



DECISION NOTICE OF SHERIFF CHRISTOPHER DICKSON

ON AN APPLICATION FOR PERMISSION TO APPEAL
(DECISION OF UPPER TRIBUNAL FOR SCOTLAND)

in the case of

KIMBERLEY BAFF

Appellant

and

FRASERBURGH CAR SALES LIMITED

Respondent

FTT Case Reference FTS/HPC/EV/18/1244

7 August 2019

Decision

The Upper Tribunal dismisses the whole proceedings in terms of Rule 10(2)(a) of the Upper Tribunal for Scotland Rules of Procedure 2016.

Reasons for decision

Introduction

[1] This is an application by the appellant which has been treated as an application for the Upper Tribunal (hereinafter referred to as "UT") to give permission to appeal a decision

of the First-tier Tribunal (hereinafter referred to as “FTT”), dated 2 May 2019. The FTT decision of 2 May 2019 determined that: (1) the respondent (Fraserburgh Car Sales Limited) was entitled to an eviction order under ground 11 of schedule 3 to the Private Housing (Tenancies) (Scotland) Act 2016 (hereinafter referred to as “the 2016 Act”); and (2) that the respondent was entitled to an eviction order under each of grounds 11 and 14 of schedule 3 to the 2016 Act.

[2] Before considering the procedure before the FTT and UT it is first convenient to set out the relevant law.

The relevant law

[3] Section 46 of the Tribunals (Scotland) Act 2014 (hereinafter referred to as "the 2014 Act") provides:

“46 Appeal from the Tribunal”

- (1) A decision of the First-tier Tribunal in any matter in a case before the Tribunal may be appealed to the Upper Tribunal.
- (2) An appeal under this section is to be made-
 - (a) by a party in the case,
 - (b) on a point of law only.
- (3) An appeal under this section requires the permission of-
 - (a) the First-tier Tribunal, or
 - (b) if the First-tier Tribunal refuses its permission, the Upper Tribunal.
- (4) Such permission may be given in relation to an appeal under this section only if the First-tier Tribunal or (as the case may be) the Upper Tribunal is satisfied that there are arguable grounds for the appeal.
- (5) This section-
 - (a) is subject to sections 43(4) and 55(2),
 - (b) does not apply in relation to an excluded decision.”

[4] Rule 37(1) and (2) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 provide:

“37.- Application for permission to appeal a decision of the First-tier Tribunal

- (1) A person must make a written application to the First-tier Tribunal for permission to appeal.
- (2) An application under paragraph (1) must-
 - (a) identify the decision of the First-tier Tribunal to which it relates;
 - (b) identify the alleged point or points of law on which the person making the application wishes to appeal; and
 - (c) state the result the person making the application is seeking.”

[5] Regulation 2(1) to (3) of the Scottish Tribunals (Time Limits) Regulations 2016 (hereinafter referred to as "the Time Limit Regulations 2016") provide:

“2.- Time limits for applying to the First-tier Tribunal or Upper Tribunal for permission to appeal against its own decision

- (1) An application for permission under sections 46(3)(a) or 48(3)(a) of the Act (application for permission to appeal the Tribunal's own decision) must be received by the Tribunal whose decision is being appealed against within the period of 30 days beginning with the relevant date.
- (2) The First-tier Tribunal or the Upper Tribunal, as appropriate, may on cause shown extend the period beyond 30 days if it considers such an extension to be in the interests of justice.
- (3) Subject to paragraph (4), the relevant date is the later of the date on which-
 - (a) the decision appealed against was sent to the appellant;
 - (b) the statement of reasons for the decision was sent to the appellant.”

[6] Rule 3, 9 and 10 of The Upper Tribunal for Scotland Rules of Procedure 2016 (hereinafter referred to as “the UT Rules 2016”) provide:

“3.- Notice of appeal against a decision of the First-tier Tribunal

- (1) A person may lodge with the Upper Tribunal a notice of appeal against a decision of the First-tier Tribunal.
- (2) A notice of appeal must -
 - (a) identify the decision of the First-tier Tribunal to which it relates; and

