeal by Mr Pradip Sutare

against a decision of First-Tier Tribunal For Scotland

in the case of

MR PRADIP SUTARE, 372 Colinton Main Road, Edinburgh, EH13 9BS

Appellant

and

(FIRST) MR RAMESH GOLKONDA, 19 Craigmount Brae, Midlothian, EH12 8XD

and

(SECOND) FIRST-TIER TRIBUNAL FOR SCOTLAND HOUSING AND PROPERTY CHAMBER, Glasgow Tribunals Centre, 20 York Street, Glasgow, G2 8GT

Respondents

FTT Case Reference FTS/HPC/EV/18/1995

27 June 2019

Order

The Upper Tribunal, having considered the parties' written submissions on the appeal,

Quashes the decision of the First-tier Tribunal for Scotland dated 31 January 2019 and

Remits to the First-tier Tribunal for Scotland to proceed as accords before a differently constituted panel .

Reasons for Decision

Introduction

[1] In a written decision dated 9 April 2019 but intimated to parties on 11 April 2019 I granted the appellant permission to appeal to the Upper Tribunal for Scotland ("UTS") in respect of three Grounds of Appeal which were listed as numbers 2, 3 and 4 in that decision. Permission was granted to appeal against a decision of the First-tier Tribunal for Scotland ("FTS") dated 31 January 2019 under case reference FTS/HPC/EV/18/1995 making an order for possession of property at 372 Colinton Mains Road Edinburgh EH13 9BS. There is a separate appeal by the appellant under reference number UTS/AP/19/0003 in which he has been granted permission to appeal against a further decision of the FTS also dated 31 January 2019 under case reference FTS/HPC/CV/18/1997 making an order for payment by the appellant to the respondent of the sum of £5,760.00. These cases were heard together before the FTS. The appeal in case number UTS/AP/19/0003 will be granted for the same reasons as the same issues arise. I have retained the original numbering i.e. 2, 3 and 4 in respect of the grounds of appeal in this decision.

[2] The first named respondent has participated in this appeal by submitting a written response setting out his grounds for opposing the appeal. The second named respondent has not participated in the appeal at any stage. The appellant has lodged further written material in reply to the first named respondent's response. All of this material has been taken into account in arriving at this decision.

[3] Having considered the material submitted to me by the parties I decided that I should determine this appeal without the need for a hearing. This decision was intimated to parties. I had had the benefit of hearing argument from parties on the application for

permission. I considered that I had sufficient material to allow me to determine the appeal on the papers. The solicitors for the first named respondent expressly consented to the appeal being determined without a hearing.

[4] The Grounds on which I granted permission were as follows.

Ground 2 – The FTS erred when it refused to postpone the hearing set for 31 January 2019 on the appellant's emailed application received at 16.42 hours on 30 January 2019, notwithstanding the exhibition by him of a certificate from his general practitioner stating that he was unfit for work.

Ground 3 – The FTS erred in treating the appellant's application for review of the decision of 31 January 2019 as constituting an application for permission to appeal.

Ground 4 – As the hearing on 31 January 2019 was fixed to allow a witness who was departing permanently to India to give evidence on behalf of the first named respondent, the FTS should not have proceeded in the absence of the appellant when it was advised at the hearing on 31 January 2019 that the first named respondent that witness no longer proposed to call the witness.

The Response of the first named respondent

Ground 2

[5] The first named respondent submitted that the Grounds of Appeal should be refused and the decision of the FTS should be upheld. With respect to Ground 2 reference was made to Rules 28 and 29 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the FTS Rules"). These rules provide the FTS with discretionary powers when dealing with applications to postpone and deciding whether to

proceed with a hearing in the absence of a party. As to the approach to be taken in dealing with appeals from lower courts exercising discretionary powers, reference was made to *G* v *G (Minors: Custody Appeal)* [1985] 1 WLR 647 (Lord Fraser of Tullybelton at 652F). This had been cited with approval by Lord President Emslie in *Britton* v *Central Regional Council* 1986 SLT 207. The FTS had the authority to determine if a person is unfit to attend a hearing. Reference was made to passages at paragraphs 6, 7 and 11 in the opinion of the court delivered by the Lord Justice Clerk (Gill) in *Scottish Ministers* v *Smith* [2010] CSIH 44. I should view the FTS decision in the light of the earlier procedural history including (a) postponements secured by the appellant and (b) the refusal by the FTS of earlier requests by him for postponement on 21 January 2019 and 28 January 2019. The appellant was simply trying to delay matters and had done so persistently throughout the proceedings. Further delay would prejudice the first named respondent. There was no error in the circumstances.

