Upper Tribunal for Scotland

2024UT52
Ref: UTS/AP/24/0062

DECISION OF

Sheriff T Kelly

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

Mr Alan Hart

Appellant

- and -

Edinburgh City Council

Respondent

FTS Case Reference: FTS/LTC/CT/24/00134

Glasgow, 25 September 2024

Decision

The Upper Tribunal refuses the appellant permission to appeal the decision of the First Tier Tribunal for Scotland, Local Taxation Chamber dated 5 July 2024.

Introduction

[1] Edinburgh City Council decided on 26 February 2024 to refuse the appellant's application relative to the subjects at 17/9 Roseburn, Maltings, Edinburgh EH12 5LJ ("the property") for

exemption from council tax liability for the period of January to February 2024 made on the basis that it was unoccupied, uninhabitable and under repair.

[2] By parties' consent, the First Tier Tribunal for Scotland, Local Taxation Chamber ("FTS") determined the matter without hearing evidence. In its decision of 5 July 2024, the FTS summarised the appellant's case at paras. 4.2 – 4.6 and the respondent's case at paras. 4.7 – 4.8. It was not disputed that the FTS adopted the correct approach, deciding the matter anew rather than simply reviewing the correctness or otherwise of the decision of the respondent.

[3] Schedule 1 to (as applied by Regulation 3 of) the Council Tax (Exempt Dwellings) (Scotland) Order 1997 ("the 1997 Order") provides for the dwellings exempt from Council tax. These include at para.2:

> "An unoccupied dwelling–
>
> (a) which–
>
> (i) is undergoing or has undergone (since the last occupation day) major repair work to render it habitable; or
>
> (ii) is undergoing or has undergone (since the last occupation day) structural alteration;
>
> (b) in respect of which no more than 12 months have elapsed since the last occupation day; and
>
> (c) in respect of which no more than 6 months have elapsed since the major repair work or structural alteration in question was substantially completed."

FTS Decision

[4] In its decision of 5 July 2024, the FTS looked at the work carried out at the property and posed the question: "Has there been major repair work to render the dwelling habitable?

[5] The FTS analysed the evidence in relation to the time period for the work to be carried out and the nature and extent of the work to be carried out. The appellant submitted that the property could not be let and that fungicide was being used. An en-suite bathroom provided sanitation and washing facilities throughout the period of the work being undertaken. The dwelling was unoccupied throughout the time that the repair was being carried out. The FTS decided that an owner occupier could have continued to live in the dwelling with access to rudimentary washing facilities and limited sanitation. The conclusion of the FTS was that the dwelling was capable of being lived in and was thus habitable during the period of the works. It was not undergoing and had not undergone major repair work to render it habitable. It was not undergoing and had not undergone structural alteration. It refused the appeal.

[6] The appellant sought permission to appeal the decision from the FTS. By decision dated 9 August 2024 it refused permission to appeal. The appellant now seeks permission to appeal from the Upper Tribunal. In terms of rule 3(6) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016, where the FtT has refused leave to appeal, the Upper Tribunal 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. On that ground of appeal it said this:

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

[5] In *Wightman v Advocate General* 2018 SC 388 Lord President Carloway (at [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].

[6] An appellant requires 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 arguable ground of appeal is capable of being formulated then there is clearly no point in wasting further time and resources in the matter proceeding. The respondent in a hopeless appeal ought not to have to meet any further procedure in a challenge with no merit. It is in the interests of justice that an appeal which is misconceived and is incapable of being articulated such that it cannot be characterised as arguable is stopped in its tracks.

Error or Point of Law

[7] *Advocate General for Scotland v Murray Group Holdings Ltd* [2015] CSIH 77; 2016 SC 201 (affirmed by UKSC in [2017] UKSC 45; 2018 SC (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 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 before the Upper Tribunal at a hearing.

Hearing: 20 September 2024

[8] Mr Hart appeared personally at the hearing on his application for permission to appeal. The respondent did not appear and was not represented. Mr Hart focused upon the nature of the

work undertaken in the course of repairs at the property. The insecticide used had a warning for young children. He was not able to have a family reside in the property when the work was being carried out. He had foregone a significant amount of rental income during the period of repairs. It was not safe for tenants to be within the property.

[9] Mr Hart developed this submission with reference to legal responsibilities he submitted that he owed in the circumstances to tenants at the property. He sought to challenge findings in fact 5.8 and 5.13. He contended that the error or law was in the FTS "taking account of manifestly irrelevant considerations". The FTS had relied upon material submitted from a contractor's estimate. This was inaccurate. The use of the insecticide meant that it was not safe for anyone to continue to reside in the property. The work constituted a danger. Photographs had been submitted to the FTS. There was significant disrepair. The use of the insecticide meant that windows had to be opened and face masks worn.

[10] The appellant was referred to the statutory scheme which governed the decision, namely the 1997 Order. It was recognised at finding in fact 5.11 that this was major repair work. Mr Hart explained that the floors had to be lifted and replaced. The place was full of fungal spores. It was not safe to be occupied.

Decision

[11] In his application for permission to appeal within the Form UTS-1, the appellant makes reference to a number of reasons given by the FTS to refuse permission to appeal. The application for permission to appeal to the Upper Tribunal is not a process to seek review of the decision to refuse permission to appeal by the FTS. The application for permission to appeal is considered by

the Upper Tribunal in terms of rule 3(6) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016, by deciding upon the arguability of the proposed grounds of appeal.

[12] The challenges which the appellant mounts against the decision of the FTS of 5 July 2024 relate to the FTS decision on matters of fact. The appellant seeks to characterise, as an error on the FTS' part, its acceptance of a contractor's opinion about the nature of the work being undertaken whilst the premises were occupied and a refusal to accept his opinion that the works could only safely be undertaken when the property was vacant.

[13] This is to mischaracterise the decision of the FTS. The decision of the FTS was not based upon competing opinions on a question of fact but rather a sound analysis of the competing submissions set against the statutory scheme.

[14] The appellant submitted that the decision of the FTS cast doubt on – or was in conflict with - the duty of care owed by the appellant *qua* landlord to his tenants. The FTS correctly identified this as an irrelevant matter. On this issue the FTS at para. 5.17 said this:

> "Had the appellant decided to undertake the work during the tenancy the tenant may well have asked to be decanted or have sought a rent reduction for the inconvenience but that would be a private matter between the appellant and tenant."

The property was unoccupied when the work was being carried out.

[15] The factual matrix against which the decision was made was uncontroversial. The nature and extent of the work to be carried out was not disputed. The length of time that it took was not the subject of competing submissions or evidence. What had to be determined was whether the building was habitable and whether there was any alteration to the structure or to the building. The FTS decision at paras. 5.16 and 5.17 comprehensively reasons through those issues. It essayed

the factors it took into account. None of these are said to be irrelevant. The appellant has not pointed out any irrelevant factors which have made their way into the FTS reasons. The matters to the fore of the appellant's submission were not disputed questions of fact that the FTS had to resolve in arriving at its decision.

Conclusion

[16] The FTS did not fall into error in its approach or decision-making. No arguable ground of appeal has been tendered by the appellant. Permission to appeal is refused.

Member of the Upper Tribunal for Scotland