



2023UT16

UTS/AP/22/0032

DECISION OF

Sheriff F McCartney

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

IN THE CASE OF

Edinburgh Holiday & Party Lets Limited (SC577943), PO Box 46, Mailbox 46, 2 Corstorphine High Street, Edinburgh, EH12 7ST, sometimes trading as EHPL Limited, whose sole director is Mr Mark Edward Fortune (the landlord)

Appellant

-and-

City of Edinburgh Council, 101 Niddrie Mains Road, Edinburgh, EH16 4DS

Respondent

FTS Case Reference: FTS/HPC/RP/19/3633

31 March 2023

Decision

Permission to appeal is refused.

Introduction

[1] This case commenced with an application by City of Edinburgh Council ('the Council') on 5 November 2019 to the First Tier Tribunal (FTS).

[2] In short, the Council sought a ruling regarding property standards at Gillespie Crescent, Edinburgh in terms of s 14(1)(b) of the Housing (Scotland) Act 2006. The Council's position to the FTS was that notwithstanding what various leases might say, the property was not being let out as holiday accommodation but rather as short term tenancies, and as such, the FTS had jurisdiction to determine the matter.

[3] The FTS' decision is lengthy. It narrates the procedural history of the case between the application being lodged in November 2019 and being finally determined on 8 November 2022.

[4] The procedure that took place before the FTS includes a preliminary hearing assigned for 27 January 2020 rescheduled to 27 February 2020, where neither party attended, around 8 directions being issued between February 2020 and August 2022, a case management discussion on 14 January 2021, 3 review hearings, and 3 attempts at arranging a site visit before the visit took place on 29 June 2022. The substantive hearing appears to have taken place in July 2022, with 2 further directions were made before the decision was issued in November 2022. By any means, it is clear that extensive procedure took place before the FTS.

[5] The proceedings were defended before the FTS, initially on the basis that papers had not been served on the correct party. Issue was taken with who the landlord was (as opposed to the owner of the property). Later the dispute centered on whether repairs were required or had been carried out.

[6] The FTS expressed concern as to the co-operation of the appellants. Whilst a substantive issue was raised in relation to who the correct respondent was, the appellants appear not to have cooperated in with the FTS. Mr. Fortune did not provide an address in France for the service of documents. A review hearing held by telephone in March 2021 was unproductive after one person refused to identify themselves, and another person – a Mr. Edwards – was abusive. Mr. Fortune told the FTS at one stage that he was not party to information regarding the occupants of the property (paragraph 59 of the decision). The decision of the FTS narrates threats by Mr. Fortune to complain about the legal member of the FTS (which ultimately do not appear to have been made), Mr. Fortune’s refusal by to provide information as to a health appointment (regarding a reason why a representative could not attend a hearing), a refusal to cooperate with inspections on various dates, correspondence to the tribunal that Mr. Fortune or the appellants had sought an interdict to prevent the FTS inspecting the property and that such an interdict had been granted. Most concerning is that the FTS note that on 29 July 2022 Mr. Fortune used abusive language towards them. I return to that protracted history later.

[7] On the 8 November 2022 the FTS issued its decision. It made various findings relative to the condition of the property, and made a repairing standard enforcement order under s 24(1) of the 2006 Act. The FTS refused the appellants leave to appeal. Leave to appeal is now sought from the UTS.

Grounds of appeal

[8] The proposed grounds for appeal are contained within a letter dated 16 December 2022, on headed notepaper of EHPL Ltd. An oral hearing took place on 30 March 2023. The

respondents were represented at that hearing by Mr Fortune. He relied on the letter of 16 December 2022 and made additional oral submissions.

[9] The letter does not have listed grounds of appeal. I considered whether the letter was sufficient to be treated as a Notice of Appeal with grounds sufficiently articulated in terms of Rule 3 of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016. I will treat it as if it is sufficient and I have grouped together paragraphs of that letter under the following headings, and deal with each in turn.

The tribunal erred in accepting witness statements before it

[10] This ground of appeal is set out in the third & fourth paragraphs of the letter of 16 December. In essence the appellants complain that witness statements, taken by an officer of the council, should not have been admitted into evidence as they were unsigned, uncorroborated, and were hearsay evidence.

