Upper Tribunal for Scotland

[2021] UT 22
UTS/AP/21/0004

DECISION NOTICE OF SHERIFF IAN HAY CRUICKSHANK

On an application for permission to appeal – Reconsideration of Upper Tribunal Permission to Appeal Decision

Miss Phoebe Combes Mr Christopher Isaacs

Appellant

and

FaceWorks Solutions & Technologies

Respondent

FTT Case Reference FTS/HPC/CV/20/2015

29 April 2021

Decision

Having re-considered the appellants' application for permission to appeal Refuses permission to appeal the decision of the First-tier Tribunal Housing and Property Chamber dated 4 December 2020 on the proposed grounds set out in appellant's Form UTS-1 dated 22 February 2021.

Introduction

[1] Miss Combes and Mr Isaacs ("the appellants") have sought permission to appeal a decision of the First-tier Tribunal Housing and Property Chamber ("the FtT") dated 4 December 2020. Leave to appeal has been refused by the FtT. Permission to appeal has also been refused by Upper Tribunal member Sheriff Ross.

[2] The appellants have requested re-consideration of the decision of Sheriff Ross dated 8 March 2021. The request is made under Rule 3(7) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 (No. 2016/232). Under Rule 3(8) such an application requires to be dealt with by a member of the Upper Tribunal different from the member who refused permission without a hearing.

[3] A hearing took place before me on 13 April 2021 and was conducted via the WebEx platform. This technology allowed the parties to attend by remote means from various multi-national locations. Whilst I presided over the hearing from Lerwick Sheriff Court with the Tribunal Clerk in Glasgow, the appellants participated from Australia and the respondent's representative, Ms Kol, participated from France.

Grounds of appeal

[4] The grounds of appeal are two-fold. The appellant's state:

(1) "The decision of the FtT is premised on logically invalid reasoning, namely fallacious reasoning. This renders the decision irrational, thereby unsound as an exposition of the applicable law in Scotland."

(2) "The fallacious reasoning is predominantly reflected in paragraphs 20 and 21 of the decision. The fallacies led the FtT to conclude that it had no jurisdiction and no legal basis to join other parties to the hearing. It is the refusal to join other parties to the proceedings that is the part of the decision being contested."

[5] In advance of the hearing on 13 April 2021 the appellant's lodged written submissions as part of their Form UTS-1. The respondents lodged written submissions in respect of the appellants' reconsideration request. Both parties adopted their respective written submissions and were each given the opportunity to expand these in oral submissions at the hearing before me.

Discussion

[6] The appellants applied to the FtT for an abatement of rent, or compensation, due to a delay in repairing their tenanted property to make it wind and water tight. On 10 May 2019 the appellants reported to the respondents that there was water ingress in the bedroom of the property. The necessary repairs were effected by 20 August 2020.

[7] It should be noted that the appellants are supported in their appeal by the respondents. Rather unusually, the respondents were supportive of the appellant's position before the FtT albeit the respondents did not consider they were liable given the terms of section 16(4) and (5) of the Housing (Scotland) Act 2006. The respondents had made a voluntary payment by way of compensation in any event. The respondents argued that any delay in effecting repairs was due to a lack of consent by the majority of owners within the tenement block which led to the respondents not having the necessary right of access to effect repairs earlier than they had been able to do. In this respect the FtT agreed and dismissed the application.

[8] The point of law which the appellants seek to advance in this reconsideration of leave to appeal relates to the FtT not having allowed additional parties, being other proprietors of the tenement block, to be included in the application. This had been sought by the respondents prior to the Case Management Discussion. The respondent's requested

that the FtT should add the 11 further proprietors of the tenement block as additional respondents. The FtT did not agree that it was appropriate to do so.

[9] The appellants argued that the FtT had erred in law in not agreeing to add the various co-proprietors of the tenement block as additional respondents. In particular they submitted that the FtT's errors in law are reflected in paragraphs 20 and 21 of the decision. These paragraphs are in the following terms:

> "20. The Tribunal did not agree that there was such an issue. The tribunal generally deals with disputes between Landlords and tenants. The Tribunal can, in appropriate cases, add additional parties to an application. In this case, however, there is no legal connection between the tenants and the proprietors of other properties within the tenement block. Any legal relationship which exists with the tenants is between them and the Respondents. In the event that there was any order for payment made against the Respondents, the Respondents would then have a right of relief against the proprietors of the other properties within the tenement block. They do not require to be party to these proceedings for that right of relief to be effective.
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> 21. Separately, however, given that the Tribunal found that it was not appropriate to make any order for payment against the Respondents, there can have been no basis for there being any order against any of the other proprietors either. In such circumstances, there was no basis for adding numerous additional respondents and certainly no basis for delaying the proceedings to enable that to happen. The desire of the Respondents to have other proprietors added as respondents was well intentioned, but in the circumstances, misconceived. For the reasons stated above, there was no proper basis for adding such persons as additional Respondents."

[10] The appellants submitted that the decision of the FtT was premised on logically invalid and fallacious reasoning rendering the decision irrational. The FtT had wrongly concluded that it could not join other proprietors to the hearing. In their written submissions the appellants sought to demonstrate that the FtT decision was logically unsound. In particular, it was logically incorrect to conclude that an order for payment against other proprietors was possible only if an order for payment had been made against the respondents. If section 16(4) of the Housing (Scotland) Act 2006 had been correctly interpreted then it provided a "near impenetrable statutory defence for landlords".

