



**DECISION ON PERMISSION TO APPEAL AND ORDER NO. 3 IN CONNECTION
THEREWITH AND DECISION ON PRELIMINARY ISSUES
BY**

SHERIFF GEORGE JAMIESON

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

Mr Campbell Taylor, Miss Louise Drysdale, 36 Dalmahoy Crescent, Balerno, Edinburgh, EH14
7BX
per DWJLAW,
15 North Claremont Street, Glasgow, G3 7NR

Appellants

- and -

Mr Nicholas Karl Hocking, Flat 10 28 Citypark Way, Edinburgh, EH5 2FA
per TC Young,
7 West George Street, Glasgow, G2 1BA

Respondent

FTS Case Reference:- FTS/HPC/EV/22/2683

Paisley 6 November 2023

Decision: Permission to Appeal; and Order No. 3

The Upper Tribunal for Scotland (“UTS”) grants permission to the Appellant to appeal to the UTS against the decision of the First-tier Tribunal for Scotland (“FTS”) dated 4 May 2023 granting an eviction order against the Appellants, on grounds of appeal 2.1, 2.2, 4.2 and 5; Refuses permission to appeal on grounds of appeal 1, 3(i) and 4.1; **Orders** parties to comment on the matters in

paragraphs [17] and [18] of this Decision in their Response and Reply to the extent they think appropriate.

Decision: Preliminary Issue in Respect of Grounds of Appeal

The Upper Tribunal for Scotland (“UTS”) dismisses grounds of appeal 3(i) – (iv) from further consideration by the UTS.

Introduction

[1] By decision dated 21 September 2023, the UTS ordered a combined hearing be fixed to determine the Appellants’ application for permission to appeal on grounds of appeal 1, 2.1, 2.2, 3(i), 4.1 and 4.2 and, as a preliminary issue, the competency of grounds of appeal 3(i), 3(ii), 3(iii) and 3(iv) and the competency of an appeal to the UTS on ground of appeal 5. This hearing took place by way of webex on 1 November 2023.

[2] The Appellants were represented at the hearing by Mr Gordon Lindhorst, Advocate, who made oral submissions in support of permission to appeal, and the competency of appealing to the UTS, on all ten grounds of appeal. The Respondent was represented by Ms Donnelly, Solicitor, who adopted her written submissions in support of refusing permission to appeal.

Decision on the Preliminary Issue Relating to Grounds of Appeal 3(i) – (iv)

[3] The FTS granted permission to appeal on grounds of appeal 3(ii), 3(iii) and 3(iv) which all relate to the decision of the FTS to *refuse* an eviction order in respect of ground of possession 11.

[4] Having considered parties’ submissions, I am of the opinion an appeal on these grounds is not competent as a successful party may not in law appeal an order in favour of that party (Jacobs, *Tribunal Practice and Procedure* (5th edition, 2019), paragraphs 4.54 and 4.167. I therefore dismiss

these grounds of appeal from further consideration by the UTS and in addition refuse permission to appeal on ground of appeal 3(i) as not arguable for the same reason.

Decision on the Preliminary Issue and on Permission to Appeal Relating to Ground of Appeal 5

[5] Ground of appeal 5 raises challenges to the Decision of the FTS under the Human Rights Act 1998, referring to article 8 of the Convention (right to respect for private and family life) and article 1 of protocol 1 (protection of property). There are good reasons why this might not be a competent ground of appeal, having regard to the discussion thereon at pages 376, 377, 369 – 380, and 386 – 389 of Stalker, *Evictions in Scotland* (2nd edition, 2021).

[6] Nonetheless, the FTS must act compatibly with Convention rights (section 6(1), Human Rights Act 1998) and Mr Lindhorst therefore submitted that compliance with those standards was a legitimate form of review of a decision of the FTS by the UTS. I am persuaded this is at least an arguable point of law. It raises an important point of principle. I accordingly regard this as both a competent and arguable ground of appeal.

Ground of Appeal 1

[7] This ground of appeal is a general assertion the FTS erred in law in various ways. There are no substantive reasons given in connection with this ground of appeal why it erred in any of these ways. I therefore uphold Ms Donnelly's submission that this ground is not arguable.

