Upper Tribunal for Scotland

[2020] UT 30
UTS/AP/20/0006

DECISION NOTICE OF SHERIFF IAN H L MILLER

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

in the case of

MR ALAN ROBERTS, 1/3 10 Fingal Road, Renfrew, PA4 8FH

per MRS BARBARA ROBERTS, 1/3 10 Fingal Road, Renfrew, PA4 8FH

Appellant

and

HACKING & PATERSON, 1 Newton Terrace, GLASGOW, G3 7PL

Respondent

FTT Case Reference FT/HPC/PF/19/2135

14 July 2020

Decision

The Upper Tribunal, having considered the applicant's application requesting the permission of the Upper Tribunal to appeal against the decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) dated 15 January 2020, Refuses the application because the applicant has not been able to identify a point of law.

Introduction

[1] The applicant requests the permission of the Upper Tribunal (the UT) to appeal against the decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (the FtT) dated 15 January 2020 (the FtT decision). He has submitted his application in Form UTS-1 following the decision of the FtT dated 12 February 2020 which refused to grant his application for permission to appeal and declined to review the FtT decision of its own accord (the FtT refusal).

[2] The applicant's complaint before the FtT as presented to it by Mrs Roberts, acting as the representative of her son the applicant and accepted as such by the FtT, was described in paragraphs 30 and 31 of the FtT decision as being:

> "30. Mrs Roberts advised the Tribunal that the mainstay of the complaint was lack of communication and transparency in the invoicing for all common charges including costs for the Quay Wall, cost of roof anchors, maintenance and servicing of the water pump, grass cutting and electricity charges.
>
> 31. With regard to the Quay Wall, the complaint was set out in the Application as the Respondents failing to ascertain all of the ownerships and so failing to apply apportioned costs correctly. In addition, the Applicant asserted that the Respondents deliberately delayed instructing surveys and repair work to the Quay Wall until Miller no longer had an ownership in the Quay Wall and did not attempt to pursuer Miller for costs which occurred during Miller's ownership."

[3] The FtT considered these matters in the context of its discussion of the application of section 2.1 of the Code of Conduct for Property Factors which has been effective since 1 October 2012 (the Code) and of the property factor's duties imposed by the Code. It did that in particular under reference to two Deeds of Conditions that both parties accepted from the way in which they presented their respective cases related to and governed the applicant's property. They are the Deeds referred to in paragraph 33; the Deed of Conditions by Braehead Park Estates Ltd., Clydeport Properties Ltd. and Park Lane Land Ltd registered (presumably in the Books of Council and Session although that is not stated)

on 23 July 2004 (the 2004 Deed) and the Deed of Conditions by Sovereign House, Fairbriar Homes Limited and Miller Homes Limited registered (also presumably in the same Books) on 13 December 2006 (the 2006 Deed).

[4] Having done that, the FtT concluded at paragraph 33 that

> "the Respondent did not provide false or misleading information in respect of the Applicant's liability for the Quay Wall or that the Respondents should pursue Miller for this liability."

Grounds of appeal

[5] The proposed grounds of appeal are stated in the paper apart accompanying the applicant's Form UTS-1. They can be characterised as two grounds: (i) that the FtT's interpretation of the title deeds of the applicant's property as set out in paragraph 33 of the FtT decision is incorrect; and (ii) that the property factor did not pursue the developers while they had ownership of the site on which the applicant's property stands. The particular feature of the applicant's title that is in dispute in the first ground is the extent of the responsibility of the applicant to pay for charges for which he has been invoiced that are said to be his share of the common charges incurred and in particular the charge in respect of the Quay Wall that forms the south bank retaining structure of the River Clyde at the part of the river that is adjacent to the development of which the applicant's property forms one unit. The factual situation that is founded upon in the second ground relates to certain conduct of the property factors in 2015 to early 2017.

[6] The applicant seeks permission to challenge the FtT finding that, as he puts it,

> "the Tribunal states that the Deeds oblige the [?] owners and developers to set out the River Frontage landscaping and LIGHTING to a specific standard before handing over responsibility to the future owners but does not contain a similar obligation for the Quay Wall."

He asserts that "the Quay Wall forms part of the Common areas and it also forms part of a separate area referred to, in the Title Deeds, as the River Frontage" and that,

> "the Title Deeds do indeed state that Miller Homes were obliged to lay out and construct the FACILITIES and landscaping on the River Frontage to a specific standard before handing it over to the responsibility of the Homeowners and that they also had to serve a Completion Notice to prove that this work was done."