[11] The FTS narrated some of the witness statements within in its decision. The statements concern whether the individuals are living in the property as a holiday let, or whether the individuals are in fact longer term residents. The statements are taken by David Ross, an employee of the Council. They narrate the questions asked by Mr Ross and the answers given. Mr Ross was accompanied by a witness when he took the statements, sometimes a police officer.

[12] Hearsay evidence is admissible before the tribunal. Corroboration is not required. Witness statements do not need to be signed. Mr Ross was present at the substantive hearing before the FTS to answer any questions on the statements.

[13] There is no error of law under this heading. Leave to appeal is refused on this ground.

That the tribunal erred by treating Mr Fortune and EHPL Limited as one and the same

[14] This proposed ground of appeal concerns the question of whether the FTS conflated the position of Mr Fortune, as an individual, with EHPL Ltd.

[15] The procedural history on this point is as follows.

[16] The application was lodged in November 2019. At para 12 (i) of the FTS's decision refusing permission to appeal, the FTS note the application was served against both Mr Fortune and EHPL Ltd. Following being told by Mr Fortune that EHPL Ltd no longer existed, Mr Fortune continued to make representations to the FTS (presumably in his own right). In May 2022, the FTS made an order adding EHPL Ltd as a party to the application, presumably because the information that EHPL Ltd was no longer in existence was considered by the FTS to be wrong. In December 2021 EHPL Ltd advised the FTS that they were no longer the landlord. Mr Fortune continued participating in the FTS proceedings. On 20 August 2022, EHPL Ltd told the FTS that they were the landlord.

[17] It is notable that, at the very least, a degree of confusion has been raised by the representations made to the FTS. I note that Mr Fortune contacted the FTS on 13 January 2020 in his own name, on 27 January 2020 he told the FTS that service of certain papers, which had been by way of sheriff officers at the address on the lease documentation, was incorrect, that he resided in France but did not provide an address. It was he who advised the FTS by email on 24 February 2021 that EHPL Limited was no longer in existence. At another stage Mr Fortune told the FTS that he was not the landlord. He told the FTS that the landlord was Edinburgh Holiday and Party Lets Limited. Although he was the director, he told the FTS he was not able to comply with the direction of 16 February 2021, for reasons not specified. Mr Fortune appears to have acted before the FTS as the EHPL Ltd's representative, including

the extensive submissions to the FTS as to why the FTS could not inspect the property for COVID related reasons.

[18] The designation of the appellants in this decision is taken from the FTS's decision. Generally if an action is raised against a limited company, the details of individual directors are not specified in the instance or the order. At para 154 (i) and (ii) of the FTS's decision, the landlord is noted to be the registered owner of the property (which appears to be Mr Fortune as an individual), and it is noted that Mr Fortune is the sole director of Edinburgh Holiday and Party Lets Ltd, sometimes trading as EHPL Ltd.

[19] Leases were produced to the FTS. These were to show the tenants were not in occupation in the property as a holiday lets but as short term tenants. The leases produced appear to be in the name of EHPL Ltd. The fact that the leases were not in Mr Fortune's name might suggest proceedings should not have been raised or involved Mr Fortune as an individual. But that would be to ignore the reality of the situation before the FTS. Mr Fortune made extensive submissions at the oral hearing in relation to the separate identities of himself and a limited company. The FTS were told at different points contradictory information on who the landlord was. The fact that a limited company has a separate legal persona is not in dispute. It is clear the FTS were anxious to understand who the landlord was. It is clear from reading the decision there was ambiguity (caused by the appellant) as to in whose name individual leases were at any particular time. The tenants appear to be students. It appears there was a number of students in the property throughout the lifetime of the case. Against that background, it is perhaps not surprising that the FTS designated the appellants in the way that it did, should there be any further changes as to who the landlord is, given the property is owned personally by Mr Mark Fortune.

[20] I also note the FTS made an order on 17 May 2021 adding Edinburgh Holiday and Party Lets Limited (SC577943) as a party to the application. Accordingly the FTs clearly recognised that Edinburgh Holiday and Party Lets Limited was a separate legal entity.

[21] The property has 7 bedrooms, all of which appear to have been let separately. There are communal areas to the property. The FTS were no doubt anxious that, if it was persuaded to make an order, that the order would be enforceable.

[22] There is no error in law under this heading and leave to appeal is refused on this ground.

The condition of the property

[23] This proposed ground of appeal is set out in the third page of the letter 16 December 2022. It is said that the FTS overstepped the mark, and that its decision was deciding what standard of cleanliness or decoration a property should be.

