



DECISION NOTICE OF SHERIFF IAIN FLEMING

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

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

Appellant

and

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

Respondent

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

4 August 2021

Decision

The appeal is granted and the case is remitted to the First-tier Tribunal for reconsideration.

[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 appellant's agent, on 26 January 2021, requesting a postponement of the CMD arranged for 10 February 2021. The email stated that the appellant 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 appellant 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 hearing had been refused and explained the reasons for the refusal. It also invited consideration by the appellant 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, the appellant was neither present or represented and a finding was made which was adverse to the appellant’s interests. The appellant has now been granted permission to appeal upon the basis that he was advised by the FtT that, notwithstanding the narrative of the letter, the FtT hearing would take place on 10 December 2021. The appellant 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.

[6] 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 states “The Tribunal has refused the request and further...the Tribunal will therefore go ahead as

scheduled,” that the appellant 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 appellant’s representative to check the date with the FtT’s administration. The FtT noted that the respondent’s representative, who had received a copy of the same email on 5 February 2021, attended the CMD on the “correct date.”

[8] Permission to appeal has been granted. The appellant has contacted the Upper Tribunal to advise that he is insisting on his appeal and requesting an oral hearing. The respondent has indicated that he does not challenge or oppose the “appeal decision” which I take to mean the decision of the FtT in refusing permission to appeal. For reasons that will become apparent the Upper Tribunal will consider this matter on the basis of written submission only.

[9] *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])

[10] 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 appellant. 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.

[11] Notwithstanding the reasons given by the FtT for its decision, the The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 in terms of Rule 24 require that each party is given reasonable notice of the date, time and place of the hearing. In terms of the letter from the FtT administration that Rule was not complied with. The appellant was not provided with the date of the hearing. He was provided with a different date. The appellant is entitled to rely upon the date which is specified in the written communication from the FtT. He did not attend the hearing 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.

[12] The FtT concluded that the appellant would necessarily assume that the date within the letter is a mistake, rather than considering the alternative possibility that the appellant was assuming that the narrative within the text of the letter is in error. The appellant did not have proper intimation of the date of the hearing following his request to postpone. Thereafter, having provided the appellant with the wrong date for the hearing of the appeal, and for the hearing to proceed in his absence is a decision which no reasonable tribunal could properly reach and constitutes an error of law.

[13] In the circumstances I grant the appeal. The case will be remitted to the First-tier Tribunal for reconsideration.