He concludes that "the River Frontage obligation, as set out in the 2004 Title Deed was not complied with by Miller Homes." He adds, at the end of the paper apart a question:

> "So why did [the respondents] commission their own survey of the Quay Wall in early 2015, when Miller Homes were still on site, building houses, and then hold onto that survey until Miller had left site in November 2016 before presenting it to the homeowners in February 2017"?

Discussion

[7] An appeal of the present kind is to be made (a) by a party to the case, (b) on a point of law only: section 46(2) of the Tribunals (Scotland) Act 2014 (the 2014 Act). For (2)(b) the fundamental legal requirement of the appellant's application is that it must identify, and therefore state and support, a point or points of law that he asserts would justify the grant of leave to appeal. It is then for the UT to decide whether what he contends satisfies the requirement that there are arguable grounds for the proposed appeal: section 46(4). These statutory requirements are replicated in their essentials in rule 3 of The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 (the 2016 Regulations). It is concerned with the requirements of a notice of appeal against a decision of the FtT. Sub-paragraph (2) of the rule states that a party lodging a notice of appeal against such a decision must in it: (a) identify the decision of the FtT to which it relates; and (b) identify the alleged error or errors of law in the decision.

[8] That means that I have to deal with three issues:

1. Is the application made by a party to the case?
2. If so, does the application identify a point or points of law?
3. If it does, is the point of law, or are the points of law, arguable?

The first is a matter of fact, the second a matter of mixed fact and law and the third involves the exercise of a judicial discretion.

The first issue

[9] The applicant's application runs in his name and therefore complies with subsection (2)(a). The answer to this issue is yes.

[10] Before leaving this requirement I would like to make two observations on a strictly obiter basis about the FtT refusal which was made on a preliminary point alone and expressed no opinion on the merits of the application.

[11] The first relates to the ground of the FtT refusal. It was that the application did not run in the name of the applicant but in that of his representative and as such failed to comply with the mandatory requirement that an appeal under section 46(2)(a) of the 2014 Act is to be made by a party in the case.

[12] It seems to me that the ground is challengeable under reference to the terms of the procedural regulations that govern such applications, those being The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (the 2017 Regulations). The application was made, as it had to be, under rule 37 of the 2017 Regulations. Subparagraph (1) of that rule directs that an application for permission to appeal a decision of the FtF must be made in writing by "a person". "Person" is not defined for the purposes of the 2017 Regulations but the word "party" is in rule 1(2) and is stated to include "the homeowner" and "any other person permitted the First-tier Tribunal to be a

party to proceedings". A representative is also there defined as including "a lay representative". In the FtT decision the preamble and paragraph 5 both refer to the applicant and to his mother as his representative. In paragraph 6 the FtT repelled a preliminary plea made on behalf of the respondents which sought to challenge her right to be her son's representative. The decision was expressed as follows:

> "The Tribunal had regard to [the] Rules and took the view that, whilst no formal intimation had been made, it was evident from the Application and subsequent correspondence that Mrs. Roberts represented her son. Further, the productions lodged by both Parties showed that the Respondents had corresponded with Mrs. Roberts on behalf of the Applicant. Accordingly, the Tribunal, having regard to the overriding objective as set out in the Rules, took the view that Mrs. Roberts had been appointed as a representative for the Applicant."

In furtherance of that decision, from and after paragraph 30 of the FtT decision the FtT refers to submissions that she made to it in her accepted capacity as representative and it took account of them in reaching its decision on the merits of the application.

[13] Against that background of acceptance of her role as representative it seems to me regrettable at the very least that the FtT decision was made under section 46 and neither made reference to the rules in the 2017 Regulations nor to an explanation why the FtT did not refer to them and apply their relevant provisions. It is worth noting that the FtT refusal was made by the same FtT members as made the FtT decision and therefore it is right to infer that they were aware of their acceptance of the involvement of Mrs Roberts when they were considering the application for permission to appeal both from the terms of the FtT decision and from their personal involvement in the case at first instance.

