

Upper Tribunal for Scotland



2022UT23
Ref: UTS/AP/21/0044

Decision of

Sheriff Pino Di Emidio sitting as a Judge of the Upper Tribunal for Scotland

in an Appeal against a

Decision of the First-Tier Tribunal for Scotland (Housing and Property Chamber)

in the case of

Countrywide Residential Lettings Limited t a Slater Hogg,
Greenwood House, 91-99 New London Road, Chelmsford, Essex, CM2 0PP

Appellant

and

Mr Archie Cowan,
2 Targe Wynd, Stirling, FK7 7XR

Respondent

First-tier Tribunal ref: FTS/HPC/LA/21/0307

Act: McEntegart, Anderson Strathern Solicitors

Alt: Party

14 July 2022

The Upper Tribunal for Scotland:

1. Refuses the respondent's preliminary applications made at the appeal hearing on 21 June 2022:
 - a. For refusal of the appeal without a full hearing due to the failure of the appellant's solicitor to join the remote hearing set for 20 May 2022; and
 - b. objecting to the lodging of the appellant's List of Authorities;

2. Grants the appeal:
 - a. Quashes the decision of the First-tier Tribunal for Scotland dated 28 September 2021 in so far as it found the appellant in breach of paragraph 21 of the Letting Agent Code of



Practice by not carrying out a check on the prospective tenant's right to reside in the United Kingdom;

- b. Quashes the Letting Agent Enforcement Order made by the First-tier Tribunal for Scotland on 28 September 2021 ordering the appellant to pay the respondent the sum of £7,302; and
- c. Remakes the decision, finds that the appellant was not in breach of paragraph 21 of the Letting Agent Code of Practice and rejects the respondent's complaint under this paragraph of the Code.

Note of reasons for decision

[1] This appeal raises a question as to whether the First-tier Tribunal had adequate evidence to support its conclusion that the appellant was in breach of paragraph 21 of the Letting Agent Code of Practice (made under Letting Agent Code of Practice (Scotland) Regulations 2016 (SSI 2016/133)) by failing to use reasonable care and skill when it failed to check on a prospective tenant's right to reside in the United Kingdom. There is a separate question as to whether the appellant has made sufficient concessions to the effect that it accepted that it was in breach of the Code.

[2] The appellant acted for the respondent in connection with the letting of a property at 2 Chamfron Gardens, Stirling, FK7 7XU. The letting was not successful. The tenant failed to pay the rent and was eventually evicted from the property. The respondent complained that the appellant had failed to comply with a number of the provisions of the Code when it acted for him in connection with the arranging of the tenancy. The decision of the First-tier Tribunal for Scotland dated 28 September 2021 rejected all other complaints but found that the appellant was in breach of paragraph 21 of the Code and issued a Letting Agent Enforcement Order ordering the appellant to pay the respondent the sum of £7,302.

[3] On 9 November 2021 the First-tier Tribunal granted permission to appeal on the question whether it had erred in law in determining that the appellant had failed to comply



with paragraph 21 of the Code when it failed to check on the prospective tenant's right to reside in the United Kingdom.

[4] The respondent requested a hearing on the appeal. An attempt to hold the remote hearing on 20 May 2022 was unsuccessful because the appellant's solicitor had technical difficulties in joining on that date. On that occasion I discharged the hearing on my own motion. The hearing was then re-scheduled for 21 June 2022 when it took place remotely and without incident.

Preliminary issues

[5] On 21 June 2022, the respondent, who joined the hearing from a different time zone in the Middle East, raised two preliminary matters. First, he objected to the admission of the appellant's List of Authorities, listing four items, which had been lodged shortly prior to the hearing fixed for 20 May 2022. The Tribunal had not specified any time limit for lodging of authorities. As the hearing set for 20 May 2022 was postponed, the respondent had ample opportunity to seek legal advice. He lives abroad but he had the means of seeking such advice using remote means of communication. The first two items on the List were plain on the face of the First-tier Tribunal decision. I refused the application.