- (b) identify the alleged error or errors of law in the decision.
- (3) The appellant must provide with the notice of appeal a copy of-
- (a) any written record of the decision being challenged;
 - (b) any separate written statement of reasons for that decision; and
 - (c) the notice of permission to appeal or alternatively notice of refusal of permission to appeal from the First-tier Tribunal.
- [...]
- (6) The Upper Tribunal may, where the First-tier Tribunal has refused permission to appeal-
- (a) refuse permission to appeal;
 - (b) give permission to appeal; or
 - (c) give permission to appeal on limited grounds or subject to conditions; and must send a notice of its decision to each party and any interested party including reasons for any refusal of permission or limitations or conditions on any grant of permission.
- (7) Where the Upper Tribunal, without a hearing-
- (a) refuses permission to appeal; or
 - (b) gives permission to appeal on limited grounds or subject to conditions, the appellant may make a written application (within 14 days after the day of receipt of notice of the decision) to the Upper Tribunal for the decision to be reconsidered at a hearing.
- (8) An application under paragraph (7) must be heard and decided by a member or members of the Upper Tribunal different from the member or members who refused permission without a hearing.
- (9) Where the First-tier Tribunal sends a notice of permission or refusal of permission to appeal to a person who has sought permission to appeal, that person, if intending to appeal, must provide a notice of appeal to the Upper Tribunal within 30 days after the day of receipt by that person of the notice of permission or refusal of permission to appeal."

"9.- Failure to comply with rules etc.

- (1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or an order, does not of itself render void the proceedings or any step taken in the proceedings.
- (2) If a party has failed to comply with a requirement in these Rules, a practice direction or an order, the Upper Tribunal may take such action as it considers just, which may include-
 - (a) waiving the requirement;

- (b) requiring the failure to be remedied; or
- (c) exercising its power under rule 10 (dismissal of a party's case)."

"10.- Dismissal of a party's case

- (1) The Upper Tribunal must dismiss the whole or a part of the proceedings if the Upper Tribunal-
 - (a) does not have jurisdiction in relation to the proceedings or that part of them; and
 - (b) does not exercise its power under rule 7(3)(1)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.
- (2) The Upper Tribunal may dismiss the whole or a part of the proceedings if-
 - (a) the appellant has failed to comply with an order which stated that failure by the appellant to comply with the order could lead to the dismissal of the proceedings or part of them;
 - (b) the appellant has failed to co-operate with the Upper Tribunal to such an extent that the Upper Tribunal cannot deal with the proceedings fairly; or
 - (c) in proceedings which have been transferred from the First-tier Tribunal, the Upper Tribunal considers there is no reasonable prospect of the appellant's case, or any part of it, succeeding.
- (3) The Upper Tribunal may not dismiss the whole or a part of the proceedings under paragraph (1) or (2) without first giving the appellant an opportunity to make representations in relation to the proposed dismissal."

[7] Section 46 of the 2014 Act makes clear that the appellant can only appeal to the UT on a point of law (section 46(2)(b) of the 2014 Act). If a party in a case wishes to appeal a decision of the FTT to the UT they must first seek permission to appeal. An application for permission to appeal to the UT must first be made to the FTT and must be received by the FTT within 30 days beginning with the relevant date (regulation 2(1) of the Time Limit Regulations 2016). The FTT may, on cause shown, extend the 30 day period if it considers such an extension to be in the interests of justice (regulation 2(2) of the Time Limit Regulations 2016). Permission to appeal to the UT can only be granted if the FTT or the UT is satisfied that there are arguable grounds for appeal.

[8] The appellant, at this stage, in order to satisfy the UT that there are arguable grounds for appeal, requires, in my view, to point to a material error of law, which could result in the decision of the FTT being quashed in terms of section 47(1) of the 2014 Act. An error of law would include: (i) an error of general law, such as the content of the law applied; (ii) an error in the application of the law to the facts; (iii) making findings for which there is no evidence or which is inconsistent with the evidence and contradictory of it; and (iv) a fundamental error in approach to the case: for example, by asking the wrong question, or by taking account of manifestly irrelevant considerations, or by arriving at a decision that no reasonable tribunal could properly reach (see *Advocate General for Scotland v Murray Group Holdings* 2016 SC 201 at paras 42 to 43).

