Upper Tribunal for Scotland

[2020] UT 31
UTS/AP/20/0016

DECISION NOTICE OF SHERIFF CHRISTOPHER DICKSON
ON THE APPELLANT'S APPLICATION
FOR PERMISSION TO APPEAL TO THE UPPER TRIBUNAL

in the case of

MARIE-CLAIRE RACKHAM-MANN

Appellant

against

GRAHAM HENDRY

Respondent

FTT Case Reference FTS/HPC/CV/19/2620

6 August 2020

DECISION

The Upper Tribunal, not being satisfied that there are arguable grounds for appeal, refuses permission to appeal to the Upper Tribunal.

REASONS FOR DECISION

Introduction

[1] This is an application by the appellant (who was the former tenant of the property at Howe, Harry, Orkney KW17 2JR) 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") made at a Case Management Discussion (hereinafter referred to as a "CMD") on 10 March 2020.

[2] By decision at a CMD on 10 March 2020 the FTT: (i) determined that Mr Hendry's application should be determined without a hearing; and (ii) made an order for payment by the appellant to Mr Hendry of the sum £8,459.92. That sum of £8,459.92 was made up of two elements, namely £5,520 in respect of unpaid rent and £2,939.92 being the cost due by the appellant in respect of the cost of the electricity supplied to the property during her tenancy. The FTT had in fact originally reached an identical decision at a CMD on 9 January 2020. However, it was discovered that the appellant had sought to participate, via a telephone conference call, at the CMD on 9 January 2020, but had not been able to do so. On discovery of this issue the FTT, in terms of Rule 39 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (hereinafter referred to as "the 2017 Rules"), reviewed the decision made at the CMD on 9 January 2020 and decided to consider Mr Hendry's application for payment in respect of unpaid rent and electricity costs at a CMD on 10 March 2020. The appellant was notified that a CMD would be taking place on 10 March 2020 but did not participate in that hearing.

[3] The appellant sought permission from the FTT to appeal the FTT decision of 10 March 2020 to the UT on a number of purported points of law. However, many of the points raised by the appellant referred not to the FTT decision of 10 March 2020 but to a previous case where the FTT had granted an eviction order against the appellant. The appellant also contended that the FTT had not adequately addressed the "intentioned preclusion" from the CMD held on 9 January 2020 and made complaints about FTT's approach to the factual question of the amount due in respect of unpaid rent. By decision of

8 June 2020 the FTT refused to give the appellant permission to appeal to the UT (the reasons for that decision are set out at para 9 below).

[4] The appellant has now applied to the UT for permission to appeal from the FTT decision of 10 March 2020 to the UT. Form UTS-1 is the form used to, amongst other things, request permission to appeal from the UT. Part 7 of Form UTS-1 states:

> "**7. REASONS FOR REQUESTING AN APPEAL/PERMISSION TO APPEAL**
>
> Please give details of your reasons for requesting an appeal or permission to appeal here. You must identify the points of law on which you are appealing."

The appellant has completed Part 7 of Form UTS-1 in the following terms:

> "The decision shows that the Tribunal wrongly applied, misinterpreted and disregarded a relevant principle of valuation and other professional practice. In addition the Tribunal took account of irrelevant considerations and failed to take account of relevant considerations and evidence which amounts to a substantial procedural defect. These infer that there are points at issue which are of potentially wide implication, in that the Tribunal's initial decision was based on fraudulently produced accounts and the basis of the submission of the application was a failed attempt at extortion and blackmail. The actions of the Tribunal meet Pt 3"

The relevant law

[5] 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."

[6] Rule 3 of The Upper Tribunal for Scotland Rules of Procedure 2016 (hereinafter referred to as "the 2016 Rules") provides:

> "(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."