[6] The second preliminary point was an application for the appeal to be refused without a full hearing due to the failure of the respondent to attend on 20 May 2022. This failure was said to be in line with the more general dilatory conduct of the proceedings by the appellant. It was regrettable that the respondent was put to inconvenience and delay by the technical problems on 20 May 2022, the refusal of the appeal without a full hearing would have been manifestly unjust and a disproportionate sanction for what is a problem encountered from time to time when proceedings are conducted remotely. I also refused this application.

The parties' submissions on the appeal



[7] Both parties presented written submissions in advance of the hearing. The appellant's position was that no evidence has been led as to what constituted the standard of reasonable care and skill in the circumstances of this case. At best, the respondent had established that in England letting agents would have had an obligation to check the visa status of the prospective tenant. That was not sufficient to allow the First-tier Tribunal to reach the conclusion it did. As a result the First-tier Tribunal erred in law by reaching a conclusion for which there was no evidence before it. The respondent submitted that the First-tier Tribunal was entitled to reach the conclusion it did and it had not erred in law.

The Nature of the Appeal

[8] This appeal is brought under section 46 of the Tribunals (Scotland) Act 2014. It is based on the proposition the First-tier Tribunal has made an error of law which entitles this Tribunal to interfere with its decision. In *Advocate General for Scotland v Murray Group Holdings Limited* 2016 SC 201 (IH) the Court of Session dealt with the nature of an error of law for these purposes. At paragraph [43] of the Opinion of the Court where Lord Drummond Young said:

“The third category of appeal on a point of law is where the tribunal has made a finding ‘for which there is no evidence or which is inconsistent with the evidence and contradictory of it.’ (*Inland Revenue Commissioners v Fraser*, [1942 SC 493] per Lord President Normand, pp 497, 498.) This runs into a fourth category, comprising cases where the First-tier Tribunal has made a fundamental error in its 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 tax tribunal could properly reach. In such cases we conceive that the Court of Session and the Upper Tribunal have power to interfere with the decision of the First-tier Tribunal as disclosing an error on a point of law (*Edwards v Bairstow*, [[1956] 3 AC 14] per Lord Radcliffe, p 36).”

[9] The appellant's submission is based on the third category described in the passage from *Advocate General for Scotland v Murray Group Holdings Limited* but it is necessary to consider the fourth category as well.



[10] Paragraph 21 of the Code provides, so far as relevant:

“you must carry out the services you provide to landlords ... using reasonable care and skill...”

The First-tier Tribunal’s decision

[11] The First-tier Tribunal’s decision purports to make a small number of findings in fact at paragraph 16. These are not really findings in fact based on the evidence it heard on the respondent’s complaints. The findings in fact relevant to this appeal, i.e., on the procedure in place for additional checks for prospective tenants from abroad can be found in the discussion in paragraph 17. The First-tier Tribunal thought the appellant’s employee generally credible and reliable but they were not satisfied with her evidence on this issue. Its main criticism of her is in the following passage.

“...her failure to provide any sort of explanation as to the failure to check [the tenant’s] was unsatisfactory. Whilst the tribunal acknowledges that “Right to Rent” checks are not a legal requirement in Scotland, failure to carry out checks of a non-UK citizen’s visa would mean that the agent could not be satisfied on the tenant’s ability to live in the Property as a long-term let.”

[12] The First-tier Tribunal set out its conclusion on the alleged breach of paragraph 21 of the Code at paragraph 18. It found that the respondent would not have agreed to let to the prospective tenant had he known of that person’s visa status and the onus was not on him to request a visa check be carried out. It went on:

“The [respondent] was entitled to rely on the [appellant’s] reasonable care and skill to reference prospective tenants appropriately. However the Tribunal considered that it would be reasonable to assume that where presented with a prospective tenant who has advised that he only just arrived in the UK, that a letting agent acting with reasonable care and skill would carry out a check on that prospective tenant’s right to live in the UK. This was not a short term let. “



The First-tier Tribunal's conclusion on paragraph 21 of the Code is founded on its findings at paragraph 17 as quoted above. Regardless of any legal requirement to carry out a visa check, the appellant could not be satisfied of his ability to reside in the property on a long-term basis.

