Upper Tribunal for Scotland

[2021] UT 37
UTS/AP/21/0016

DECISION NOTICE OF SHERIFF IAN HAY CRUICKSHANK

ON AN APPLICATION FOR PERMISSION TO APPEAL – RECONSIDERATION OF UPPER TRIBUNAL PERMISSION TO APPEAL DECISION

in the case of

MR NWAORA RANDALL ENE, 357 George Street VACATED, First Floor Right, Aberdeen, AB23 8LR

Appellant

and

MR GRAME TOCHER, c/o 2 Corse Grove, Bridge of Don, Aberdeen, AB23 8LR
per Peterkins Solicitors
100 Union Street, Aberdeen, AB10 1QR

Respondent

FTT Case Reference FTS/HPC/EV/20/2501

7 October 2021

Introduction

Application for Permission to Appeal Reconsideration

[1] Nwaora Randall Ene ("the appellant") has sought permission to appeal a decision of the First-tier Tribunal Housing and Property Chamber ("the FtT") dated 26 March 2021. Leave to appeal was refused by the FtT on 13 May 2021. Permission to appeal was also refused by Upper Tribunal member Sheriff Jamieson in terms of his written decision dated 28 June 2021.

[2] The appellant has requested re-consideration of the decision of Sheriff Jamieson refusing permission to appeal. The request is made in terms of 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 1 September 2021 and was conducted via the Cisco WebEx platform. This technology allowed the parties to attend by remote means from various locations. The appellant appeared and represented himself. The respondent, who also attended the hearing, was represented by Mr Kingston.

Background to this appeal

[4] This matter relates to a short-assured tenancy entered into between the parties on 1 July 2015. The initial period of let was from 1 July 2015 until 30 June 2016. The lease provided for the landlord to give the tenant two months written notice of termination otherwise the lease would continue on a month-to-month basis until terminated "by written notice as aforesaid". The initial rent was £650 per month. This was reduced by agreement in March 2018 to £475 per month. The appellant had not paid rent since March 2020.

[5] Agents for the landlord served a notice to quit, and a notice in terms of section 33 of the Housing (Scotland) Act 1988 on 6 May 2020. In line with the requirements of the Coronavirus (Scotland) Act 2020, the notice period was extended to 6 months. The date given to the appellant for removal in terms of the Notice to Quit was "by the 30 November 2020". The section 33 notice stated that the landlord required vacant possession "as at 30/11/2020" and further stated "The tenancy will reach its termination date as at that date

and WE NOW GIVE YOU NOTICE THAT YOU ARE REQUIRED TO REMOVE FROM THE PROPERTY ON OR BEFORE 30/11/2020"

[6] Following service of the notice to quit the appellant did not voluntarily vacate the property. An application was made to the FtT seeking an order for eviction. At a Case Management Discussion on 26 March 2021, at which the appellant was not present, an order for possession upon termination of a short-assured tenancy was made in favour of the lanlord. The appellant had lodged written submissions which were considered at the Case Management Discussion. Given the fact that an earlier Case Management Discussion had been adjourned on the request of the appellant the FtT determined that it was appropriate to proceed with the hearing in the appellant's absence.

[7] In their findings in fact the FtT found that a valid notice to quit had been served, the tenancy had reached its ish, tacit relocation was not operating, as at 12 November 2020 rent arrears had increased to £3,200, and arrears at the date of the hearing were in the region of £4550. The FtT concluded that it was reasonable in all the circumstances that the order should be granted.

[8] A further aspect to this appeal relates not to the decision reached by the FtT itself but to the enforcement procedure, namely the eviction procedure by Sheriff Officers, which followed. The appellant seeks to argue that the eviction which took place on 9 June 2021 proceeded whilst the 30 day period for applying for permission to appeal to the Upper Tribunal had not expired and, as such, was unlawful.

Grounds of appeal

[9] The appellant, in his Form UTS-1 states his grounds of appeal were contained in an email sent on 8 June 2021. He thereafter further outlines the grounds of appeal in the Form

UTS-1 in restricted terms. The grounds of appeal, as I understand them, can be summarised as follows:

1. The decision made by the FtT was a reserved matter under the Scotland Act 1998 as issues of immigration law were engaged. As such, the proceedings should be transferred to the Upper Tribunal (United Kingdom) or to the Court of Session.

2. Alternatively, proceedings should have been transferred to the Sheriff Court as the issue related to rent arrears.

3. That the notice to quit was invalid as it failed to comply with the provisions contained in the Private Housing (Tenancies) (Scotland) Act 2016. In particular the Notice to Quit failed to disclose the grounds relied upon for recovery of possession.

4. That the section 33 notice was invalid as the wrong date of the tenancy was stated. The FtT erred in granting the order for eviction as no valid notice in terms of section 33 had been produced and relied upon.

5. That no ish was specified in the tenancy agreement.

6. That the FtT proceeded unlawfully by proceeding with the Case Management Discussion in his absence.

7. That the FtT misdirected itself in determining that it was reasonable in all the circumstances to grant the order for eviction.

