



DECISION OF

Sheriff Ian Hay Cruickshank

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

Mr Eric Hamilton

Appellant

- and -

Lowther

Respondent

FTS Case reference: FTS/HPC/PF/18/3124

1 September 2023

Decision

Refuses the appellant's request for an extension of time to lodge his notice for permission to appeal the decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) dated 5 December 2022; Refuses to admit the appellant's late notice in terms of Rule 3(5)(b) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016.



Introduction

[1] In this appeal a preliminary issue arises. Mr Eric Hamilton (“the appellant”) has lodged a notice requesting permission to appeal in terms of section 46(3)(b) of the Tribunals (Scotland) Act 2014. His application has not been lodged timeously.

[2] After a very lengthy procedural history the FTS issued a written decision dated 5 December 2022 finding that the respondents had breached the Property Factors (Scotland) Act 2011 Code of Conduct. The FTS proposed to issue a Property Factor Enforcement Order (“PFEO”). In terms of section 19 of the 2011 Act the FTS allowed the parties an opportunity to make representations in relation to the terms of the proposed order and gave them 14 days to do so. The respondents submitted written representations but the appellant did not. The FTS thereafter issued the PFEO.

[3] On 19 January 2023 the appellant emailed the FTS stating he did not agree that the sum of £500 awarded should be credited to his Property Factor account. On 31 January 2023 the FTS responded and advised it was normal practice for the payment to be made to such an account. On 6 February 2023 the appellant responded by email expressing dissatisfaction that the payment was not made to him personally. He emailed again on 8 February 2023 advising that he wished to appeal the decision of the FTS dated 31 January 2023 (albeit there was no decision made on that date). The FTS treated this as an application seeking permission to appeal.

[4] Permission to appeal was refused by the FTS on 24 February 2023 and its written decision was received by the appellant on 28 February 2023. The appellant’s request for permission to appeal, in Form UTS-1, is dated 16 April 2023 but is stamped as being received by the Upper



Tribunal for Scotland (“UT”) on 31 May 2023. The appellant requested that the UT grant an extension of time for submitting the notice for permission to appeal.

[5] On receipt of papers I issued an order assigning a Hearing to determine the preliminary issue as to whether an extension of time for lodging the notice of appeal should be granted in terms of Rule 3(5) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 (“the 2016 Regulations”). The order stated that it was for the appellant to explain why it was said to be in the interests of justice that the time should be extended. The appellant was invited to lodge documentation or written evidence in support of that. The Order further stated that the respondents were entitled to provide written representations or to participate personally in the Hearing.

Grounds of appeal

- [6] The appellant’s proposed grounds of appeal can be summarized as follows:
1. The FTS erred in issuing a PFEO which included that the respondents must credit the appellant’s factoring account in the sum of £500.00 to recompense the appellant for the worry, stress and inconvenience incurred as a result of breaches of the Code when the FTS should have ordered the payment be made direct to the appellant.
 2. That the sum of £500.00 as awarded was, in any event, inadequate to compensate the appellant for the breaches of the Factoring Code found proved by the FTS.

[7] In relation to the matter of late lodging of the appeal, and in requesting an extension of time, the appellant in his Form UTS-1 stated the following:



“I could not submit appeal on time due to a period of illness I have been suffering and this was beyond my control and in the interests of justice I am requesting more time to appeal the tribunal’s decision. I am ready now to submit the appeal and apologise for any inconvenience this has caused.”

Submissions at the Hearing

[8] The Hearing to consider the preliminary issue was assigned as a hybrid hearing and proceeded on 29 August 2023. The appellant stated he could not attend by remote means. Accordingly he attended personally at the Tribunal Centre in Glasgow. I attended remotely by WebEx as did the legal representative for the respondents.

[9] The appellant did not lodge written submissions in advance of the hearing nor did he produce any vouching or written evidence in support of his request for the time limit to be extended. He provided oral submissions for my consideration. A great deal of these submissions were focused on the potential merits of the appeal. I reminded the appellant that whereas the merits might be a factor to be considered I wished to hear detailed submissions on why the application was lodged late.

[10] The appellant’s submissions on reasons for late lodging attributed to his state of health were relatively brief. He stated that he suffered from diverticulitis. This was a debilitating health condition and it meant that there were periods when he could not leave his house. The appellant confirmed he stayed with his brother but stated his brother could not have assisted him in lodging the appeal timeously.