[14] It seems to me that the FtT should have applied to the application for permission to appeal the same approach and reasoning under the 2017 Regulations as it used at first instance and on the same factual ground, namely that the direct involvement of Mrs Roberts indicated that she was acting throughout as the representative of the applicant, her son. It

was perhaps unfortunate that she submitted the application for permission to appeal in her own name but she had been accepted by the FtT as the applicant's representative and therefore as appearing as an agent for a disclosed principal with that legal interest on his behalf. That accepted status should have been taken into account. To have done that could be said to have the capacity to assuage any misgivings about the implementation for the present application of the word "party" in section 46(2)(a) because it could be extended to include an accepted representative acting on behalf of a principal who was a party. The FtT could then have invoked the same overriding objective, found in rule 2, and perhaps most pertinently rule2(2)(b) of dealing with the proceedings justly by seeking informality and flexibility in proceedings. It would then have been open to them to conclude in the exercise of its discretion, as the FtT did at first instance, that she was acting in that capacity in the present application requesting permission to appeal when she completed that application. They could then have directed that it should be treated as equivalent to his writ. If the FtT had, in the exercise of its discretion, seen fit to reach that conclusion it would then have been incumbent upon it to make a decision on the merits of the application. In my opinion that is the course that it ought to have taken and the conclusion that it ought to have reached in the particular circumstances of the application.

[15] The second is on the absence of any reference to the merits of the application in the FtT refusal. I would respectfully suggest that where a decision is made on a preliminary issue and not on the substantive merits of the application that the FtT should indicate what its decision would have been on the merits. There are two reasons for this. The first, and by far the more important, is that the applicant is entitled to know what the FtT thought of the ground on which he chose to present his application. It is a judicial decision and as such the giving of reasons is pars judicis and they should be available to the applicant. Rule 38(3)

directs that if the FtT refuses permission to appeal on any point of law, it must provide a statement of reasons for its decision. It seems to me that this requirement is wide enough to cover an indication of how the FtT would have dealt with the merits where it disposes of the application on a preliminary issue. The second is that such an expression of the FtT view on the merits can guide the UT when as here it is asked to consider permitting an appeal to the UT because the UT can derive help from the reasoning of the FtT in reaching its own decision. The reasoning need not be expressed in full terms but it should be given precisely, clearly and at least briefly.

The second issue

[16] To satisfy the second issue the applicant must identify the decision of the FtT to which it relates, identify the alleged point or points of law that indicate that the FtT fell into legal error in the FtT decision.

[17] The process of considering the appellant's request for permission to appeal the FtT decision has to be conducted by reference to the FtT decision and in light of the proposed grounds of appeal contained in his application. This process involves working with the material presented to the FtT on the basis of which it reached the FtT decision. This process reinforces the essential fact that this is an appeals process and not a review process.

[18] The FtT describes the material that it was given to work with in paragraphs 2 to 4 of the FtT decision and states in paragraph 29 that it took them all into account in reaching its determinations.

[19] The gravamen of the application is said to relate to the FtT interpretation of the two Deeds of Conditions as expressed in paragraph [33] of the FtT decision and to its conclusion

there on the contention that the respondents did not pursuer Miller Homes for costs incurred during their period of ownership of the development of which the applicant's property forms one unit. As such the application would appear to raise the same issues as the FtT state in paragraphs [30] and [31] of the FtT decision although they are expressed in a different form of words.

[20] The applicant does not take issue with the use made of the 2004 Deed and the 2006 Deed by the FtT. As expressed in paragraph 28 of the FtT decision it was "in respect of the common parts relevant to the [applicant's] Property and the obligations in respect of the common parts". As a result he must be held to accept that the FtT had regard to the correct title deeds for those stated purposes and therefore in their interpretation of what liability for common charges they imposed on the applicant there are no grounds of appeal open to him that the FtT either entertained the wrong issue or took into account irrelevant considerations or failed to take into account relevant and material considerations which it ought to have taken into account. The only grounds of law open to him under this head are (a) that the FtT decision contains a material error of law going to the root of the question for determination or, (b) insofar as it involved the exercise of a judgement, that it is so unreasonable that no reasonable tribunal acting reasonably thereon could have reached it.