8. That the eviction which took place on 9 June 2021 proceeded whilst the 30 day period for applying for permission to appeal to the Upper Tribunal had not expired and, as such, was unlawful. This, the appellant argues is a competent ground of appeal which the Upper Tribunal has jurisdiction to consider and, further, has the power to remedy and impose orders to, effectively, reduce and set aside the unlawful eviction process in this case.

Discussion

[10] At the Hearing on 1 September 2021 the appellant adopted all of the written submissions which had been lodged and provided further oral submissions. He emphasised what he considered to be procedural improprieties on the part of the FtT. He submitted that insufficient weight had been given to the historical background of the tenancy and the fact that his inability to pay rent had been materially affected by his immigration status and the fact that he could not work. In addition, the appellant argued that no consideration had been given to the fact that he had been paying rent prior to the Coronavirus Pandemic. The appellant continued to argue that the eviction had been unlawful given its timing and, as such, the Upper Tribunal had the power to consider this as a valid ground of appeal which would entitle the Upper Tribunal to quash the decision of the FtT.

[11] Mr Kingdom referred to documentation and submissions he had made before the FtT. It was not accepted that the notices served had been inadequate or incorrect. Mr Kingdom submitted that the Case Management Discussion had been previously re-scheduled after taking account of a request from the appellant regarding his religious beliefs. The FtT had in no way been misled as to the factual background and the reasons for seeking repossession. Taking account of all the circumstances, the FtT had exercised its discretion appropriately and it was reasonable for the order sought to have been granted. It was not accepted that the Upper Tribunal could look specifically at the eviction process which followed upon the order being granted by the FtT and, even if the full 30 day period allowed for appeal had not expired, it did not form the basis of a competent ground of appeal.

Conclusion

[12] 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 only if I am satisfied that there are arguable grounds for the appeal. My function, as a member of the Upper Tribunal, is limited as it is not an opportunity to rehear the factual matters previously argued before the FtT.

[13] 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 to 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 (*Advocate General for Scotland* v *Murray Group Holdings* 2016 SC 201 at paras 42 to 43). It is for the appellant to satisfy me that there are arguable grounds for appeal which point to an error of law.

[14] It must also be noted that in terms of Rule 2 of the 2016 Rules the purpose of the Upper Tribunal is to hear and decide cases transferred or referred to it from the FtT and to hear and decide appeals from the FtT. In terms of section 47(2) of the Tribunals (Scotland) Act 2014, if the Upper Tribunal quashes the decision of the FtT on a point of law it may re-make the decision, remit the case to the FtT or make such further order as the Upper Tribunal considers appropriate.

[15] With regard to the appellant's first ground of appeal I do not consider that the appellant's immigration status in any way affects the jurisdiction of the FtT. It was entirely competent for the FtT to consider the application before it. In relation to the appellant's

second ground, the Sheriff court's functions and jurisdiction relating to an assured tenancy has been transferred to the FtT (Section 16(1)(c) of the Housing (Scotland) Act 2014).

[16] The appellant's third ground of appeal is not arguable. The tenancy was created under the Housing (Scotland) Act 1988. A notice to quit in the circumstances of this case does not require that any grounds need to be given in relation to the reasons for issuing the said notice. The notice to quit complied with the requirements of the lease and observed the necessary extended notice period required by current legislation.

[17] The appellant's fourth ground of appeal is not arguable. I can find nothing prejudicial in the terns of the section 33 notice served on the appellant. The said notice served its statutory function, namely, that the landlord had given the tenant notice that he required possession of the house (section 33(1)(d)).

[18] The appellant's fifth ground of appeal is not arguable. The FtT properly considered whether the lease had reached its ish as they were required to do in terms of section 33(1)(a) of the Housing (Scotland) Act 1988. They found in fact that the lease had reached its ish based on evidence, which the FtT accepted, to support that fact.

[19] The appellant's sixth ground of appeal is not arguable. In proceeding with the Case Management Discussion in the absence of the appellant the FtT properly considered and balanced the interests of both parties. It is clear that the FtT gave full consideration to the absence of the appellant prior to proceeding with the Hearing. The FtT's reasoning is contained in paragraph 3 of the decision and the conclusion that it was fair to proceed was reasonable in the circumstances.

[20] The appellant's seventh ground of appeal is not arguable. Based on the facts which the FtT found proved it was reasonable for the order sought to be granted. As I have observed, this is not an opportunity to rehear the factual matters previously argued before

the FtT. In the absence of an error of law it is not for me to substitute my own decision for that of the FtT merely because I either disagree with the conclusion it reached or because I would have arrived at a different conclusion had I been dealing with this matter at first instance.

[21] The appellant's final ground of appeal is not arguable. I am dealing with an appeal from the FtT. It is whether or not, in reaching the decision, the FtT erred in law. It is not the function of the Upper Tribunal to consider the enforcement procedure which followed upon the decision of the FtT. If the enforcement procedure was unlawful given its timing, a matter upon which I express no view, then should any remedy be open to the appellant, such remedy is not within the jurisdiction of the Upper Tribunal.

[22] Based on the facts which the FtT found proved it was appropriate in law to grant the order sought by the respondent. There is no basis upon which the Upper Tribunal is entitled to interfere with the decision. The grounds of appeal are unarguable. Permission to appeal is refused.

Sheriff Ian H Cruickshank

Member