[11] The appellant also submitted that he had been trying to secure legal representation without success throughout the lifetime of the application before the FTS. He had found it impossible to find a solicitor who was prepared to act in Tribunal proceedings under the legal aid scheme. The Law Society had provided him with a list of 50 solicitors who might be in a position to assist but he had not been able to instruct any solicitor. He cited lack of legal assistance as another factor why the appeal had been lodged late.

[12] Mr Adams, for the respondents, adopted the written submissions which had been lodged in advance of the hearing and provided further oral submissions. He submitted that it was not in the interests of justice for an extension of time to be granted. The case had an inordinate and lengthy procedural history. The appellant had first lodged his application with the FTS in November 2018. The interests of justice required that proceedings should be brought to a conclusion.

[13] It was submitted that further delay was prejudicial to the respondents. During the whole life of the proceedings the appellant had made no payments to the respondents as Property Factors. Prior to the application being lodged with the FTS the respondents had raised a simple procedure claim against the appellant to recover sums they considered due under the parties' factoring agreement. This action was paused in the Sheriff Court to await the outcome of the FTS application. The respondents had continued to meet the appellant's share of the common policy buildings insurance and were suffering detriment.



[14] Mr Adams also submitted that there had been various adjournments requested by the appellant before the FTS. There had been a previous appeal to the UT. This was now the second application for permission to appeal which had been lodged late.

[15] Mr Adams candidly admitted that if illness was the reason given for late lodging that would not ordinarily lead to an objection. On this occasion it was appropriate to object in what he described as an exceptional case and based on the claim of illness, for which there was no medical or other evidence, it was not in the interests of justice to extend the time limit. Similarly, on the matter of obtaining legal assistance only general information had been given without any specific explanation given as to why securing legal assistance had proved such a barrier. Mr Adams was aware that there were firms who did represent clients at Tribunals under the legal aid scheme.

Discussion

[16] In terms of Rule 3(9) of the 2016 Regulations a person who intends appealing the FTS refusal of permission to appeal must provide a notice of appeal to the UT within 30 days after the day of receipt by that person of the refusal of permission to appeal. In terms of Rule 3(5)(a) if an appellant lodges a notice of appeal later than the time required then the notice of appeal must (i) include a request for an extension of time, (ii) explain why the notice of appeal was not provided in time; and (iii) state why it is said to be in the interests of justice that the time be extended. Unless the UT extends the time for lodging the notice of appeal the UT may not admit the notice (Rule 3(5)(b)).



[17] The issue of when late lodging of an appeal will be allowed, and the tests to be applied, have been developed in the jurisdiction of England and Wales. In *Norwich and Peterburgh Building Society v Steed* [1991] 1 WLR 449, a case concerning the factors relevant to an application for permission to appeal where lodged late, the Court said this:

“The matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay; secondly, the reasons for the delay; thirdly, the chances of the appeal succeeding if the application is granted; and fourthly the degree of prejudice to the respondents if the application is granted” (McCowan LJ at page 450)

[18] A person’s health condition, if relied upon as a reason, is always an important consideration when deciding whether to grant an extension of time. The proviso is that the health condition was operative at the relevant time, that it explains or excuses the failure to act timeously and there is no countervailing interest to any other party, such as long delay. (*J v K* [2019] EWCA Civ 5 at paragraph 39 specifically addressing the issue in relation to mental ill-health)

[19] Even where there is an acceptable explanation for the delay, the length of the delay remains relevant. There will be cases where the delay is too long to justify an extension of time. The significance of the merits of the appeal will depend on other factors. Little significance need be attached to the merits where the delay is short or excusable. Greater significance may attach where delay is lengthy. It might be unnecessary to go into the merits of the prospective appeal in much detail (*R v Secretary of State for the Home Department ex p Mehta* [1975] 1 WLR 1087 at 1091).



[20] The issue of prejudice requires consideration of the effect of extending or refusing the time limit. It should be a careful balance of the respective prejudice that would be suffered by each party dependent on how the court's discretion is exercised.