The FTT's refusal of permission to appeal, dated 18 June 2019

[9] By email of 28 May 2019 the appellant sought an extension from the FTT of the time limit for applying for permission to appeal. The FTT considered that application and extended the period in which the appellant could lodge an application for permission to appeal to 17.00 hours on Friday 7 June 2019. By email of 4 June 2019 the appellant sought a further extension from the FTT of the time limit for applying for permission to appeal to the UT. The FTT considered that application but decided that cause had not been shown to justify a further extension of the time period. By email of 7 June 2019 at 16.01 hours to the FTT the appellant stated:

“This is an appeal by Miss Kimberley Baff on the decision to evict. This letter lodges the appeal timeously.

Please note that all material for the appeal cannot be sent by email. Please note that all material relied upon is on a hard drive. The hard drive will be delivered to the tribunal on or before Tuesday 11 June 2019. This would have been done sooner.

However I was prevented from entering the property address by John Simpson and his chums. Mr Simpson who has no legal right to enter the property was at the property and inside the property. I got really scared and left.

On Thursday the 7th of June I boarded the last bus for boddam and retrieved the drive from the property. I left boddam at 05.01am on the first bus out of the place. I have just woke up having slept after my experience.

Mr John Simpson and his chums entering the property illegally prevented me retrieving the drive to submit timeously. Please note this for future reference. Then drive is sent and will be tracked and traced until delivered. The drive was sent timeously. The appeal is now lodged timeously."

By email of 11 June 2019 at 11.37 to the FTT the appellant stated:

"For security reasons we are having to hand deliver the drive. The post office cannot insure the data. We anticipate travel this week finance permitted where the drive will be delivered."

[10] The FTT, by decision of 18 June 2019, refused to give the appellant permission to appeal to the UT. At para 9 to 13 of that decision the FTI gave their reasons for doing so:

9. The tribunal carefully considered the Respondent's *[now the appellant's]* application for permission to appeal being her email to the tribunal dated 7 June 2019 timed at 16:01. This is the only application received timeously by the tribunal.
10. In terms of Regulation 2(1) of the 2016 Regulations an application for permission to appeal the tribunal's Decision "*must be received by the Tribunal whose decision is being appealed against*" within the relevant period, in this case by 5pm on Friday 7 June 2019.
11. The tribunal cannot take into account an application not received timeously. The Respondent's email refers to material contained on a "drive". That drive has not been received timeously. (Whether the tribunal could take into account material on a "drive" if that "drive" had been received timeously is questionable but is not a matter upon which the tribunal needs to reach a view in the circumstances.)
12. Having considered the Respondent's application for permission to appeal the tribunal's determination dated 2 May 2019 the tribunal determined that the application should be refused as the application for permission fails to identify any point or points of law in the tribunal's decision as a result of which the terms of paragraph 37 of the Procedure Regulations 2017 and section 46 of the 2014 Act are not met.

Right of Appeal

13. A landlord, tenant or third party applicant aggrieved by the decision of the Tribunal may seek permission to appeal from the Upper Tribunal on a point of law only within 30 days of the date the decision was sent to them.”

The procedure before the UT

[11] By email of 19 June 2019 to the UT the appellant forwarded both the letter that had been sent to her from the FTT, enclosing the FTT decision of 18 June 2019, together with the decision itself and stated:

“Hi [*first name*]. Can you please place an appeal against the decision to not allow extension to appeal. I have sent the letters that I got.
Thank you Kimberley Baff”

The appellant did not appear to appreciate that the FTT had refused permission to appeal and that what she required to do was to seek permission to appeal to the UT from the UT. In the circumstances the UT issued an order on 24 June 2019. The order of 24 June 2019, first, identified that the appellant had failed to comply with Rule 3(2) and (3) of the UT Rules 2016 by: (1) failing to complete form UTS-1 (which is the form that should be used to seek permission to appeal from the UT to the UT); (2) failing to provide a written record of the decision of the FTT being challenged, namely the FTT decision of 2 May 2019; and (3) failing to clearly and concisely identify the alleged error or errors of law made by the FTT; and, second, ordered the appellant to complete the following by 8 July 2019:

1. To lodge with the UT a properly completed form UTS-1 which:
 - (1) Clearly and concisely identified the alleged error or errors of law made by the FTT; and
 - (2) Clearly and concisely stated why the identified error or errors of law were arguable grounds for appeal.

2. To provide the UT with the following document:

(1) The FTT decision of 2 May 2019.

The order of 24 June 2019 stated that failure to comply with the order could, and was likely to, lead to the dismissal of the proceedings.