Ground of Appeal 2.1

[8] This ground of appeal challenges the manner in which the FTS carried out its balancing exercise in relation to the question of reasonableness in granting the order for eviction on ground of possession 4. Having considered parties' submissions, I consider this ground is arguable for the

reasons advanced by Mr Lindhorst; there appears, for example, to be no explanation given by the FTS why it held that the “balancing exercise” favoured the Respondent.

Ground of Appeal 4.1

[9] Ground of appeal 4.1 challenges the adequacy of the FTS’s reasons for finding a breach of clause 7 of the tenancy agreement by the Appellants. However, I find these reasons detailed, satisfactory and to relate to a finding in fact. This ground of appeal therefore raises no arguable point of law for consideration by the UTS.

Grounds of Appeal 2.2 and 4.2

[10] Grounds of appeal 2.2 and 4.2 challenge the decision of the FTS to delay execution of the eviction order to 31 August 2023. Though not referred to by the FTS, this power derives from rule 16A(d) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 - ordering a delay in execution of an order by the First-tier Tribunal at any time before it is executed. However, the FTS gave no reasons, and referred to no evidence, for choosing 31 August 2023 as the date to which execution of its order would be delayed, and as stated by Mr Lindhorst in his submissions to me, appears not to have invited parties to make submissions on this point to the FTS.

[11] I do not read rule 26(6) – which I believe applies as this rule, not rule 26(4) as referred to in the grounds of appeal, relates to the current proceedings under chapter 12 of Part 3 of the 2017 Rules of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 concerning private residential tenancies - as necessarily placing a duty on the FTS to give reasons in an application for an eviction order in respect of a private residential tenancy (the word

“may” is used therein in relation to giving reasons), but nonetheless the FTS has certain common law duties in this regard.

[12] These duties are summarised, albeit in a different context, in the Appendix to *Secretary of State for the Home Department v TC* [2023] UKUT 164 (IAC), paragraph (3) of which states that reasons for a decision of the first tier tribunal must be intelligible and adequate in the sense that they must enable the reader to understand why the matter was decided as it was.

[13] Reasons can be briefly stated (Appendix to *Secretary of State for the Home Department v TC* [2023] UKUT 164 (IAC), paragraph (1)) as, for example, in a similar context in *Reid v Redfern No. 4* [2019] SC DUM 41 at paragraphs 17 – 21.

[14] I am therefore of the opinion grounds of appeal 2.2 and 4.2 are arguable - both in relation to the failure to state reasons for the FTS choosing 31 August 2023 as the date to which execution of the eviction order would be delayed, and in relation to any failure on the part of the FTS to invite submissions from parties on any such delay.

Conclusion

[15] The appeal will proceed in relation to three matters.

[16] First, the FTS’s assessment of the reasonableness of granting an eviction order in respect of ground of possession 4, including any issue commented upon by the FTS in respect of failed ground of possession 11 which might be relevant to that exercise.

[17] Although I have not allowed the appeal to proceed on ground of appeal 3(i), Mr Lindhorst may refer to any such matters as he thinks fit and which he thinks are relevant to an analysis of

this matter. Parties might wish to comment in their Response and Reply on *Barclay v Hannah* 1947 S.C. 245 at 249 per Lord Moncrieff.

[18] Secondly, in relation to this matter, the relevance of “review” on human rights grounds, which will include an assessment of proportionality in respect of article 8. Some comment on *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] A.C. 1016 so far as it discusses A1P1 might also be of assistance to the UTS in considering this issue.

[19] Thirdly, in relation to the failure of the FTS to give reasons for, or invite submissions, in respect of delaying execution of the eviction order and the date to which execution ought to be delayed. Although any such delay might seem to be in favour of the Appellants, they appear not to have been given any opportunity of requesting a longer period of delay on the *esto* basis the FTS were to grant an eviction order and hence have an interest to appeal this decision.

Further Appeal

[20] My decision on the preliminary issues, but not on permission to appeal or Order No. 3, is subject to a further right of appeal to the Court of Session. Accordingly, a party aggrieved by that decision may seek permission from the UTS to appeal to the Court of Session on a point of law within 30 days of the date on which this decision is sent to a party. Any such application 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) in terms of section 50(4) of the Tribunals (Scotland) Act 2014, state the important point of principle or practice that would be raised in the further appeal or any other compelling reason there is for allowing a further appeal to proceed.

George Jamieson
Sheriff of North Strathclyde
Judicial Member of the Upper Tribunal for Scotland