[21] Specifically, in terms of Rule 3(5) of the 2016 Regulations the party who seeks the extension must convince the court that it is in the interests of justice for the time limit to be extended. The interests of justice require that the fairness of allowing an extension of time has to be balanced against the interests of all parties. Ultimately, the Rule does not allow for an extension of time as a matter of right in every case. There is good reason for that. Once the time for appealing has elapsed the respondent would be entitled to regard the decision as final. Deprivation of that entitlement can only be "on the basis of a discretionary balancing exercise, however blameless may be the delay on the would-be appellant" (per Lord Donaldson of Lynton MR in *Norwich and Peterburgh Building Society v Steed* at page 454).

Conclusion

[22] This case has an extraordinary procedural history to date. A detailed chronology is incorporated in the decision of the FTS and I will not repeat it. Putting it at its most succinct the appellant lodged his application before the FTS in November 2018. He lodged a previous appeal to the UT (UTS/AP/19/0041) first considered without a hearing and thereafter reconsidered at a hearing. The judgement of Sheriff Miller dated 6 December 2019 refused permission to appeal late. The judgement of Sheriff Fleming dated 19 March 2020 extended the time limit for lodging permission to appeal late and the appeal itself was ultimately granted with the matter remitted



back to the FTS. In the prior appeal the appellant lodged the permission to appeal request late by over four months and it was with considerable hesitation that the UT extended the time limit.

[23] On the matter of the written decision dated 5 December 2022 now sought to be appealed, notwithstanding that it was accompanied with a proposed PFEO in relation to which the parties were given 14 days to make representations, any application for permission to appeal should have been lodged by the appellant with the FTS within 30 days of the date of the decision being sent to him. It seems clear that the appellant missed that time limit. His first contact with the FTS was on 19 January 2023 and it was his email of 8 February 2023 that was taken by the FTS as an application for leave to appeal. The FTS did not address the issue of whether an application for an extension of time was required and it should have done so.

[24] The appellant received the decision of the FTS refusing permission to appeal on 28 February 2023. He should have lodged his application with the UT within 30 days after the date of receipt of that refusal, namely by 30 March 2023. The application was not received by the UT until 31 May 2023. That was two months late.

[25] The length of delay here is significant. The reasons for the delay are given as a health condition which impacted on the appellant and his ongoing difficulties in securing legal representation. I note the latter reason was given by the appellant as justification for late lodging to the UT in his previous appeal application.

[26] The principal reason advanced by the appellant to explain the late lodging of the current appeal was given as his health condition. Little detail was provided. No medical evidence in support of his condition, and the limitations it would bring, was lodged or referred to. I have no



way of adequately assessing to what extent the appellant's health condition impacted on his ability to observe the time limit provision of the 2016 Regulations. In particular, I have been provided with no information or evidence which assists in ascertaining how the health condition impacted over the two month period in question.

[27] Without considering the merits in detail I balance these against the significant period of delay. Having considered the very comprehensive written decision of the FTS and the reasoning provided for that decision, on a preliminary basis, I have concluded that the appellant's chances of success on appeal are extremely limited even presupposing that I could be persuaded to grant permission to appeal in the first place.

[28] I also look to the degree of prejudice to the respondents if the extension is granted. This goes beyond the fact that, if granted, the respondents would become involved in further appeal procedure. There is here the matter of the unresolved simple procedure case in the Sheriff Court paused until the FTS matter has been determined. That simple procedure case has been paused for approximately 4 years and 9 months. The respondents are entitled to have that matter progressed and resolved. There is also the matter of ongoing non-payment of factoring charges which the appellant accepts but provides no reasoned explanation as to why this is the case.

[29] Finally, there is the overall procedural circumstances of this case. This is not an isolated example of the appellant failing to comply with time limits. This is the second occasion where the appellant has lodged an appeal to the UT late. Given that previously he failed to convince the first UT member that it was in the interests of justice to extend the time limit, and only



marginally convinced the second UT member to extend the time limit, the appellant cannot argue he has no prior experience of appreciating how important the observance of time limits are.

[30] Balancing all relevant factors the appellant has failed to convince me that it is in the interests of justice that the time be extended for lodging his notice to appeal. Having refused to extend the time limit the 2016 Regulations state that the appellant's notice may not be admitted.

Sheriff Ian Hay Cruickshank

Member