Upper Tribunal for Scotland

[2021] UT 35
UTS/AP/21/0014

DECISION NOTICE OF SHERIFF TONY KELLY

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

in the case of

MR JAMES MALLOCH, Homeless NFA, Edinburgh

Appellant

and

BERNISDALE HOMES LIMITED, 1A Roseberry Crescent Lane, Edinburgh, EH12 5JR

Respondent

FTT Case Reference FTS/HPC/CV/20/2576

3 December 2021

3 December 2021

The Upper Tribunal refuses the appellant permission to appeal the decision of the First-tier Tribunal Housing and Property Chamber dated 23 March 2021.

Introduction

[1] In this case an application was made to the First Tier Tribunal ("FtT") for an order for payment. The FtT ordered the appellant to pay to the respondents the sum of £13,680 by decision dated 12 March 2021. The appellant sought permission to appeal the decision. The

FtT refused that application on 27 April 2021. A subsequent application was made to the Upper Tribunal ("UT") for permission to appeal and, on 21 September 2021, it too was refused. The appellant has sought a reconsideration of that refusal under rule 3(7) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 ("2016 regulations"). A hearing was convened via Webex on 19 November 2021 for that purpose.

Arguable

[2] In terms of rule 3(6) of the 2016 Regulations, where the FtT has refused leave to appeal, the UT may give permission to appeal if "the Upper Tribunal is satisfied that there are arguable grounds for the appeal", section 46(4) of the Tribunals (Scotland) Act 2014. Nowhere in the statute or secondary legislation is the phrase "arguable grounds for the appeal" defined. Case law in other situations is of limited 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. After reviewing several potential schemes or tests, 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. On that ground of appeal it said this:

> "Arguable in this context means that the appeal can properly be put forward on the professional responsibility of counsel"

[3] In *Wightman* v *Advocate General for Scotland* 2018 SC 388 Lord President Carloway (at [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, see [2] – [9].

[4] The threshold of arguability is therefore relatively low. An appellant does, however, require to set out the basis of a challenge from which can be divined a ground of appeal capable of being argued at a full hearing. This is an important qualification or condition on appealing which serves a useful purpose. If no proper ground of appeal is capable of being formulated then there is clearly no point in wasting further time and resources in the matter proceeding. The respondent in a hopeless appeal ought not to have to meet any further procedure in a challenge with no merit. It is in the interests of justice that an appeal which is misconceived and is incapable of being articulated such that it cannot be characterised as arguable is stopped in its tracks.

Error or point of law

[5] *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])

[6] In essence, therefore, the task of the UT 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 low bar. As with applications to the supervisory jurisdiction of the Court of Session at permission stage, the basis of a prima facie appeal ought to be capable of identification.

Hearing: 19 November 2021

Appellant

[7] Mr Malloch commenced his submissions by providing some background to his claim. He referred to a previous application made by him to the FtT. The decision in that case is from February 2019. For Mr Malloch this was important in order to understand his submission regarding the status of the tenancy – either a short assured tenancy or a private residential tenancy. At [35] of the FtT's decision of February 2019 it is stated that:

> "The Tribunal was not persuaded by the Applicant's references to the development of section 8 (regarding the payment of rent in advance) in the model tenancy agreement for a private residential tenancy. The Tribunal noted that the Tenancy Agreement did not constitute a private residential tenancy but also that the relevant provision of the model agreement referred to a restriction on how much rent may be 'paid' in advance, rather than any restriction on 'imposing' a 'requirement' to pay more than a certain period in advance. The restriction in the model tenancy appears to prevent a tenant choosing to make a payment more

> than six months in advance, as well as preventing a landlord making it a requirement that rent is payable more than six months in advance."

[8] For Mr Malloch this was a clear example - and there were many others - of concerning behaviour on the part of DJ Alexander, letting agents acting for the respondents. Mr Malloch stated that he had never heard of section 89, Rent (Scotland) Act 1984 ("section 89") before the email received from an employee of DJ Alexander. He did not know anything about tenancy agreements. This email prompted him to look further into the matter.