[13] While the approach in paragraphs 17 and 18 just quoted is clear, there are some other aspects of the First-tier Tribunal's decision that are perhaps less satisfactory. There is a lengthy narration of the evidence of respondent's three witnesses at paragraphs 7, 8 and 10 and of the appellant's witness at paragraph 11. At paragraph 17 the First-tier Tribunal explained why it found some aspects of the evidence of the appellant's witness to be unsatisfactory. At paragraph 23 it resolved a conflict between the evidence of the respondent's wife and the appellant's employee by preferring the latter. While it is possible to discern the overall factual conclusions by a close reading of the whole text, the failure to make express findings in fact makes some parts of the decision somewhat difficult to follow. At paragraph 9, the First-tier Tribunal records that it refused to allow the respondent's witness Mr. Loble to be recalled on the second day of the hearing to give further evidence that might have touched on the question of the standard of reasonable care and skill to be expected of a letting agent. That may have been a decision that affected the final outcome.

Analysis

[14] The respondent's complaint relates to the standard of service provided by the appellant. The standard imposed by paragraph 21 to take reasonable care and skill reflects the language that is used to impose obligations on those who provide professional services in the law of delict and, sometimes, by implication in the law of contract. That standard would have applied if the respondent had sued the appellant in the ordinary courts for negligence. It is well established that in order to succeed in such a complaint it is necessary for the person making the complaint to satisfy a three part test. In the context of medical negligence in the leading case of *Hunter v Hanley* 1955 SC 200 Lord President (Clyde) said at 206



“... in regard to allegations of deviation from ordinary professional practice ... such a deviation is not necessarily evidence of negligence. Indeed it would be disastrous if this were so, for all inducement to progress in medical science would then be destroyed. Even a substantial deviation from normal practice may be warranted by the particular circumstances. To establish liability by a doctor where deviation from normal practice is alleged, three facts require to be established. First of all it must be proved that there is a usual and normal practice; secondly it must be proved that the defender has not adopted that practice; and thirdly (and this is of crucial importance) it must be established that the course the doctor adopted is one which no professional [person] of ordinary skill would have taken if he had been acting with ordinary care. There is clearly a heavy onus on a pursuer to establish these three facts, and without all three his case will fail. If this is the test, then it matters nothing how far or how little he deviates from the ordinary practice. For the extent of deviation is not the test. The deviation must be of a kind which satisfies the third of the requirements just stated.”

[15] Numerous other authorities could be cited to vouch this proposition as it applies in the common law of negligence. The consequence is that a fact finder requires not only to make findings about what the professional concerned did but also make findings about the standard which required to be achieved when exercising reasonable care and skill and whether on the facts found the professional failed to reach that standard.

[16] In this case the obligation to carry out work to a standard of reasonable care and skill is imposed by the Code. There is no material before me to suggest that the approach to compliance with the obligation in paragraph 21 should be treated any differently. It follows that in normal circumstances the respondent would have to establish three matters. These are that (1) the usual and normal practice of letting agents when dealing with proposed tenants from abroad would be to carry out the checks that the respondent claims were necessary; (2) the appellant failed to follow that practice; and (3) the course taken by the appellant was one that no professional person of ordinary skill would have taken if he or she had been acting with ordinary care. These are all matters of fact that require to be proved. The first and third requirements may often be established by reference to the evidence of an expert practitioner in the field, though other evidence might suffice.



[17] The First-tier Tribunal concluded as a matter of fact that the appellant did not carry out visa checks and was unimpressed by the evidence of the appellant's employee on the point. The appellant does not dispute that the First-tier Tribunal was entitled to make that factual finding. The First-tier Tribunal was entitled to be concerned at the standard of service provided by the appellant on this occasion but that does not entitle the First-tier Tribunal to assume that this amounted to a breach of the paragraph 21 of the Code. The First-tier Tribunal proceeded on an express assumption which took the place of evidence as to the standard required to be exercised by a letting agent on the question of checks into the prospective tenant's right to live in the UK.