[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) and that permission to appeal to the UT can only be granted if the UT is satisfied that there are arguable grounds for appeal. Rule 3(6) of the 2016 Rules makes clear that the UT is entitled to: refuse permission to appeal; give permission to appeal on all grounds sought; or give permission to appeal on limited grounds. The question therefore, at this stage, is whether the UT is satisfied that the purported points of law, identified by the appellant, set out 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 8 June 2020

[9] The reasons for the FTT refusing permission to appeal were as follows:

> "The Tribunal considered carefully the request for permission to appeal but did not consider that it contained any valid ground for an appeal, which in terms of Section 46 of the Tribunals (Scotland) Act 2011 [*sic*] can only be made on a point of law.
>
> Much of the content of the application could not be considered by the Tribunal as it was not relevant to the present case, because it related to a separate application for an Eviction Order and much of the remainder related to matters of fact, which cannot be subject of appeal.
>
> The Tribunal noted that the Respondent [*who is the appellant in the current application before the UT*] referred to the proceedings of 10 March 2020 as a "Review Hearing". The proceedings were a continued Case Management Discussion, not a Review Hearing. There had been no "intentioned preclusion" of the Respondent on 9 January, but an oversight on the part of the Tribunal. The Tribunal, recognising its own administrative error of not enabling the Respondent to participate via a telephone conference call in the Case Management Discussion, had reviewed its own Decision by continuing the matter to a further Case Management Discussion. This had been intimated to the Parties and, when the Respondent did not join the conference, attempts had been made to contact her, particularly in light of the previous error on the part of the Tribunal. The Respondent had chosen not to participate on the Case Management Discussion and the Tribunal was entitled to proceed in her absence. The view of the Tribunal was that it had dealt fairly with the Respondent by reviewing its original Decision and in attempting to contact her on the morning of the Case Management Discussion when she did not join the telephone conference call.

> At the Case Management Discussion on 10 March 2020, the Tribunal had considered all the evidence before it, including written submissions made by the Respondent on 29 February 2020 and had decided that it had before it all the information it required to determine the application. Accordingly, the Tribunal had exercised the power, vested in it by Rule 17 of the 2017 Regulations, to do anything at a Case Management Discussion which it may do at a hearing, including making a Decision. Rule 17 is a "free-standing" Rule. The Tribunal had not relied on Regulation 18 [*sic*] of the 2017 Regulations in deciding the application on 10 March 2020. The view of the Tribunal was that the argument that the Tribunal erred in law was founded on a mistaken apprehension by the Respondent of the purpose of the Case Management Discussion of 10 March 2020 and a misunderstanding by the Respondent as to the Rule under which the Decision was made. The Decision clearly stated that it was made in terms of Rule 17 of the 2017 Regulations. Accordingly, there was no stateable ground of appeal on a point of law and application for permission to appeal was refused."

Discussion

[10] The purported points of law on which the appellant seeks to appeal on have been set out at para 4 above. The appellant has failed to state what "relevant principal of valuation and other professional practice" the FTT have wrongly applied, misinterpreted or disregarded. The appellant has failed to identify what irrelevant consideration the FTT took into account or what relevant consideration or evidence it failed to take into account. The appellant also appears to again be making reference a previous case where the FTT granted an eviction order against the appellant. The FTT appear to have dealt appropriately with the fact that the appellant was not able to participate at the CMD on 9 January 2020. In the circumstances the FTT, at its own instance, reviewed the decision made at the CMD on 9 January 2020 and decided to reconsider Mr Henry's application at the CMD on 10 March 2020. There is no suggestion that the appellant had not been given reasonable notice of the CMD held on 10 March 2020 in accordance with Rule 17(2) of the 2017 Rules and, therefore, the FTT was entitled to do anything at the CMD which it may have done at a hearing, including making a decision (see Rule 17(4) of the 2017 Rules). Rule 18 of the 2017 Rules had

no application at the CMD on 10 March 2020 (see *Dymoke v Best* [2019] UT 50, per Sheriff Di Emidio at para 15) and the FTT was, subject to Rule 2 and 3 of the 2017 Rules, entitled to proceed in the absence of the appellant (see Rule 29 of the 2017 Rules). In the circumstances the appellant has failed to identify any point of law and I am therefore not satisfied that there are arguable grounds for appeal. Permission to appeal is therefore refused.

Reconsideration

[11] The terms of Rule 3(7) of the 2016 Rules have been set out at para 6 above. Given that permission to appeal to the UT has been refused, the appellant, if unhappy with this decision, may, in terms of Rule 3(7) of the 2016 Rules, make a written application (within 14 days after the day of receipt of the notice of this decision) to the UT for the decision to be reconsidered at a hearing made up of a different member, or members, of the UT.