[9] The FtT decision which is the subject of appeal, at [65], deals with the status of the tenancy. This issue was not the subject of a decision because both potential types of tenancies were subject to the protection of section 89. Of this, Mr Malloch said the original FtT decision of February 2019 made it clear that it was not possible to have a term included in a lease that required payment of more than 6 months' rent in advance. The model tenancy agreement prohibited this. A term to this effect could not be included in a private residential tenancy. Mr Malloch referred to the Upper Tribunal's previous refusal to grant him permission to appeal. Mr Malloch said this was a "very clearly arguable" point and, on the basis that there was a low bar of arguability - referring in this regard to *Ramirez Stich* v *Strachan* [2020] UT 15 – permission to appeal ought to be granted to him.

[10] Mr Malloch did not insist upon ground of appeal No 2.

[11] In relation to ground of appeal No 3 - that the Tribunal had no evidence before it from which it could base its finding in fact No 8 - Mr Malloch relied upon his detailed application for permission. In that Mr Malloch outlined the various potential strands of evidence which in his view could be said to form a basis for the finding. He subjected these to some close scrutiny. Mr Malloch was asked about his conclusion (see para 65 of his

written application for permission to appeal) that there was nothing to justify a finding in fact that he "wished" to pay 12 months' rent in advance as opposed to being "prepared and able" to pay 12 months' rent in advance. In response, Mr Malloch repeated that he had no desire or intention to pay 12 months' rent in advance. He was asked to pay and he was surprised that there was nothing reduced to writing about this. This had prompted him to act. He explained that he had had problems in a previous tenancy where he had been reassured that the property would be available for a further 6 months and this was reneged on. This prior experience had informed his behaviour here. He had no wish to pay 12 months in advance.

Respondent

[12] Mr Alexander said that he had very little to say. It was a matter for the UT. He said that he lacked any legal qualifications. He was content that the matter be left to the UT to decide whether there was an arguable case to allow permission to appeal.

[13] In response to an enquiry, Mr Alexander explained that the clause at issue here had been inserted in the tenancy agreement at the prompting of Mr Malloch who had negotiated a discount on the basis that he would pay 12 months' rent in advance. This had led to this clause appearing. Mr Alexander was adamant that this was not included in agreements as a matter of course.

[14] Mr Malloch in response sought clarification of this matter and it was reiterated for the benefit of parties that the UT was not hearing evidence as to fact or opening up a further enquiry on factual grounds. On that basis Mr Malloch said that he had nothing further to say.

Decision

[15] I am grateful to Mr Malloch for his submissions and for responding to the enquiries I made of him. I endeavoured to afford him every possible latitude by taking frequent breaks in the course of the hearing for permission to appeal on 19 November 2021.

[16] Before the FtT a case management hearing decided to have the case proceed to a full hearing and identified disputed issues – see [10]. At the hearing evidence was led and the FtT narrates the witnesses' evidence and submissions. It made findings in fact – [59]. The FtT referred to previous applications featuring the parties, reference to which was said to be necessary to fully understand the present application. No issue is taken with the FtT narration of the prior proceedings – see [4] – [7]. The crux of the FtT decision was the application of section 89 of the Rent (Scotland) Act 1984. Much of the application for permission to appeal is taken up with the status of the tenancy – a private residential tenancy or a short assured tenancy. The FtT found that the application of section 89 is not dependent on the type of tenancy – see [64]. As to whether there had been a breach of section 89, the FtT referred to the findings of the FtT and UT in the previous applications – [65]. The FtT at [67] identified the issue for it to decide in the following manner:

> "was the clause in the tenancy agreement stating rent was payable 12 months in advance a requirement which had been imposed as a condition of the renewal of the lease."

[17] Proposed ground of appeal No 1 focuses upon two issues: (i) the status of the tenancy – short assured tenancy or private residential tenancy, and (ii) the purported breach of section 89 of the Rent (Scotland) Act 1984.

[18] For Mr Malloch the status of the tenancy had significance because the previous Tribunal decision of February 2019 made it clear that in a private residential tenancy a term

such as the one criticised in the lease agreement between parties here was prohibited. The matter was canvassed in some detail on 19 November 2021 and Mr Malloch made it clear that this was the conclusion that he sought to make: the absolute prohibition in terms of the model tenancy agreement of a private residential tenancy to include a term such as that criticised here.

