Upper Tribunal for Scotland

2022UT22
Ref: UTS/AP/22/0004

**DECISION OF**

Sheriff Iain M Fleming

**In respect of**

**APPLICATION TO APPEAL TO THE COURT OF SESSION**

Mr Mohammed Arshad, 584 Cathcart Road, Glasgow, G42 8AB
per AQA Property,
584 Cathcart Road, Glasgow, G42 8AB

Appellant

- and -

Mr Atif Aziz Khawaja, Mrs Samina Aziz Khawaja, 36 Garturk Street flat 0/2, Glasgow, G42 8JF
per Govan Law Centre,
Orkney Street Enterprise Centre, 18-20 Orkney Street, Glasgow, G51 2BX

Respondent

FtT case reference FTS/HPC/RP/19/2089

1 August 2022

**Decision**

[1] The Upper Tribunal refuses permission to the appellant to appeal the decision of 25 May 2022 to the Court of Session.

*Background*

[2] On 9 October 2019, the First Tier Tribunal for Scotland (Housing and Property Chamber) (hereafter "the FtT") issued a decision requiring the appellant to comply with a Repairing Standard Enforcement Order (hereafter "the RSEO") relative to the property known as and forming Flat 0/2, 36 Garturk Street, Glasgow G42 8JF. The FtT also considered whether a Rent Relief Order should be made in terms of section 27 of the Housing (Scotland) Act 2006 (hereafter "the 2006 Act") and determined that an appropriate reduction in the rent payable by the tenant to the landlord would be to reduce the rent payable under the tenancy by 90% until the RSEO had been complied with.

[3] The appellant appealed against that decision and the FtT granted permission to the appellant to appeal on 5 January 2022. On 25 April 2022, by Cisco WebEx, the Upper Tribunal heard and subsequently refused the appeal in terms of a written decision of 25 May 2022.

[4] The appellant has now contacted the Upper Tribunal seeking permission to appeal to the Court of Session "against the Rent Relief Order and permission to appeal the Upper Tribunal's decision that the landlord had failed to comply with the Repairing Standard Enforcement Order."

[5] By means of amplification the appellant states that "due to nature of work the latest damp report provider has clearly told us they cannot carry out damp-proof treatment while the tenant is living inside".

[6] Further, the appellant has indicated that he wishes permission to appeal to the Court of Session to "revoke this Rent Relief Order as well as the decision that landlord failure to comply with RSEO due to the tenant still living inside the property." It is stated within the application seeking permission to appeal to the Court of Session that the company who has been instructed to carry out the works is "refusing to carry out any work until (*sic*) the tenant is living in the property". In addition it is stated that for health and safety reasons the damp proof work cannot be carried out. In the view of the appellant the rent relief order is unfair.

[7] In order to obtain permission to appeal to the Court of Session against the decision of 25 May 2022 it is necessary that the appellant meet the terms of section 48 of the Tribunals (Scotland) Act 2014 (hereafter" the 2014 Act") which provides as follows:

> **"48 Appeal from the Tribunal**
> (1) A decision of the Upper Tribunal in any matter in a case before the Tribunal may be appealed to the Court of Session.
> (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 Upper Tribunal, or
> (b) If the Upper Tribunal refuses its permission, the Court of Session.
> (4) Such permission may be given in relation to an appeal under this section only if the Upper Tribunal or (as the case may be) the Court of Session is satisfied that there are arguable grounds for the appeal."

[8] The right of appeal to the Court of Session is characterised by section 50 of the 2014 Act as a "second appeal" in terms of section 50(7). That section also provides, so far as relevant to the

application, that for the purpose of section 48(1) of the 2014 Act the Upper Tribunal or (as the case may be) the Court of Session may not give its permission to the making of a second appeal unless also satisfied that subsections 3 and 4 of the said section 50 of the 2014 Act apply. Subsections 3 and 4 provide:

> (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.

[9] This is a second appeal. The underlying policy of the legislation is to restrict second appeals to narrow categories of cases. Accordingly, for permission to appeal to the Court of Session to be granted the appellant requires to identify a point of law, to satisfy the Upper Tribunal that there are arguable grounds of appeal and to identify that the second appeal would raise an important point of principle or practice. Alternatively, if an important point of principle or practice is not identified the Upper Tribunal is required to consider if it is satisfied that there is some other compelling reason for allowing a second appeal to proceed.

[10] That which the appellant seeks to identify as a ground of appeal in his application does no more than restate the factual case which he put before the FtT and before the Upper Tribunal. The appellant does not seek to argue why he considers that the Upper Tribunal decision is incorrect, beyond indicating that it is "Unfair against the landlord." Both the FtT and the Upper Tribunal

were aware of the factual position that the damp report provider was unable to carry out any damp proof treatment while the tenant was living inside the property. The Upper Tribunal decision sets out the law which applies and the steps which the appellant requires to take. The appellant considers the outcome to be unfair.

[11] In essence, the first task of the Upper Tribunal is to ascertain, with reference to the material submitted, whether the appellant has identified an error of law that is capable of being argued. Permission to appeal was granted originally by the FtT on a point of law and that was argued before the Upper Tribunal. Although the application for permission to appeal does not seek to identify an arguable ground of appeal, given that there was identified by the FtT a point of law which was capable of being argued and therefore being stateable I consider that the appellant has identified an arguable ground of appeal.

[12] The identification of a point of law alone is insufficient for determination of the application for permission to appeal to the Court of Session. In light of section 50(3) and section 50 (4) of the 2014 Act the Upper Tribunal may not give its permission to the making of a second appeal unless an important point of principal or practice has been identified to the Upper Tribunal or there is some other compelling reason for allowing a second appeal to proceed. No important point of principal or practice has been identified by the appellant. For an important point of principle or practice to be established it must be one that extends beyond the specific and limited interest of the appellant *(Eba v Advocate General for Scotland* [2011] UKSC 29. No such argument is placed

before the Upper Tribunal in the application to appeal. Further, no compelling reason for granting leave to appeal to the Court of Session has been presented or identified by the appellant. This category includes decisions which are perverse or plainly wrong or where, due to some procedural irregularity, the petitioner had not had a fair hearing at all. Such a definition does not apply in this case. The word compelling is a strong word which emphasizes the truly exceptional nature of the jurisdiction. *(Uphill v BRB (Residuary) Ltd* [2005 EWCA Civ 60.] No compelling reason to grant permission to appeal is apparent.

[13] In these circumstances, permission to appeal is refused.

Sheriff Iain Fleming
Member of the Upper Tribunal for Scotland

Notification of further right to make an application for permission to appeal [6]

The respondent has the right to make an application to the Court of Session for permission to appeal within the period of 42 days commencing with the date on which this decision is sent to parties.