Upper Tribunal for Scotland

2022UT20

UTS/AP/22/0014

DECISION OF SHERIFF F McCARTNEY

On an application for permission to appeal (decision of first-tier tribunal for Scotland)

In the case of

TONERO LTD,
1/2, 23 Milovaig Street, Glasgow, G23 5JA

Appellant

and

COUNTRYWIDE RESIDENTIAL LETTINGS,
Countrywide House, Lake View Drive, Annesley, Nottingham, NG15 0DT
per Anderson Strathern, George House, 50 George Square, Glasgow, G2 1EH

Respondent

FTT Case Reference FTS/HPC/LA/21/3139-3142

19 July 2022

Decision

[1] Leave to appeal is refused.

Introduction

[2] On 14 March 2022, the First-tier Tribunal rejected four applications made by Tonero Ltd. It ruled that the applications were all frivolous in terms of Rule 8(1)(a) of the

First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017. The First-tier Tribunal refused leave to appeal. Tonero Ltd renew their application for leave before the Upper Tribunal.

[3] A telephone hearing was held on 17 June 2022. The Appellant was represented by Mr Etineh, a director of the Appellants. The Respondent was represented by Mr McEntegart.

[4] It is helpful to have a short summary of the factual background. The Respondents provided services to the Appellants as letting agents for four properties. The Appellant made complaints about the services provided, ultimately making an application in November 2020 to the First-tier Tribunal alleging various breaches of the relevant Code of Practice for letting agents. That application was registered by the First-tier Tribunal under reference FTS/HPC/LA/20/2493. After the lodging of that application, settlement discussions took place between the parties. The Respondent considered those discussions concluded in a binding settlement; the Appellant disagreed that those discussions had such effect.

[5] To resolve the issue as to whether there was a binding agreement, the Respondents raised a Sheriff Court action seeking declaratory orders. On 5 October 2021 Sheriff Holligan determined settlement discussions between the parties formed a binding agreement to settle, and granted various orders ordaining the Appellant to take certain steps to implement the agreement. Sheriff Holligan's decision was not appealed. On 26 October 2021, a director of the Appellants contacted the First-tier Tribunal to withdraw application FTS/HPC/LA/20/2493.

[6] The Appellant then made four applications to the First-tier Tribunal, dated 21 December 2021. These are the applications rejected by the First-tier Tribunal and now sought to be appealed. These applications were registered under references

FTS/HPC/LA/21/3139 to /3142. The applications sought to raise various alleged breaches of the relevant Code of Practice. There is no dispute that the properties and alleged breaches of the Code raised before the First-tier Tribunal in the current appeals are the same as those raised in the application of November 2020, which Sheriff Holligan ultimately found was settled between the parties. The only difference between the applications is that the Appellant now allege breaches of the Code of Practice by the Respondent's conduct during the negotiations.

Grounds of appeal

[7] The Appellant has various documents before the Upper Tribunal setting out his ground of appeal, including written submissions. At the oral hearing the Appellant argued that six points of law arose for the Upper Tribunal to consider, as set out in their written application:

> "That the FTT reaches a decision totally at variance with the reasons for my application made in terms of the Housing (Scotland) Act 2014 section 48(3)
>
> The FTT fails to give me the benefit of the doubt (where there is a doubt)
>
> The FTT fails to act in accordance with section 14.1 "GOVERNING LAW and Clause 15 'JURISDICTION' of the settlement agreement
>
> The FTT fails to direct itself properly in law (ie the decision and statement of reasons fails to follow the statute, relevant legislations, case law that has interpreted how the law should be applied)
>
> The FTT ignores relevant factors and or takes into account irrelevant factors
>
> The FTT reverses the burden of proof or imposes too high a burden of proof"

[8] For each of point of law (bar point 3) a case or cases are cited, mainly English High Court authority.

[9] Specifically the Appellant alleges that the imposition of a time limit of 24 hours for the Appellant to respond to a settlement offer is a breach of paragraph 17 of the Code. By that paragraph the Respondents are required to be "open, honest, transparent and fair" in dealings with landlords. In terms of section 48 of the Housing (Scotland) Act 2014 a landlord is entitled to apply to the First-tier Tribunal for a ruling on whether the Code has been breached. The Appellant contrasts the time limits by which the Respondent dealt with his initial complaint (a matter of weeks) to the 24 hour period for the Appellant to respond to the offer. Reliance is placed on time limits in other consumer complaints guidance, such as the ACAS guidance on settlement agreements. The 24 hour deadline was so unfair that it amounts to a breach of the Code. Reference is made to psychological pressure put upon the Appellant by the time limit. The Respondents are said to have engaged in "gross misconduct", "unfairness", "dishonesty" and undue influence. The Appellant argues the First-tier Tribunal should have examined the behaviour of the Respondent during the settlement negotiations. Whilst the complaint arises because of the imposition of a deadline of 24 hours on the Appellant by the Respondent's legal agents, the complaint is about the Respondent. The obligations to act in accordance with paragraph 17 of the Code apply during settlement negotiations. In addition to claiming the breach of paragraph 17 of the Code before the First-tier Tribunal, the Appellant also sought an order that the settlement agreement was null and void, and a compensation order. An application cannot be frivolous in all these circumstances. The Appellant is a lay person and did not have legal advice during the negotiations.