[21] In its task of interpreting the two Deeds the FtT had the benefit of what it describes in paragraph 4 of the FtT decision as "legal opinions". It used them as it confirms in paragraph 29 and refers to more particularly in paragraphs 57 and 58. The task was not an easy one for the FtT because as stated and echoing the submissions of the parties (recorded at paragraph 54 of the FtT decision), it found the terms of the Deeds of Conditions to be "ambiguous and conflicting". In addition it went on to say that the two legal opinions agreed that "there is common liability for common property within the whole site" but

beyond that expressed "different views on the extent of the common liability of the individual residential unit owners, of which the Applicant is one" (paragraph 57). The applicant takes no exception to those conclusions. The FtT had to undertake the task of interpretation in the dual context of an assertion that the respondents were, in the circumstances pertaining to the applicant's property, in breach of Section 2.1 of the Code (paragraphs 30 to 36 of the FtT decision) and of the duties of the property factor (paragraphs 54 to 65 ibid). The applicant's criticisms were similar for both grounds; effectively what is set out at paragraphs [30] and [31] of the FtT decision.

[22] Section 2.1 of the Code is the first subsection of the part of the Code that is headed "Communication and Consultation". The preamble to the section indicates its purpose: "Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes." Subsection 1 is brief and to the point: "You must not provide information which is misleading or false."

[23] The FtT reached a decision on the extent of the common liability to be found in the 2004 Deed and the 2006 Deed for both assertions and it is applied to both situations. For section 2.1 it is given at paragraph 33 and for the asserted breach of property factor's duties at paragraph 64. They did that in light of the legal opinions and the submissions of both parties as recorded in the FtT decision. The FtT would appear to have favoured the views expressed in the opinion presented on behalf of the respondents rather than the one on which the applicant relied. If that inference is correct it would provide a good explanation for the way in which the paper apart that accompanies Form UTS-1 has been framed.

[24] In this situation the first question is whether the conclusion on the extent of the common liability amounts to an error of law. The applicant is of the opinion that it does for the reasons stated in his Form UTS-1. I am not persuaded that what he says there supports

that conclusion. The FtT applied its collective mind to the interpretation of the title deeds on the question of the extent of common liability where it is accepted by both parties and not questioned in the application that it was not amenable to a single unequivocal answer. In order to give the necessary answer the FtT had to exercise its judgement on them in light of the competing submissions of parties and the differing views in the legal opinions. It says that it did that and explains its reasons for what it concluded for both assertions in the FtT decision, albeit briefly but sufficiently to support the conclusion. The explanation is not challenged as being in any way inadequate in itself. The applicant has not been able to say in his Form UTS-1 why it is that the FtT, faced with title deeds described as ambiguous and legal opinions as differing, erred in law in the exercise of its judgement in respect of its reasoning process and the legal conclusion that it favoured. The fact that its conclusion may not be as supportive of his position and submissions before the FtT as he wished is not enough to amount to a point of law. This is because the demand that there be a point of law indicates that the Upper Tribunal has been constituted as a forum of appeal and not a forum of review.

[25] The second question is whether the FtT decision on the extent of the common liability is so unreasonable that no reasonable tribunal, aware of the law and the whole facts and circumstances of the case before it and acting reasonably thereon could have reached or imposed it. The straight answer to this is that the applicant does not challenge the FtT decision on this ground and therefore the question does not arise.

[26] That leaves the allegation that the respondents failed in a factorial duty by not pursuing Miller Homes, the developers, for costs incurred during their period of ownership of the development of which the applicant's property forms one unit. That period would appear to have ended in November 2016 when the developers left the site. The applicant

has expressed his concern in his Form UTS-1 in the form of a question but I will treat it as a separate proposed ground of appeal.

[27] The FtT records the applicant's submission on this at paragraph 31 of the FtT decision and its decision on it is contained within paragraph 33 that "there does not appear to the Tribunal to be anything before it to suggest that the Respondents … should pursue Miller for the liability."

[28] That decision was made, as the paragraph makes clear, under reference to its findings on the terms of the 2004 Deed and the 2006 Deed and in the context of Section 2.1 of the Code. It was made on a matter of fact. It rests ultimately on the same grounds as both questions discussed above. For the reasons I have already given, the allegation does not raise a point of law on the ground of error in law. As for the reasonableness of the decision there is nothing in the application to suggest that it is challenged as being unreasonable in the sense that is required to found a point of law.

[29] For all the foregoing reasons I conclude that the applicant has been unable to identify a point of law as required by section 46(2)(b) and therefore answer no to this issue.

The third issue

[30] I do not need to answer this issue because of my determination of the second one.

Conclusion

[31] Having concluded for the reasons I have given that the applicant has been unable to comply with the requirements of section 46(2)(b) of the 2014 Act, I must refuse his application requesting permission to appeal to the Upper Tribunal against the FtT decision.