[18] In the absence of an evidential base for its conclusion, was the First-tier Tribunal entitled as a specialist tribunal to make the assumption it did? The First-tier Tribunal thought the failure to check was a serious one that resulted in loss to the respondent. It might be suggested that the respondent's argument comes down to saying that the failure of the appellant's employee to carry out checks of a non-UK citizen's visa was so egregious that the First-tier Tribunal as a specialist tribunal was entitled to make the assumption it did because it was involved in an evaluative exercise of the kind discussed in *Advocate General for Scotland v Murray Group Holdings*. The task before the First-tier Tribunal was not one where its expertise could be a substitute for evidence on what the standard required by paragraph 21 actually was. There required to be evidence as to what actually constituted reasonable care and skill in this context. If there was such evidence it could have been challenged by the appellant. In the absence of such evidence the First-tier Tribunal had no foundation for its conclusion on the question of what was reasonable care and skill. Without that foundation there was no basis for a conclusion that the standard was not met in this case.

[19] The respondent has a fallback position that the appellant made a concession that it failed to comply with paragraph 21 of the Code. He did engage in correspondence with the



appellant but the emails from the appellant on which he relies do not contain a concession that paragraph 21 of the Code was breached. This argument is without foundation.

[20] The respondent complained about a number of other alleged failures to comply with paragraph 21 of the Code. The First-tier Tribunal's decision found against him on all those other complaints. Each complaint is dealt with in a separate paragraph which makes clear findings and contains further reasoning. The appellant pointed out that at paragraph 21 of its decision the First-tier Tribunal dealt with the respondent's complaint about a failure to check for earlier adverse decisions of the First-tier Tribunal relating to the prospective tenant which were a matter of public record. The First-tier Tribunal found that the appellant failed to make this check but noted the lack of evidence that a reasonable letting agent would have carried out such a check as a matter of course. The appellant is well founded in arguing that this was exactly the approach that should have been applied to the complaint of breach of paragraph 21 of the Code.

Result

[21] This Tribunal is satisfied that the First-tier Tribunal erred in law and that the appeal should be granted. Therefore the decision of the First-tier Tribunal and the related Letting Agent Enforcement Order ordering payment of the sum of £7,302 will be quashed.

[22] This Tribunal has power to re-make the decision in terms of section 48(2)(a) of the Tribunals (Scotland) Act 2014 and do anything that the First-tier Tribunal could do if re-making the decision (section 48(3)(a)). At the hearing the appellant submitted the decision should be remade if the appeal was successful. The respondent submitted that if the appeal was successful the case should be remitted to the First-tier Tribunal so that further evidence could be led to fill the gap identified in this appeal. In the circumstances there has to be some finality to the dispute. This Tribunal remakes the decision, finds that the appellant was not in breach of paragraph 21 of the Code and dismisses the complaint made under that paragraph.



Observations

[23] Given the terms of paragraph 18 of the First-tier Tribunal's decision with its express reference to making an assumption, an application for review under Rule 39 of First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 would have allowed that First-tier Tribunal the opportunity to consider whether it should change its own decision. Having regard to the approach taken at paragraph 21 of the First-tier Tribunal's decision, such an application might have carried some force and saved the expense of an appeal.

[24] The respondent has been unsuccessful because he did not lead evidence which was accepted by the First-tier Tribunal as to the necessary standard of reasonable care and skill. The failure of his claim under the Code does not preclude him from bringing a claim under separate civil court proceedings against the appellant on the basis of professional negligence. The enactment of the Code did not oust the jurisdiction of the civil court to decide upon such a claim.

Appeal provisions

[25] A party to this case who is aggrieved by this decision to set aside the previous decision of the Tribunal and re-decide the appeal may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.

Sheriff Pino Di Emidio
Member of the Upper Tribunal for Scotland