Upper Tribunal for Scotland

[2019] UT 59
UTS/AP/19/0037

DECISION NOTICE OF SHERIFF I FLEMING

in the case of

ABDUL MAJID, c/o 26 Cadzow Street, Hamilton ML3 6DG
per Excel Letting, 26 Cadzow Street, Hamilton ML3 6DG

Appellant

and

ADELE GAFFNEY AND ANDREW ROBERT BRITTON
35 Riverbank Drive, Bellshill ML4 2PR

Respondent

FTT Case Reference FTS/HPC/EV/19/2434

17 October 2019

Decision

The Upper Tribunal refuses permission to appeal.

Introduction

[1] On 2 August 2019, the applicant made an application to the First-tier Tribunal in terms of rule 109 of the First-tier Tribunal for Scotland, Housing and Property Chamber Rules Procedure 2017 (hereafter "the Procedure Rules"). The application was rejected by the First-tier Tribunal upon the basis that it appeared to be frivolous within the meaning of rule 8(1)(a) of the Procedure Rules and because the First-tier Tribunal had good reason to

believe that it would not be appropriate to accept the application "within the meaning" of rule 8(1)(c) of the Procedure Rules. The decision is then explained. An application for permission to appeal the decision was made by the applicant on 23 August 2019. On 4 September 2019 this application was refused by the First-tier Tribunal.

[2] An application has now been received by the Upper Tribunal dated 9 September 2019 from the applicant requesting permission to appeal the decision of the First-tier Tribunal.

[3] A written application to the Upper Tribunal for permission to appeal must:

(a) identify the decision of the First-Tier Tribunal to which it relates

(b) identify the alleged point or points of law in which the person making the application wishes to appeal.

(c) state the result the person making the application is seeking. (Section 37(2) of the Procedure Rules.)

[4] The appeal identified the First-tier Tribunal decision to which it related. It contends that the First-tier Tribunal erred in law in determining the application was frivolous under the Procedure Rules, Rule 8(1)(a) and separately that it would not be appropriate to accept the application under the Rule 8(1)(c) of the Procedure Rules.

[5] In terms of section 46 of the Tribunals (Scotland) Act 2014

"46. An Appeal from the Tribunal.

1 A decision of the First-Tier Tribunal on any matter in a case before a 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-Tribunal or(as the case may be) the Upper Tribunal is satisfied that there are arguable grounds for appeal."

[6] The Inner House of the Court of Session in the case of *Advocate General for Scotland* v *Murray Group Holdings Limited* (2015) CSIH 77 identified four different categories of case covered by the concept of an appeal upon a point of law: these are (i) an error of general law, the content of its rules; (ii) an error in the application of the law to the facts; (iii) making findings in fact without a basis in the evidence; and (iv) taking a wrong approach to the case by, for example, asking the wrong questions or taking account of manifestly irrelevant considerations, or by arriving at a decision that no reasonable tribunal can properly reach.

[7] In this case the applicant seeks to invoke the first and second categories.

[8] The tenancy in this application is a private residential tenancy. It can only be brought to an end under Part 5 of the Private Housing (Tenancies) Scotland Act 2016 (hereafter "the 2016 Act"). In this case the applicant sought to bring the tenancy to an end by means of an application for an eviction order. The original application for the eviction order by the appellant was necessarily accompanied by a Notice to Leave which was dated 1 July 2019 and which had been served on the tenant. It stated:

"You are in rent arrears of £1525 from rent due 30/4/19, 31/5/19 and 30/6/19. Despite repeated reminders and promises of payment, your account remains in arrears."

[9] The First-tier Tribunal may only order eviction if one of the grounds specified in Schedule 3 to the 2016 Act applies. It is clear from the terms of the Notice to Leave that ground 12 is being relied upon; as at the date of the Notice to Leave the tenant must have been in rent arrears for three or more consecutive months. Therefore, if the tenant was first in arrears of rent as at 30 April 2019 then the expiry of the three month period would be

30 July 2019. As at 1 July 2019 the tenant was not in rent arrears for three or more consecutive months. The tenant must have been in arrears for the specified period of time, not simply owing rent. Ground 12 does not apply as at the date of service of the Notice to Leave.

[10] The error in law, the applicant contends, is that there is no requirement in private residential tenancy legislation for the ground of eviction to apply when the Notice to Leave is issued. Accordingly, as was identified in the decision of the First-tier Tribunal, the question to be considered is whether it is necessary that the ground of eviction applies as at the date of service of the Notice to Leave.

[11] In the original First-tier Tribunal decision it was stated that a Notice to Leave can only valid if the eviction ground specified therein was satisfied as at the date of the service of the Notice. If that were not the case then the result would be that tenants could be threatened with eviction for something they had not yet done on the basis that, if they subsequently did it, an application for eviction could be raised. Section 62 of the Private Housing (Tenancies) (Scotland) Act 2016 states:

> "62 Meaning of Notice to Leave
>
> *Stated Eviction Ground*
>
> Reference is in this part to a notice to leave are to a notice which –
>
> (a) it is in writing
> (b) specifies the day on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the First-Tier Tribunal.
> (c) states the eviction ground or grounds on the basis which the landlord proposed to seek an eviction order in the event the tenant does not vacate the property before the end of the day specified in accordance with paragraph (b) and (d) fulfils any other requirements prescribed by the Scottish Ministers in Regulations"

[12] In terms of regulation 6 of the Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulation 2017 a Notice to Leave is given by a landlord to the tenant under section 50(1)(a) (termination by notice to leave and tenant leaving) of the Act and must be in the form set out in Schedule 5.

[13] The basis for the decision of the First-tier Tribunal is that the Notice to Leave specified a ground for eviction which was not satisfied as at the date of the service. That being the case the notice itself is invalid.

[14] The appellant appears to be conflating two separate statutory provisions. In terms of section 62(1)(b) reference is made to a date on which the landlord "expects to become entitled to make an application for an eviction order to the First-Tier Tribunal". It is clear that the word "expects" relates to the date on which the application will be made. That is entirely distinct from the eviction ground. The statutory provision is clear which is that the ground of eviction must be satisfied at the date of service of the Notice to Leave. If it is not it is invalid. If it is invalid decree for eviction should not be granted. The decision of the First-tier Tribunal sets out the position with clarity. It could in my view it could never have been intended by Parliament that a landlord could serve a notice specifying a ground not yet available in the expectation that it may become available prior to the making of an application. Such an approach would be open to significant abuse. Either the ground exists at the time when the Notice to Leave is served or it does not. If it does not the Notice to Leave is invalid and it cannot be founded on as a basis for overcoming the security of tenure that the 2016 Act. There is no arguable ground of law. Permission to appeal is refused.