[11] The appellants referred to section 71 of the Private Housing (Tenancies) (Scotland) Act 2016 which stated that the FtT had whatever competence a sheriff would have in civil proceedings. Reference was made to the overriding objective in the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017. I was further referred to the case of *Czerwinski* v *HMA* 2015 SLT 610 as a useful authority when construing the meaning of "arguable grounds for appeal" in terms of section 46(4) of the Tribunals (Scotland) Act 2014. Finally I was referred to the observations of Sheriff Pino Di Emidio in *Dymoke* v *Best* [2020] UT 18. The appellants submitted that in *Dymoke* my fellow Upper Tribunal Member accepted that the "arguability" test for permission to appeal was a relatively low hurdle.

[12] In written submissions the respondents submitted that anyone reading the decision of the FtT would struggle to make coherent sense of the decision. The respondents did not resist the grounds of appeal. The respondents made reference to the effect of the overriding objective as stated in the 2017 Regulations. With reference to Rule 3, and the use of the word "must", by refusing to join other proprietors to the application, the FtT had failed to fulfill the responsibility placed on it in terms of the procedure rules.

[13] The respondents submitted that the FtT's conclusion in paragraph 20 of its decision, namely that proprietors of the other properties did not require to be party to proceedings for the right of relief to be effective, demonstrated erroneous thinking and was an error in law. In this case the respondents had not sought to shrug their responsibility as landlord. They had relied on section 16 (4) of the Housing (Scotland) Act 2006 as they had not delayed in their attempts to put things right for the tenants but this meant that their remained a duty of care between the remaining proprietors and the respondent's tenants and it was right that the co-proprietors should have been joined as additional respondents to these proceedings.

Conclusion

[14] This is an appeal in terms of section 46 of the Tribunals (Scotland) Act 2014. As such, an appeal is to be made on a point of law only. In terms of section 46(4) permission to appeal may be given if I am satisfied that there are arguable grounds for appeal. The function of the Upper Tribunal is limited as it is not an opportunity to rehear the factual matters previously argued before the FtT. My task is to decide whether the grounds of appeal disclose an arguable error of law on the part of the FtT.

[15] In terms of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, Schedule 1, Rule 2(1) states that the overriding objective of the FtT is to deal with the proceedings justly. Dealing with proceedings justly includes those matters listed in Rule 2(2). In terms of Rule 3 the FtT must seek to give effect to the overriding objective when exercising any power under the Rules and when interpreting any rule. It must manage proceedings in accordance with the overriding objective. The parties to an application must assist the FtT to further the overriding objective.

[16] Rule 32 deals with the addition, substitution and removal of parties. The Rule is in the following terms:

> **"32. – Addition, substitution and removal of parties**
> (1) The First-tier Tribunal may make an order adding, substituting or removing a party to the proceedings, including where-
>
> > (a) the wrong person has been named as a party; or
> > (b) the addition, substitution or removal had become necessary because of a change in circumstances since the start of proceedings.
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> (2) If the First-tier Tribunal makes an order under paragraph (1), it may give such consequential orders as it considers appropriate.
>
> (3) A person who is not a party may make a written application to the First-tier Tribunal to be added or substituted as a party under this rule."

[17] The FtT determined that the respondents were not liable for reimbursement for rent or compensation as a result of the appellant's tenanted property failing to be wind and water tight for a period of time. In this respect, the respondents succeeded in arguing that they were entitled to rely upon sections 16(4) and 16(5) of the Housing (Scotland) Act 2006. Having satisfied the FtT that the respondents were entitled to rely on this statutory provision the matter in dispute, so far as the FtT was concerned, was at an end. The respondents were found not to be liable. In those circumstances, in my judgement, the FtT cannot be said to have erred in law in refusing to join other parties, namely the remaining 11 co-proprietors of the tenement, as additional respondents.

[18] I consider that the FtT resolved this dispute by considering, properly interpreting, and applying the relevant law. It would not have been appropriate to accede to the respondents request to join other parties to the application as additional respondents. The dispute was correctly identified and based on the facts as found to exist the FtT did not err in law in refusing to join other parties to the application.

[19] Furthermore, I note that, in terms of the grounds of appeal, it is the decision of the FtT not to add other parties to the proceedings that is the part of the decision being contested. This is the error in law which the appellants seek to argue. It is not the case, as I understand the basis of the appeal that the appellants seek to argue that the FtT was wrong in dismissing the application against the respondent. The appellants seek to argue that it is the other potential respondents, namely the other tenement co-proprietors, who should have been called as additional parties that may have liability to meet their claim. In this respect, I can identify no legal basis upon which the FtT would have been entitled to add further respondents in terms of the application before it. The FtT had no jurisdiction in this case to consider potential delictual liability on the part of the other co-proprietors. Rule 32 would

not, in my judgement, allow for the co-proprietors to be joined to the application as was requested by the respondents.

[20] Having given consideration to the submissions of both the appellants and the respondents I am not satisfied that there are arguable grounds for this appeal. Having reconsidered this request for permission to appeal, I refuse permission for the reasons above stated.