Ground 3

[6] At the permission hearing the first named respondent submitted that, even if it was an error for the FTS to proceed on the basis that there was an application for permission to appeal before it when such an application had not been formally made, there was no adverse practical consequence for the appellant given that the FTS had refused his application for review of its decision. That, in essence, remained his position though in his written Response he went on to make reference to the overriding objective in rule 2 of the FTS Rules. The appellant had failed to establish the way in which he was prejudiced in a practical way if the FTS had fallen into error in proceeding as it did.

Ground 4

[7] The first named respondent had intended to call a Mr. Pawan Talapadi was a witness. He was due to leave permanently for India on 1 February 2019 and for that reason the hearing had been fixed for 31 January 2019 to allow his evidence to be taken. The witness did not attend on 31 January 2019 and the first named respondent was entitled to decide not to call the witness.

Submissions by the appellant

[8] As noted in my permission decision of 9 April 2019, the appellant had submitted a large amount of written material in advance of that date and following the hearing on 4 April 2019. The clerks to the UTS have copied all of that material to the first named respondent's solicitor. I sought to distill the essence of his arguments in the permission decision. In essence, the appellant submitted that he had been significantly prejudiced by the decision to refuse a postponement. He had been incapacitated and could not reasonably have been expected to attend on 31 January 2019 through no fault of his own. The additional material submitted since the hearing on 4 April 2019 did not add materially to the appellant's case.

Reasons for Decision

Ground 2

[9] The first named respondent's solicitor attended the FTS hearing on 31 January 2019. At the permission hearing before me he advised me that he had not been informed that the FTS had received a request for postponement from the appellant late in the afternoon of the

previous day. The appellant had submitted a GP certificate which was not on soul and conscience which indicated that he was suffering from "R Groin folliculitis" (an infection of the hair follicles) and was unfit for work. The appellant informed me that he learned that the hearing had gone ahead, notwithstanding his request when he called the FTS offices on the afternoon of 31 January 2019. The first named respondent's solicitor accepted at the permission hearing that he was not in a position to suggest that the medical certificate produced by the appellant was in some way false or fabricated.

[10] No separate intimation of the decision to refuse the request for postponement seems to have been given to parties outwith the terms of the FTS's decision after the hearing on 31 January 2019. It would appear that the FTS did not inform the first named respondent that the request had been made and of the evidence that was produced in support of it by the appellant. It would appear that at some point between the receipt of the appellant's request on 30 January 2019 at 16.42 hours and the commencement of the evidential hearing on the morning of 31 January 2019 the FTS decided to refuse the appellant's request without further ado.

[11] Although the GP certificate provided by the appellant was not conclusive, and the FTS was entitled to consider its terms, the FTS does not appear to have given any consideration to whether the appellant's claimed illness was genuine. The GP certificate stated he was unfit for work and (in contrast to the case of *Smith*) stated the nature of the condition from which the appellant was suffering. If his illness was genuine then he could not reasonably be expected to participate in the hearing. There was a serious prospect of injustice occurring because he would not have the opportunity to have his case heard. The appellant had produced some specific medical evidence of his incapacity. If the FTS was not

content with that evidence they could have required him to substantiate his incapacity by ordering him to produce a soul and conscience certificate as a condition of being allowed to participate further in the proceedings. The FTS entitled to be concerned that the earlier conduct of the appellant was such that there might be grounds for thinking that he was attempting to delay the progress of the case but that was not the only consideration that required to be taken into account. The FTS has not recorded its reasons for refusing to allow any postponement. There is no information as to whether it took account of the appellant's status as an unrepresented party. It did not inquire as to whether there appellant was aware that a soul and conscience certificate would normally be required to support an application for postponement. There is no suggestion that the FTS considered the extent of the prejudicial effect of a short postponement on the first named respondent in contrast to the obvious serious detriment to the appellant of a refusal to postpone. The FTS knew that the hearing had been fixed for 31 January 2019 to accommodate a witness who was moving abroad. The first named respondent was entitled to decide he no longer wished to call the witness. He was really left with no choice when the witness failed to attend. There is no sign that the FTS paused to consider whether a postponement or continuation of the hearing for a short time should be granted when it was made aware of the first named respondent's decision no longer to call the witness. There is no sign that the FTS took account of any such material considerations.

