



DECISION OF

Sheriff Kelly

**ON AN APPLICATION FOR PERMISSION TO APPEAL
(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND)
IN THE CASE OF**

Mrs Razia Saeed, Mr Mohammed Saeed, 3 Roman Gardens, Glasgow, G41 5BT

Appellant

- and -

Ms Sazia Amin, 32 Melville Street, Flat 2/1, Glasgow, G41 2JT

Respondent

FTS Case Reference: FTS/HPC/RP/22/1601

Glasgow, 11 August 2023.

Decision

The Upper Tribunal refuses the appellant's application for permission to appeal.

Introduction

[1] The respondent, Ms Amin, lodged an application with the First Tier Tribunal for Scotland, Housing and Property Chamber ("FTS") contending that the appellants, the landlords, Mr and Mrs Saeed, had failed to meet the repairing standard in connection with the property at 98 Maxwell Drive, Glasgow, G41 5PR. An inspection was carried out and thereafter a hearing convened by the

FTS. A decision was issued on 3 September 2023 resulting in a Repairing Standard Enforcement Order (“RSEO”) which stipulated a number of works to be carried out at the property and a time limit for compliance.

[2] The tenant stated that the work had not been carried out. The FTS re-inspected the property and afforded the parties an opportunity to lodge written submissions and documents. After considering these, the FTS decided that the RSEO had not been complied with and issued a Rent Relief Order.

[3] In its decision dated 31 March 2023, the FTS carefully considered the evidence submitted to it in respect of the averred breach on the part of the landlord. At paragraphs 7 to 10 it noted the fruits of their re-inspection and summarised the evidence. Its findings in fact are noted at paragraphs 11 – 19. It provides reasons for each of the findings in fact.

[4] An application for permission to appeal was submitted to the FTS. On 19 May 2023 the FTS decided to refuse that application for permission. The appellant appeals to the Upper Tribunal for permission to appeal.

Arguable

[5] In terms of rule 3(6) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016, where the FTS has refused leave to appeal, the UT may give permission to appeal if “the Upper Tribunal is satisfied that there are arguable grounds for the appeal”, section 46(4) of the Tribunals (Scotland) Act 2014. Nowhere in the statute or secondary legislation is the phrase “arguable grounds for the appeal” defined. Case law in other situations is of limited assistance. For example, in *Czerwinski v HM Advocate* 2015 SLT 610, the court was formulating the appropriate

test for the grant of leave to appeal in an extradition case in the absence of statutory guidance. After reviewing several potential schemes or tests, it settled on adopting the test applicable to criminal appeals: “do the documents disclose arguable grounds of appeal”, in terms of section 107 of the Criminal Procedure (Scotland) Act 1995. Of that test it said this:

“Arguable in this context means that the appeal can properly be put forward on the professional responsibility of counsel”

[6] In *Wightman v Advocate General* 2018 S.C. 388 Lord President Carloway (at paragraph [9]) observed that arguability and statability were synonyms. That was said to be a lower threshold than “a real prospect of success”, the test applicable in deciding whether to grant permission for an application to the supervisory jurisdiction to proceed, in terms of section 27D(3) of the Court of Session Act 1988, as amended, see [2] – [9].

[7] The threshold of arguability is therefore relatively low. An appellant does, however, require to set out the basis of a challenge from which can be divined a ground of appeal capable of being argued at a full hearing. This is an important qualification or condition on appealing which serves a useful purpose. If no proper ground of appeal is capable of being formulated then there is clearly no point in wasting further time and resources in the matter proceeding or an appeal process being lengthened. The respondent in a hopeless appeal ought not to have to meet any further or additional procedure in a challenge with no merit. It is in the interests of justice that a ground of appeal which is misconceived, is stopped in its tracks.

Error or Point of Law

[6] *Advocate General for Scotland v Murray Group Holdings Ltd* [2015] CSIH 77; 2016 SC 201 (affirmed by UKSC in [2017] UKSC 45; 2018 S.C. (UKSC) 15) concerned an appeal from the Tax &

Chancery Chamber of the First Tier Tribunal under section 13 of the Tribunals, Courts & Enforcement Act 2007. An appeal to the Upper Tribunal was available “on any point of law arising from the decision made by the First Tier Tribunal”. The appeal thereafter to the Court of Session is “on any point of law arising from a decision made by the Upper Tribunal”. It was in this context that the Inner House examined what was meant by “a point of law”. It identified four different categories that an appeal on a point of law covers:

- (i) General law, being the content of rules and the interpretation of statutory and other provisions;
- (ii) The application of law to the facts as found by the First Tier Tribunal;
- (iii) A finding, where there was no evidence, or was inconsistent with the evidence; and
- (iv) An error of approach by the First Tier Tribunal, illustrated by the Inner House with examples: “such as 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.” ([41]-[43])

[7] In essence, therefore, the task of the UT is to ascertain, with reference to the material submitted, whether the appellant has identified in the proposed ground of appeal an error of law that is capable of being stated or argued before it at a hearing. That is a low bar. As with applications to the supervisory jurisdiction of the Court of Session at permission stage, the basis of a prima facie appeal ought to be capable of identification.

Hearing: 28 July 2023

[8] The appellant Mrs Saeed was personally present. The respondent was personally present together with her solicitor, Ms Cochrane. At the outset I noted with parties the proposed ground of appeal. The landlord said that this was correctly identified in the paper apart to the Form UTS1.

Appellant

[9] Mrs Saeed submitted that there was an arguable point of law. At all times the landlords were willing to carry out the work specified in the RSEO. However, they were not permitted access to the property. On many occasions they endeavoured to contact the tenant and to make arrangements. On one occasion all of the tradesmen attended and were refused access. It was said that this was not taken into consideration by the FTS.

[10] The landlords were unaware that they had a right of access to the property. They did not know that this situation could be classified as an emergency. On one occasion when they did ask for urgent access to the property to repair a leak this took 3 weeks to be facilitated. This matter was not taken into account by the FTS.

Respondent

[11] On behalf of the respondent, Ms Cochrane moved the Upper Tribunal to refuse the application for permission. No point of law had been identified capable of being argued before the Upper Tribunal. Ms Cochrane split her submissions in relation to two separate matters:

(1) There was no basis on the evidence for the findings in fact. This was not the case. Ms Cochrane drew attention to paragraph 21 of the FTS decision of 31 March 2023. The FTS was well aware of the landlords' position regarding difficulties in securing access. It dealt with these points. It could not be said that on the evidence this conclusion was not open to the FTS.

(2) Wrong approach to the case. Factual submissions were made related to mould and to the state of disrepair in the windows to the property. Whilst these were canvassed in some detail, Ms Cochrane's ultimate position was that these were a "side issue". The state of the property and the

reasons therefor were dealt with in the original FTS decision. It decided that the property was in a state of disrepair and an order was made for work to be carried out. It was not now open to the landlords to seek to re-argue the position. The decision under appeal from the FTS related to whether the remedial work had been carried out.

[12] It could not be said that the Tribunal had taken into account irrelevant considerations or left out of account relevant matters. This was not a decision that could be characterised as one that no reasonable Tribunal could arrive at. There was an evidential basis for the decision. No arguable point of law had been stated.

Reply

[13] In a brief reply Mrs Saeed reiterated the difficulties that she had encountered in arranging access. She disputed explanations provided in relation to mould in the property and provided an explanation in this regard. She endeavoured to update the position in relation to the present state of the property and the work which had to be carried out. She submitted that the FTS had taken the wrong approach to the case.

Decision

[14] The issue to be decided by the FTS in its decision of 31 March 2023 was whether the remedial work to be carried out in terms of the RSEO had in fact been carried out. It had the advantage of re-inspecting the property and of detailed submissions from parties. It carefully evaluated that evidence and arrived at certain conclusions in relation to the failure to comply with the FTS's earlier order.

[15] It dealt with the submission made by the landlords that they had been unable to carry out

the work because of limitations placed upon access to the property. Mrs Saeed repeated the difficulties that she had encountered in relation to arranging workmen to carry out work to the property. However, it is not open to the Upper Tribunal to re-evaluate this factual assessment carried out by the FTS unless it has gone wrong. The FTS's conclusion about the reason given for failing to carry out the work relative to access to the property is detailed at paragraph 21. This was a conclusion open to the FTS on the evidence available to it.

[16] Separately, it is asserted that the wrong approach was taken to the case by the FTS. Several factual matters were canvassed in relation to the disrepair and the reason why it came to be within the property. However, the decision under appeal concerns the failure to carry out work in satisfaction of the RSEO. What Mrs Saeed seeks to do is to reopen the prior decision and that on the basis of an error as to fact. The respondent was correct in describing this issue as one that does not arise for a decision in this appeal.

Conclusion

[17] No arguable point of law having been identified, the appellants' application for permission to appeal is refused.