Upper Tribunal for Scotland

[2019] UT 51
UTS/AP/19/0001

DECISION NOTICE OF SHERIFF PINO DI EMIDIO

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

in the case of

DR PETER DYMOKE, MRS BETH DYMOKE, Rossie Priory, Inchture, PH14 9SH
per Thorntons Law LLP, Whitehall House, 33 Yeaman Shore, Dundee, DD1 4BJ

Appellants

and

MRS CAROLINE BEST, Rossie Farm House, Estate Office, Inchture, PH14 9SH
per Turcan Connell, Princes Exchange, 1 Earl Grey Street, Edinburgh, EH3 9EE

Respondent

FTT Case Reference FTS/HPC/EV/18/1098

19 September 2019

Decision

The Upper Tribunal refuses the appellants permission to appeal to the Inner House of the Court of Session.

Introduction

[1] The appellants seek permission to appeal the decision of the Upper Tribunal for Scotland ("UT") dated 17 July 2019 on the basis that important points of principle and

practice would be raised by a second appeal. In this decision I use the same abbreviations as were employed in the Decision of 17 July 2019.

[2] The application is made under section 48(3)(a) of the Tribunals (Scotland) Act 2014. Section 48(4) provides that permission may only be granted if the UT is satisfied that there are arguable grounds for the appeal. This provision, in turn, is subject to section 50(1) which provides that in the case of a second appeal sections 50(3) and (4) apply. These provision are in the following terms:

> "(3) For the purpose of subsection (1), the Upper Tribunal … may not give its permission to the making of a second appeal unless also satisfied that subsection (4) applies.
> (4) This subsection applies where, in relation to the matter in question—
> (a) a second appeal would raise an important point of principle or practice, or
> (b) there is some other compelling reason for allowing a second appeal to proceed."

[3] This is a second appeal. The application is made on the basis that section 50(4)(a) applies. Rule 32(2)(c) of the UT Rules requires the any application for permission to appeal to address the matters referred to in section 50(4). The underlying policy of the legislation is to restrict second appeals to narrow categories of cases.

[4] I have had regard to the following authorities relating to the test applied in second appeals in determining this application: *Uphill* v *BRB (Residuary) Limited* [2005] 1 WLR 2070; *EP* v *Secretary of State for the Home Department* 2014 SC 706 (IH); *HH* v *Secretary of State for the Home Department* 2015 SC 613 (IH). The Scottish decisions relate primarily to the "some other compelling reason" aspect of second appeals but they do provide some up to date guidance on the way applications for permission to bring second appeals should be approached.

[5] In so far as the decision of 17 July 2019 relates to the inter-action of Rules 2, 3, 17 and 18 of the FtT Rules I do not consider that an important point of principle or practice

arises that would merit a second appeal. So far as I am aware, there is no conflicting decision of the UT which construes these Rules in a different way. No such decision was cited to me and none is referred to in the current application. If it is thought in a future case that the approach taken in this case is misconceived, or conflicting decisions are made elsewhere, there would be the opportunity to convene a bench of three UT Judges to determine whether the approach taken is correct or not.

[6] In so far as the application for permission criticises the treatment of the FtT review decision of 15 October 2018, this criticism is misplaced. The decision of 17 July 2019 proceeded on the basis that the FtT had considered the terms of the appellants' solicitor's letter of 7 September 2018 when it decided the Application for review and did not simply ignore it or refuse to read it. This is confirmed by the terms of paragraph 7 of the FtT decision to refuse permission to appeal dated 23 November 2018.

[7] The application makes reference to the way the word "hearing" was used in FtT correspondence. The words used in administrative correspondence from the FtT clerking team do not amount to a form of authoritative interpretations of the words used in the FtT rules. It may be appropriate for the FtT administration to re-consider the way it phrases its routine correspondence with parties so as to avoid any possible confusion. This usage does not lend force to the argument of the appellants.

[8] The appellants complain that they did not get the opportunity to put their position on personal bar in a developed form because the FtT determined the application on 24 August 2018 after a CMD. As noted in the decision of 17 July 2019, extensive further material was put before the FtT at the stage of review in the form of their solicitors' letter of 7 September 2018. The FtT refused to disturb its decision at review and then refused to grant permission to appeal in relation to the same material. The appellants were entitled to

seek permission to appeal from the UT in relation to the matters in respect of which the FtT refused them permission, but did not attempt to do so. They were also entitled to apply to amend the grounds of appeal which were before the UT, but made no such application. If the personal bar argument was based on other potentially relevant factors not previously placed before the FtT in this case, such an application to the UT might have set out what that basis actually was. The only place where, after 24 August 2018, the appellants have chosen to explain what actually was the basis of their personal bar argument is in the letter of 7 September 2018.

[9] Paragraph 23 of the UT decision of 17 July 2019 makes clear that limited weight was placed on the case of *Neary* which was expressly treated as being no more than helpful given its specific context in another statutory regime. No error has been identified in this regard.

[10] For all these reasons I conclude that no important points of principle and practice have been identified in the application.

[11] The appellants accepted before both the FtT and the UT that unless they were able to establish that there was personal bar the respondent was entitled to an order for possession of the property. For the reasons given at paragraph 17 of the UT decision of 17 July 2019 the UT found that the FtT were correct to conclude that the pleadings relating to the proposed personal bar argument were inadequate and that there was no procedural irregularity in the way in which that conclusion was reached. A much fuller version of the appellant's personal bar argument was set out in the letter of 7 September 2018 when the appellants asked the FtT to review the original decision. At paragraph 19 of the UT decision reference is made to the terms of the letter of 7 September 2018 and it is concluded that the proposed version fuller of the personal argument lacked substance. This is dealt with separately from the points on which permission had been granted by the FtT and which were rejected in the

earlier paragraphs. As noted above at paragraph 8 the appellants did not attempt to expand on the proposed personal bar argument before the UT. I do not consider that a second appeal on the grounds proposed would affect the outcome of this case on the merits of the personal bar argument.

Notification of further right to make application for permission to appeal

[12] The appellants have the right to make an application to the Court of Session for permission to appeal within the period of 30 days commencing with the date on which this decision is sent to parties.