[12] The decision of the FTS to refuse to postpone the hearing on 31 January 2019 was a discretionary one and should only be interfered with when the FTS has gone plainly wrong. In the circumstances the approach the FTS took was too precipitate standing that the likely serious consequences of a decision to proceed without further reference to the appellant. If

his request was rejected, it was very likely that (a) an order for possession would be made in this case and (b) in the other case an order for payment would be made against the appellant without any opportunity for him to have his cross applications considered when these claims might have reduced in whole or in part any liability. The consequences for the appellant of the decision to refuse a postponement were very serious. In proceeding in such a peremptory way the FTS erred in law by failing to take into account a variety of relevant factors. Accordingly Ground 2 is well founded and the appeal is successful. With reference to the Opinion of the Court delivered by Lord Drummond Young at paragraph [44] in the case of *Advocate General for Scotland* v *Murray Group Holdings* 2016 SC 201 (I.H.) this is an error of the kind described as being in the fourth category.

Ground 3

[13] As I have decided to allow the appeal on Ground 2 this Ground is rendered academic. I do not intend to go into detail, but it is appropriate that I say something about it. On 20 February 2019 the FTS refused the appellant's application for review. It purported to treat the appellant's application for review as constituting also an application for permission to appeal even though no such statutory application had been made by the appellant. I am aware that there are rules of procedure governing some other statutory tribunals which expressly provide that an application for review may be treated as an application of another kind, such as an application for permission to appeal. In the absence of an express power to treat an application for review as an application for permission to appeal, I am inclined to think that it was incompetent for the FTS to proceed in the way it did in this case albeit I accept that the FTS did so with good intentions and was obliged to have regard to the

overriding objective in Rule 2 of the FTS Rules. A party seeking permission to appeal would normally be entitled to formulate the request of permission in his or her own way. Although experience suggests that requests for review and for permission to appeal may be couched in similar terms, there is no reason why that must be so given that different procedural rules and tests apply. This conclusion is stated in tentative terms as it is not determinative of this appeal. I have not had the benefit of full argument or reference to authority on the point. Had Ground 2 been unsuccessful, I would have allowed the appeal on this Ground for these reasons.

Ground 4

[14] As the appeal has been successful under Ground 2 this ground is no longer live. As I stated in my statement of reasons for granting permission to appeal I considered this ground to be ancillary to Ground 2. It stands or falls along with Ground 2. Part of my reasoning in respect of Ground 2 covers the point in issue. The appeal succeeds on this Ground for the reasons given in relation to Ground 2. I have nothing further to add in respect of it.

[15] For these reasons this appeal succeeds and the decision of the FTS of 31 January 2019 will be quashed. The case will be remitted to the FTS to proceed as accords. Having regard to the reasons why this appeal has succeeded under Ground 2, I have specified that the matter is to be dealt with by a differently constituted panel of the FTS.

Appeal provisions

[16] If the first named respondent 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 he 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 UTS 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 ("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.

Postscript

[17] The appellant has made applications of his own against the first named respondent which are presently before the FTS which bear the case numbers FTS/HPC/CV/18/3052 and FTS/HPC/PR/19/0072. The appellant has, in the course of correspondence with the clerks to the UTS, at times appeared to be under the impression that as the UTS Judge dealing with the present appeals I have some influence over the progress of these separate applications by him to the FTS. For the avoidance of doubt, the UTS can only exercise such statutory appellate functions as has been conferred on it under the 2014 Act. I have no role in the progress of those applications which are presently before the FTS. They are not before the UTS which is a statutory body with specific statutory functions and powers. The conduct of cases before the FTS is entirely a matter for that FTS while those cases are before it. In stating this here I am repeating what I said to the appellant at the hearing on 4 April 2019.