Upper Tribunal for Scotland

2023UT22
Ref: UTS/AP/23/0020 &
UTS/AP/23/0021

DECISION OF

Sheriff Tony Kelly

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

Indigo Square Property Ltd, 42 Holmlea Road, Battlefield, Glasgow

Appellant

- and -

Mr Mark Welsh, Flat 1/1, Rothesay Court, 2473 Dumbarton road, Glasgow, G14 0NT

Respondent

FTS Case Reference: FTS/HPC/PF/22/1501 & FTS/HP/PF/22/1883

Glasgow, 11 August 2023

Decision

The Upper Tribunal refuses permission to appeal in respect of ground of appeal one.

Introduction

[1] Application was made to the First Tier Tribunal for Scotland, Housing and Property Chamber ("FTS"), contending that the property factors, Indigo Square Property Limited, had failed to comply with its duties. By decision dated 25 May 2023 the FTS agreed and proposed to make a

Property Factor Enforcement Order.

[2] The property factors intimated their intention to appeal, and by emails dated 25 May and 2 June both 2023, outlining the basis of that application, sought permission to appeal from the FTS.

[3] By decision 8 June 2023, the FTS decided that that application was timeous and set out two separate grounds of appeal distilled from the material submitted to it by the appellants. It determined that the second ground of appeal raised an arguable point of law and granted permission to appeal. The FTS refused permission to appeal in respect of the first ground of appeal on the basis that it did not raise an arguable point of law. The appellant seeks permission to appeal that ground direct from the Upper Tribunal.

Arguable

[4] In terms of rule 3(6) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016, where the FTS 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. Of that test it said this:

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

[5] In *Wightman v Advocate General* 2018 S.C. 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, see [2] – [9].

[6] 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 or additional procedure in a challenge with no merit. It is in the interests of justice that a ground of appeal which is misconceived, is stopped in its tracks.

Error or Point of Law

[7] *Advocate General for Scotland v Murray Group Holdings Ltd* [2015] CSIH 77; 2016 SC 201 (affirmed by UKSC in [2017] UKSC 45; 2018 S.C. (UKSC) 15) concerned an appeal from the First Tier Tribunal, Tax & Chancery Chamber 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])

[8] In essence, therefore, the task of the UT is to ascertain, with reference to the material submitted, whether the appellant has identified in the proposed ground of appeal an error of law that is capable of being stated or argued before it at a hearing. That is a low bar.

Hearing: 27 July 2023

[9] A hearing on the appellant's application for permission in respect of ground of appeal one was convened on 27 July 2023. In seeking to identify the ground of appeal that the appellant wished to seek permission to appeal upon Mr Gilmour on behalf of the appellants read from the FTS decision the following:

> "We believe that the decision is at fault in law in the review of a previous First Tier Tribunal decision…
>
> We believe the panel averred in a statement of fact within their determination (with reference to the previous panel decision)".

[10] Mr Gilmour then referred to a number of matters which he said featured in a previous application by this homeowner to the FTS in January 2020. That application covered a lot of ground. It included the common buildings insurance policy. The matter proceeded to a hearing.

After one hour, the hearing was adjourned and the panel retired. It returned to say that the application was dismissed in its entirety. For Mr Gilmour this was a determination that Mr Welsh's "submission was completely dismissed".

[11] Because his application referred to the common buildings insurance policy, and the decision of the FTS in January 2020 was to dismiss it in its entirety, it was not now open to Mr Welsh to raise this issue afresh in this application. Mr Gilmour acknowledged that the original FTS decision did not specifically refer to the common buildings insurance policy. In his view this was because the hearing "did not get round to it". It did not matter that the decision itself did not deal with this issue. What was of significance, in Mr Gilmour's submission, was that the application featured this issue and that the application was dismissed.

[12] Mr Gilmour repeated the factual position in relation to the conduct of the hearing on a number of occasions. I asked him to point to: (i) where this issue was dealt with in the previous application; and, (ii) where the issue was dealt with in the previous FTS decision. Mr Gilmour had not anticipated that this point would be raised. He was afforded an opportunity to review the correspondence. Initially he referred to correspondence submitted in the present FTS process. His attention was drawn to the enquiry about the original application. Mr Gilmour asserted that this was a "substantive part of Mr Welsh's submission" before the original FTS. It was dismissed in its entirety. It could not be raised again.

[13] Mr Gilmour was afforded an opportunity to review the original FTS decision. After a lengthy pause in proceedings, Mr Gilmour again asserted that the hearing had lasted one hour and had been "shut down" before this matter had been canvassed. The whole of the application had

been dismissed. Mr Gilmour's submission came to be that it [the common buildings insurance policy] was "de facto included" in the determination of the original FTS. It was his "belief" that was an end to the issue.

Respondent

[14] Mr Welsh took issue with the factual description of the conduct of the original FTS proceedings. Those proceedings had not concluded within the hour. It had gone into the afternoon. The question of insurance had not been raised. Mr Welsh did not accept the characterisation of those prior proceedings.

Decision

[15] Although not stated in express terms, it is clear that in substance Mr Gilmour asserts that the previous decision of the FTS precludes the matter being aired afresh and that the principle of *res judicata* is said to have application here.

[16] This was argued before the FTS and rejected. The FTS said this at para.16:

> "In their written submissions the Factor raised a plea of res judicata by submitting that the question of the Homeowner requiring to take part in the block insurance policy had been determined by the Tribunal in an earlier decision in case reference FTS/HPC/PF/20/0128. The Tribunal reviewed the decision in that case and noted that it did not cover the question of insurance in any way. The Tribunal therefore rejects that argument."

[17] There are sound reasons why a court or Tribunal ought not to re-hear a case when a final determination has been reached which deals with the subject matter at issue between the same parties. There are a number of requirements that have to be satisfied before such a plea can be upheld. These are outlined in *Macphail* 4th Edition, paragraphs 2.128 – 2.133 and *Smith* v *Sabre Insurance* 2013 [CSIH] 28; 2013 S.C. 569.

[18] In summary, the elements of a successful plea of *res judicata* are: (i) that there has been a prior determination by a court of competent jurisdiction; (ii) that the decree in the previous action is pronounced in *foro contentioso,* without fraud or collision; (iii) the subject matter of the two actions must be the same; (iv) the *media concludendi* in the two actions must be the same; and (v) the parties to the second action must be the same as the earlier action.

[19] For Mr Welsh, this narration or description of the procedure before the original FTS was disputed. For present purposes that dispute does not require to be resolved. It matters not for this issue what procedure was followed. What matters is what was decided by the FTS and whether that precludes the matter being looked at and decided upon by this FTS.

[20] Mr Gilmour repeated on a number of occasions his "belief" that this issue had been dealt with. In his view it was enough that the original application featured reference to the common buildings insurance policy and that that application was dismissed. It is not. The requirements of a successful plea of *res judicata* are not met by the material submitted by Mr Gilmour.

Conclusion

[21] The appellant has failed to establish that there is an arguable ground of appeal such that a plea of *res judicata* would be upheld. The first ground of appeal does not contain an arguable point of law. Permission to appeal is refused.

Member