[10] The Respondents opposed the appeal. In short, the Respondent's position is that no point of law arises from the decision of the First-tier Tribunal, and the decision of the First-tier Tribunal that the application was frivolous was correct and should not be interfered

with. Whilst Mr McEntegart also made submissions on a competency point, he indicated during the course of his submissions that as such points may not need to be relied upon, he was content to withdraw those points. I am grateful to him for his pragmatic approach.

[11] In the event of the Appellant failing in his application for leave to appeal, the Respondents sought the expenses of the hearing on the basis of Rule 12.2 of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016. It was submitted that it was the conduct of the Appellant which had caused today's hearing to proceed. The Appellant had agreed settlement terms in full and final settlement of all claims and had the benefit of legal advice at the time of the settlement discussions. There had been contested proceedings in the Sheriff Court already over the question of whether there was a settlement agreement. The settlement agreement was implemented (bar a contribution towards the Appellant's legal costs: that was not yet implemented as the Appellant had not provided the requisite invoice to show those legal expenses). The Appellant had already had his case considered by the First-tier Tribunal. Leave to appeal was refused by the First-tier Tribunal. The hearing today was caused by the Appellant's insistence on seeking leave to appeal in circumstances where the Appellant had already had numerous court appearances.

[12] Expenses were opposed by the Appellant; there was a breach of the Code and in those circumstances it was unfair that the Appellant should pay the expenses of today's hearing.

Discussion

[13] It is difficult to deal with the grounds of appeal separately. Whilst the Appellant was given the opportunity via a hearing before the Upper Tribunal to explain in law why the First-tier Tribunal erred in its decision of 14 March 2022 that the applications were frivolous,

the submissions made amount to a continuing grievance about, in particular, Sheriff Holligan's decision. The Appellant has not engaged with the legal test before this tribunal, or indeed before the First-tier Tribunal. The question before the Upper Tribunal is whether leave to appeal the First-tier Tribunal's decision of 14 March 2022 should be granted. The test, where leave to appeal is sought, is that an Appellant must show that there are arguable grounds of appeal (section 46(4) of the Tribunals (Scotland) Act 2014). Whilst this test, or a similar phrase, has been considered in a number of cases (see for example the summary of such phrases and their application in paragraph 9 of *Czerwinski* v *HMA* 2015 SLT 610), in a practical sense the Appellant must show a real issue for the Upper Tribunal to grapple with.

[14] The starting point is that the Appellant concedes that the properties and time periods are the same as the applications previously withdrawn before the First-tier Tribunal. It is also conceded that those applications were withdrawn following the decision by Sheriff Holligan. The appellant argues that the cases now before the First-tier Tribunal is different, because Sheriff Holligan only dealt with the issue of whether there was a binding agreement and Sheriff Holligan did not deal with the allegation that the Respondents had engaged in "improper conduct" during the settlement discussions.

[15] The Appellant's arguments are rejected. The Appellant has no reasonable prospects of success. Any question of the Respondent's conduct could have been raised within the Sheriff Court proceedings, where the Respondents were legally represented. It was not. The Appellant has not appealed Sheriff Holligan's decision. That decision determines the applications to the First-tier Tribunal alleging breaches of the Code were been settled and fell to be withdrawn. The First-tier Tribunal cannot make an order that such settlement is null and void. The Appellant fails to explain why a 24 hour deadline to respond during a

period of negotiations, with a tribunal hearing imminent, could be considered to be in any way "improper", far less unfair or dishonest, far less how that might be a breach of the Code. The Appellant fails to explain why there is psychological damage arising from the negotiations (noting that the Appellant is a limited company). The Appellant fails in any persuasive argument that new applications before the First-tier Tribunal would have any prospects of success whatsoever.

[16] The decision of the First-tier Tribunal that the applications should be rejected as frivolous is correct. The application before the Upper Tribunal is part of a continuing attempt by the Appellant to engage in futile litigation. Leave to appeal is refused.

[17] In relation to the motion for expenses, the test within Rule 12(2) is whether "that party's act, omission or other conduct has cause any other party to incur expense which it would be unreasonable for that other party to be expected to pay….".

[18] I am persuaded that the order for expenses should be granted. The applications before the First-tier Tribunal were hopelessly misconceived. Leave to appeal was refused by the First-tier Tribunal. Reasons were given by the First-tier Tribunal at both stages. Before the Upper Tribunal, the Appellant has stated bald points of law, without explanation or justification. The Appellant has continued with a line of litigation over a matter already settled. Due to the Appellant's actings, the Respondents have incurred expense. Turning to the second part of the test on whether it is unreasonable to expect the Respondents to pay those expenses, whilst I accept that the Respondents are a reasonably large company and the origins of the dispute arise from a commercial service provided to the Appellant, the dispute now is far removed from the question of these services. The current litigation is frivolous. It is hopeless misconceived. It is unreasonable to expect the Respondents to pay their expenses in such circumstances.

Conclusion

[19] Leave to appeal is refused.

[20] The Appellant is ordered to pay the expenses, as taxed by the Auditor of the Court of Session relative to respondent's expenses before the Upper Tribunal.