Upper Tribunal for Scotland

[2019] UT 56
UTS/AP/19/0034

DECISION NOTICE OF SHERIFF IAIN FLEMING

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

in the case of

COLIN MANCLARK, 96 Arrowsmith Avenue, Glasgow, G13 2QL

Appellant

and

SAM WINDSOR, 414 Alderman Road, Glasgow, G13 4LD

Respondent

FTT Case Reference FTS/HPC/CV/19/0040

16 September 2019

Decision

The Upper Tribunal refuses the application for permission to appeal.

Background

[1] On 12 July 2019 the First-tier Tribunal for Scotland Housing & Property Chamber (hereafter" the Tribunal") made a determination under section 16 of the Housing (Scotland) Act 2016 (hereafter "the Act") and produced a statement of decision (hereafter "the decision"). On 16 July 2019 the Tribunal issued its statement of decision.

[2] By letter dated 19 July 2019 the applicant applied to the Tribunal for permission to appeal the decision.

[3] A written application to the Tribunal for permission to appeal must;

(a) Identify the decision of the First-Tier Tribunal to which it relates.

(b) Identify the alleged point or points of law in which the person making the application wishes to appeal.

(c) State the result the person making the application is seeking. (The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 section 37(2).)

[4] The appeal identified the Tribunal decision to which it related and stated that the appellant is seeking that the respondent be found liable to pay a sum in respect of rent arrears in respect of which the Tribunal found that he was not liable.

[5] The Tribunal refused leave to appeal in terms of a decision dated 29 July 2019. In terms of a letter dated 7 August 2019 the applicant has appealed to the Upper Tribunal against the decision of the Tribunal to refuse permission to appeal.

[6] Section 46(2) of the Tribunals (Scotland) Act 2014 provides that an appeal to the Upper Tribunal may be made on a point of law only. The Inner House of the Court of Session in the case of *Advocate General for Scotland* v *Murray Group Holdings Limited* (2015) CSIH 77 identified four different categories of cases covered by the concept of an appeal upon a point of law: these are (i) an error of general law, the content of its rules; (ii) an error in the application of the law to the facts; (iii) making findings in fact without a basis in the evidence; and (iv) taking a wrong approach to the case by, for example, asking the wrong question or by taking account of manifestly irrelevant considerations, or by arriving at a decision that no reasonable tribunal could properly reach.

[7] The applicant in this case both in terms of his letters of 19 July 2019 and 7 August 2019 seeks to place himself within the third and fourth categories.

[8] The area which the applicant seeks to bring under review is covered in page 5 of the Tribunal decision under the heading "Rent Arrears". The applicant's letter of 19 July 2019 disputes the entitlement of the Tribunal to make a finding in fact namely; "The respondent had no access to the property from 5 October 2018". It is alleged by the applicant that this is a wrongful assumption and not a fact. The Tribunal had the benefit of hearing the evidence led by the applicant and by the respondent. It also had the benefit of viewing written documentation which was submitted in evidence including various social media text messages which had been exchanged between the applicant and the respondent (as referred to in the Tribunal decision of 29 July 2019 refusing leave to appeal). It is clear from the terms of page 6 of the Tribunal decision that it took into account the submissions of the applicant and the respondent, both of which are explained on page 7 of the decision. It is also clear from the decision that the Tribunal considered the particular issue which forms the basis of this appeal to be focused. The evidence and the issue were both explained within the decision.

[9] The decision of the Tribunal was one involving elements of evaluation and assessment of the evidence and the submissions. The Tribunal had reservations about accepting the evidence provided by the applicant, in particular the explanation given for changing the locks to the premises. In the *Murray Group Holdings* case (supra) the court expressed the opinion that in such circumstances the Upper Tribunal should be slow to interfere with a decision of a First-tier Tribunal, particularly in the context of a specialist tribunal (as the First-Tier Tribunal for Scotland is) created by parliament. It is also

important to remember that the Tribunal is required by statute to use the special expertise of the First-tier Tribunal effectively.

[10] Upon the basis of the written decision it is clear that the finding in fact complained of is one which the Tribunal was entitled to make upon the evidence. It is a reasonable inference which can be drawn from the facts and circumstances which it established. Without reference to the respondent, the applicant changed the locks to the subjects. The Tribunal clearly did not find the explanation given by the appellant to be entirely convincing. Having made that finding the Tribunal was entitled as a matter of reasonable inference to hold that the respondent had no access to the property.

[11] What the applicant seeks to do is to revisit the decision. In essence he is inviting the Upper Tribunal to take a different view of the evidence which was before the Tribunal. It is not possible to show an error of law by pointing to the possibility of a different decision or a different consideration of the evidence. The terms of the applicant's letter of 19 July 2019 revisit the position that was clearly in evidence before the Tribunal.

[12] In so far as the applicant's appeal from the decision of the Tribunal to refuse leave to appeal which is articulated within the letter of 7 August 2019, once again this is a restatement of the position of the applicant which he stated before the Tribunal.

[13] The applicant accepts that there were a number of matters which were not before the Tribunal which he has now raised within his letters. He accepts that a number of new matters have been raised. It is contended by the applicant that "This does not mean it can be ignored once then submitted within the appeal". In that contention the applicant is incorrect. The current procedure is not an opportunity for the case to be reheard, or an opportunity for the applicant to place before the Upper Tribunal evidence that he wishes he

had led once he has become aware of what he considers to be an unfavourable determination.

[14] As Lewison LJ observed in *Fage UK Limited* v *Chobani UK Limited* [2014] EWCA Civ 5; [2014] ETMR 26; [2014] FSR 29 at [114]:

> ”the trial is not a dress rehearsal: it is the first and last night of the show. This emphasizes the need to adduce all relevant evidence at the first hearing, rather than to attempt to adduce further evidence on appeal. Once the last night of the show has finished, the audience are unlikely to be interested in additions to the script."

[15] Leave to appeal is therefore refused as the ground of appeal raises no point of law.