[24] There is no merit in this proposed ground of appeal. It is clear the FTS was not concerned about the cleanliness or decoration of the property. The FTS undertook an inspection. That inspection was carried out by both of FTS members, and accordingly the FTS saw the condition of the property for itself. The FTS's decision at paragraph 155 does not concern issues of decoration or cleanliness. It is clear the decision concerns whether the property is wind and water tight, whether there are certain safety certificates and fire detection and carbon monoxide detection systems. Leave to appeal on this ground is refused.

Allegations against a legal member of the tribunal

[25] There is no merit in this ground of appeal. The letter of 16 December 2022 refers to Ms Forbes acting out of malice. At the oral hearing before the UTS, Mr Fortune suggested that

she was biased. He has not specified on what ground Ms Forbes was either acting out of malice, bias, or had some other conflict of interest.

[26] It is noteworthy that Mr Fortune referred to Miss Forbes as corrupt (his email of 26 August 2022 to the FTS). It is also noted at para 177 of the FTS's decision that he used abusive language towards the FTS. He did not cooperate with an order of 29 July 2022 where he was to specify why Ms Forbes had a conflict of interest (para 128). In short, if there was a conflict of interest, it has never been specified.

[27] It is surprising that Mr Fortune was permitted to conduct himself the way he did before the FTS. I have already noted that a hearing was terminated because of his abusive behaviour to the FTS. It is surprising that hearing was rearranged. I also note it appears he made statements to the FTS which were not in fact true. In June 2022 he told the FTS that he was obtaining, and later had, an interdict preventing an inspection of the property being carried out. This does not appear to be correct. No interdict or interim interdict was produced to the FTS. He alleged Mr Ross of the council had bullied tenants (para 71). He alleged that he had started a complaint to "the judicial office" (para 78). No complaint appears to have been received.

[28] There is no specification in relation to any allegation regarding the conduct of otherwise of Ms Forbes. Leave to appeal on this ground is refused.

That the notice by the council to the landlord prior to lodging the application was not in proper form

[29] This proposed ground of appeal concerns a letter sent by the Council in terms of s14 of the Housing (Scotland) Act 2006, prior to the Council lodging the application with the FTS. That letter was sent to Mr Fortune in his own name, at the address for EHPL Ltd. It is said

that the letter does not satisfy the requirements of s14, on the basis that the letter was not sent to the landlord. Further it is said that the letter had the wrong postcode, and there is no proof that the letter was delivered to the correct address.

[30] On the question s14, no point of law applies. The section provides that the landlord's duty to ensure the house meets the repairing standard arises when either the tenant notifies the landlord of the necessary repairs required, or the landlord otherwise becomes aware. If the landlord at that point was EHPL Ltd, it is not disputed that Mr Fortune was the sole director. EHPL Ltd would have become aware of the necessary repairs by intimation of the letter on its director. It is irrelevant that the letter was not served on EHPL Ltd.

[31] On whether the letter had been properly served, the FTS heard first hand from Mr Ross. Mr Ross explained he had hand delivered the letter. The wrong postcode therefore did not matter. He was accompanied by a police officer.

[32] There is no merit in this proposed ground of appeal. Leave to appeal is refused.

Other comments

[33] Much of the letter of 16 December 2022 is repetitive. It does not set out clear and separate grounds of appeal. Whilst there are some other matters raised in that letter they are either repetitive of the points already raised, or are irrelevant.

[34] I note the FTS's observation that "EHPL Limited and Mr Fortune appeared, at times, to be trying to subvert the procedure failing to provide information, and providing contradictory information" (para 152). That is a fair summary. I would go further and say that the appellants have acted in a way that has been deliberately obstructive. Notwithstanding that, it is surprising that the proceedings lasted as long as they did before the FTS. If a party chooses not to instruct a representative or cooperate with the tribunal, the FTS should resist behaviour that unnecessarily prolongs proceedings. If a representative is

abusive, then the FTS should consider proceeding to make a decision without the benefit of hearing from that party. The FTS has powers in connection with preventing representatives participating in proceedings where it is in the interests of the efficient administration of justice to do so (Rule 10 (5) (b) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017). Whilst it is appreciated that these proceedings were raised prior to the COVID pandemic, it is unfortunate that it has taken from 5 November 2019 to 8 November 2022 for the FTS to issue a substantive decision.