[12] By email of 1 July 2019 to the UT the appellant stated:

“Dear sir/madam,

I am having difficulty responding to the time set to respond. I am not in a position to respond within the timeline as to ongoing harassment and hate crimes being committed against me born from the rogue landlord. Also all my material for the appeal is on hard drives currently boxed along with all computers and printers required to complete the task. Coupled with starving for three weeks to pay for the illegal eviction to which now I am unwell. I need at least 28 days to see to the task of rising an appeal.”

By email of 11 July 2019 the UT administrative staff advised the appellant that her request for an extension of time to respond would be passed to a UT Member for consideration but that in the meantime she should continue to collate the information requested in the UT order of 24 June 19.

[13] I did not have the opportunity to consider the appellant's email of 1 July 2019 until 23 July 2019. On that date, I considered that: (i) the appellant had completely failed to comply with the order of 24 June 2019; and (ii) that it was not just to grant further time to comply with the order of 24 June 2019. In the circumstances I proposed to dismiss the whole proceedings. I therefore issued an order on 23 July 2019 advising that the UT proposed to dismiss the proceedings on 1 August 2019. That order, in accordance with Rule 10(3) of the UT Rules 2016, provided the appellant with an opportunity to make written representations in relation to proposed dismissal proceedings and set a time limit of 17.00 hours on 31 July 2019 for her to do so. The UT order of 23 July 2019 also made clear that the appellant could,

as part of her written representations, also provide documentation to the UT in order to comply with the UT order of 24 June 2019. This therefore meant that the appellant still had the opportunity to comply with the UT order of 24 June 2019 more than 28 days after her email of 1 July 2019.

[14] The deadline of 17.00 hours on 31 July 2019 has now passed and the UT has not received any further communication from the appellant.

Discussion

[15] Rule 9 of the UT Rules 2016 entitles the UT to waive a failure to comply with both a requirement in the said Rules or an order of the UT if it is just to do so. In this case the appellant has failed to comply with the basic requirements of Rule 3 of the UT Rules 2016 by failing to identify the alleged error or errors of law in the decision of the FTT of 2 May 2019 and failing to provide the UT with the FTT decision of 2 May 2019. The appellant, by way of the UT order of 24 June 2019, was given an opportunity to rectify those failures and was informed that failure to comply with that order could, and was likely to, lead to the dismissal of the proceedings. The appellant failed to comply with the order of 24 June 2019. By order of 23 July 2019 the appellant was informed of the proposed dismissal of the proceedings and was given the opportunity to provide representations *in* relation to the proposed dismissal by 31 July 2019. The appellant failed to respond by 31 July 2019.

[16] I have considered whether I should use the powers in Rule 9 of the UT Rules 2016 to waive all of the appellant's failures and go on to consider whether or not the UT should give permission to appeal to the UT. In the circumstances, and standing the opportunity already given to the appellant to remedy the failures, I do not consider it just to do so. In all the

circumstances I consider that it is just for the UT to exercise its discretion to dismiss the whole proceedings. The whole proceedings will therefore be dismissed in terms of Rule 10(2)(a) of the UT Rules 2016.

[17] Had I been prepared to waive the appellant's failures I would not, in any event, have been satisfied that there were arguable grounds for appeal and would have refused permission to appeal to the UT. The appellant has had ample opportunity to set out the alleged error or errors of law in the decision of the FTT, dated 2 May 2019, but has completely failed to identify any such errors to either the FTT or the UT. In the circumstances the FTT's approach to the appellant's application for permission to appeal (which is set out at para 9 and 10) cannot be faulted and there would no basis for the UT to have been satisfied that there were arguable grounds for appeal.

Appeal provisions

[18] If the appellant is aggrieved by this decision she may seek permission to appeal to the Court of Session on a point of law only. To do so the appellant must make an application to the UT for permission to appeal from the UT to the Court of Session. Such an application must be received by the UT within 30 days of the date when this decision was sent to the appellant. Any application for permission to appeal must be in writing and must:

- (a) identify the decision of the UT to which it relates;
- (b) identify the alleged error or errors of law in the decision;
- and (c) state in terms of section 50(4) of the 2014 Act what important point of principle or practice would be raised or what other compelling reason there is that shows the appeal should be allowed to proceed.