Upper Tribunal for Scotland

[2021] UT 32
UTS/AP/21/0013

DECISION NOTICE OF SHERIFF IAIN FLEMING

On an application for permission to appeal (decision of First-tier Tribunal for Scotland) in the case of

Mr Mohammed Arshad, 584 Cathcart Road, Glasgow, G42 8AB pet AQA Properties Ltd, 584 Cathcart Road

Appellant

and

Mr Atif Aziz Khawaja, 36 Garturk Street Flat 0/2, Glasgow, G42 8JF

Respondent

FTT Case Reference FTS/HPC/RP/19/2089

27 May 2021

Decision

Permission to appeal is granted**.**

[1] The appellant is the landlord and the respondent is the tenant. A case management discussion (CMD) was arranged for 10 February 2021. Both the parties were sent a notification on 12 January 2021 stating that the said CMD would take place on that date. An email was received from AQA Property Ltd, the landlord's agent, on 26 January 2021, requesting a postponement of the CMD arranged for 10 February 2021. The email stated that the landlord was abroad for medical reasons and was too ill to attend the CMD. A copy

of an airline ticket which appeared to show that the landlord had travelled abroad in November 2020 was attached to the request.

[2] On 5 February 2021 the First Tier Tribunal (FtT) notified parties that it had considered and refused the postponement request because it did not consider that the evidence which had been provided demonstrated that there was good reason to postpone the CMD.

[3] In terms of the said letter of 5 February 2021, sent to both parties, the FtT advised that the application to postpone the FtT had been refused and explained its reasons for the refusal. It also invited consideration by the landlord as to his interest being represented by his agent AQA Property, or indeed by someone else such as a relative, friend or colleague.

[4] The said letter thereafter stated as follows:

> "The Tribunal will therefore go ahead as scheduled on Wednesday, 10 December 2021 at 10 am".

[5] This date was an error. As a matter of fact the Tribunal hearing (the CMD) was still scheduled for 10 February 2021. It took place on that date when a finding was made which was adverse to the landlord's interests. The landlord has now sought permission to appeal upon the basis that he was advised by the FtT that, notwithstanding the narrative of the letter, the Tribunal hearing would take place on 10 December 2021. The landlord complains that as a result of the error he did not attend and was denied an opportunity to attend or be represented at the CMD as a result.

[6] Permission to appeal has been refused by the FtT. It is the position of the FtT that when one considers the document of 5 February 2021 as a whole it is clear from its terms, in particular the first paragraph, which clearly states "The Tribunal has refused the request and further…the Tribunal will therefore go ahead as scheduled," that the landlord must have

known that the CMD would take place on 10 February 2021. Further, the specified date is Wednesday, 10 December 2021. A check of the calendar will clarify that while 10 February 2021 was a Wednesday, 10 December 2021 will be a Friday. The FtT, in refusing permission to appeal, concluded that "it might therefore have been expected that anyone employed by the landlord's agents would have noted this anomaly when entering this date into their diary".

[7] Further, it is the position of the FtT that if there was any doubt over the date of the CMD it was open to the landlord's representative to check the date with the Tribunal's administration. The FtT noted that the tenant's representative, who had received a copy of the same email on 5 February 2021, attended the CMD on the correct date.

[8] In terms of rule 3(6) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016, where the FtT has refused permission to appeal, the Upper Tribunal may give permission to appeal if "the Upper Tribunal is satisfied that there are arguable grounds of appeal. The phrase "arguable grounds for the appeal" is not defined within the statute. Case law in other situations is of assistance. For example, in *Czerwinski* v *HM Advocate* 2015 SLT 610, the court was formulating the appropriate test for the grant of leave to appeal in an extradition case in the absence of statutory guidance. It settled on adopting the test applicable to criminal appeals: "do the documents disclose arguable grounds of appeal?" in terms of section 107 of the Criminal Procedure (Scotland) Act 1995.

[9] In *Wightman* v *Advocate General* 2018 SC 388 Lord President Carloway (at paragraph 9) observed that arguability and statability were synonyms. That was said to be a lower threshold than "a real prospect of success", the test applicable in deciding whether to grant permission for an application to the supervisory jurisdiction to proceed, in terms of

section 27D(3) of the Court of Session Act 1988, as amended. The threshold of arguability is therefore relatively low.

[10] *Advocate General for Scotland* v *Murray Group Holdings Ltd* [2015] CSIH 77; 2016 SC 201 (affirmed by UKSC in [2017] UKSC 45; 2018 SC (UKSC) 15) concerned an appeal from the Tax & Chancery Chamber of the First Tier Tribunal under section 13 of the Tribunals, Courts & Enforcement Act 2007. An appeal to the Upper Tribunal was available "on any point of law arising from the decision made by the First Tier Tribunal". The appeal thereafter to the Court of Session is "on any point of law arising from a decision made by the Upper Tribunal". It was in this context that the Inner House examined what was meant by "a point of law". It identified four different categories that an appeal on a point of law covers:

(i) General law, being the content of rules and the interpretation of statutory and other provisions;

(ii) The application of law to the facts as found by the First Tier Tribunal;

(iii) A finding, where there was no evidence, or was inconsistent with the evidence; and

(iv) An error of approach by the First Tier Tribunal, illustrated by the Inner House with examples: "such as asking the wrong question, or by taking account of manifestly irrelevant considerations or by arriving at a decision that no reasonable tax tribunal could properly reach." ([41]-[43])

[11] In essence, therefore, the task of the Upper Tribunal is to ascertain, with reference to the material submitted, whether the appellant has identified an error of law that is capable of being stated or argued before the Upper Tribunal at a hearing. That is a relatively low threshold.

[12] I can well understand why the FtT was anxious that the CMD should proceed. The matter had been ongoing for some time and numerous extensions had previously been sought by the landlord. Further, the FtT refers to the broad terms of the letter, rather than to the specific date, from which it is clear that the postponement request has been refused.

[13] Notwithstanding the reasons given by the FtT for its decision, all of which are singularly and accumulatively valid, the fact of the matter is that the landlord was provided with the wrong date for the hearing by the FtT administration. There is an argument that the landlord is entitled to rely upon the date which is specified in the written communication from the FtT and as such was denied an opportunity to present his case. The letter from the FtT's administration is clearly contradictory. It cannot be the case that the postponement request has been refused but that a hearing previously scheduled for 10 February will now take place "as scheduled" on 10 December. An error must have occurred. However, to assume that the error within the text of the letter must necessarily relate to the date provided rather than to the outcome of the application to postpone is an arguable error of law. Thereafter, having provided the appellant with the wrong date for the hearing of the appeal, and for the hearing to thereafter proceed in the absence of the appellant and so deprive him of an opportunity to put his case is an arguable point of law which has been raised.

[14] In the circumstances I grant permission to appeal the decision.