[19] Section 89 of the Rent (Scotland) Act 1984 provides an identical prohibition:

> ""**Avoidance of requirements for advance payment of rent in certain cases.**
>
> (1) Where a protected tenancy which is a regulated tenancy is granted, continued or renewed, any requirement that rent shall be payable—
>
> (a) before the beginning of the rental period in respect of which it is payable, or
>
> (b) earlier than six months before the end of the rental period in respect of which it is payable (if that period is more than six months), shall be void, whether the requirement is imposed as a condition of the grant, renewal or continuance of the tenancy or under the terms thereof; and any requirement avoided by this section is, in the following provisions of this section, referred to as a 'prohibited requirement'."

[20] I fail to see the manner in which the status of the tenancy provides any real difference to the outcome here. It may be that for Mr Malloch a contravention of both the statutory provision and the prohibition in the model tenancy agreement adds weight to the significance of the term. However, the statutory provisions point up the significance or importance of terms such as this not being included in a lease – they are void for unenforceability and any payments thereunder ought to be returned to the tenant – section 89(2) Rent (Scotland) Act 1984.

[21] Essentially, Mr Malloch says that it is arguable that section 89 was breached. I do not agree. The FtT took some time to identify the issue before it in relation to this matter (see

[67]) and having gone through the evidence on the matter arrived at its conclusion (see [73]). The FtT took into account the previous Tribunal decision of February 2019. It did revisit the issue to ascertain, having regard to the full factual matrix in the evidence before it, whether there had been a contravention of section 89. That conclusion on the facts was one open to them. The FtT provided a reasoned decision on the basis for its conclusion on this issue. There is no basis upon which to interfere with that decision contained in ground of appeal No.1. No arguable ground of appeal has been identified in this regard.

[22] Ground of appeal No 2 is not insisted upon and I need say no more about it.

[23] Ground of appeal No 3 is directed to the finding and fact made by the FTT:

> "8. On 15 November 2017 the respondent reiterated that he wished to pay 12 months' rent in advance."

[24] Mr Malloch has very carefully dissected the potential strands of evidence from which he said this finding could have been made. He submitted that there was no basis on the evidence to enable the FtT to make this finding. In the course of the hearing of 19 November 2021 Mr Malloch was taken to his email directed to an employee of DJ Alexander on 15 November 2017:

> "Hi Judy
>
> I received a new tenancy agreement by email from Kimberley, however, there are few things I would like to clarify. I have asked Kimberley if I can arrange a meeting so I can ask her some questions about the tenancy agreement. In the meantime, I have paid the rent for November (£1165). As soon as everything is clarified with the new tenancy agreement, I can then pay twelve months rent (£13980) in advance in accordance with the new agreement. I hope that is ok.
>
> Regards
> James"

[25] Mr Malloch's submitted that there was nothing in the email chain

> "that would justify a finding in fact that the respondent 'wished' to pay 12 months' rent in advance as opposed to being 'prepared and able' to pay 12 months' rent in advance".

[26] In submissions Mr Malloch reiterated his position that he did not wish to pay the money. He referred to the factual context at the time of sending of the email. It was not his intention to pay, instead he was prepared to pay. For present purposes I do not regard that distinction of crucial significance. However, the ultimate question is whether the evidence before the FtT was capable of leading to the finding in fact made by it. I cannot say that the inference drawn by the FtT - that the appellant wished to pay the money on 15 November 2017 - is one that was not open to it on the evidence. It is an inference that the email exchange bears, supplemented by witnesses as to what was happening in the communings between parties. The FtT had the benefit of seeing and hearing these witnesses. It had a basis for its conclusion as to fact on this point. No arguable ground of appeal has been identified in this regard.

Conclusion

[27] In all the circumstances the Upper Tribunal refuses permission to appeal the decision of the First-tier Tribunal Housing and Property Chamber dated 23 March 2021 on the basis that it is not satisfied that there are arguable grounds for the appeal.