



DECISION NOTICE OF SHERIFF PINODI EMIDIO

in an Application for an Extension of Time and Permission to Appeal against a Decision of
the First-tier Tribunal for Scotland

in the case of

MRS MARILYN HENDERSON WILSON, 9 James Inglis Crescent, Cupar, KY15 4GX

Appellant

and

FIFE PROPERTIES LIMITED, 22 Bonnygate, Cupar, KY15 1LE

Respondent

FTT Case Reference: FTS/HPC/LA/20/1509

8 July 2021

Decision

The Upper Tribunal for Scotland, in respect that the appellant by application received on 11 May 2021 has sought an extension of time to lodge her notice of appeal seeking permission to appeal the decision of the First-tier Tribunal for Scotland Housing and Property Chamber dated 4 February 2021:-

1. Extends, on cause shown, the time for lodging the notice of appeal and Admits the notice of appeal though late.

2. Refuses the appellant permission to appeal in part the decision of First-tier Tribunal for Scotland Housing and Property Chamber dated 4 February 2021.

Reasons for Decision

Introduction

[1] In this Note Mrs Marilyn Henderson Wilson is referred to as “the appellant” and Fife Properties Limited as “the respondent” unless the context otherwise requires.

Background

[2] The appellant seeks permission to appeal (“PTA”) a decision of the First-tier Tribunal Housing and Property Chamber (“FtT”) dated 4 February 2021 which dealt with her complaint against the respondent of various breaches of the Letting Agent Code of Practice made under the Letting Agent Code of Practice (Scotland) Regulations 2016 (“the Code”). The FtT determined that the respondent had failed to comply with paragraphs 17, 19, 21, 26, 37, 39, 73 and 108 of the Code and awarded her the sum of £400 in compensation. The FtT also concluded that the respondent had not failed to comply with paragraphs 23, 27, 28, 30, 32m, 43, 55, 57, 62, 69, 85, 86, 90, 94 and 102 of the Code. On 1 March 2021 the appellant sought PTA from the FtT in relation to its decisions relating to paragraphs 23, 27, 57, 85, 90, 94 and 102 of the Code. The FtT refused PTA in a further decision which is dated 18 March 2021.

[3] After she learned that she had been refused PTA by the FtT the appellant decided she wished to exercise her right to ask this Tribunal for PTA in relation to the matters on which the FtT declined to give her permission. A letter sent by the appellant seeking PTA from this Tribunal bore the date stamp 17 March 2021 while the decision of the FtT to refuse

PTA was dated 18 March 2021. This discrepancy arose because the FtT's decision to refuse PTA was sent to the FtT clerks on 12 March 2021 but was dated 18 March 2021. This error does not appear to have been noticed at the time and the FtT's decision to refuse PTA was issued on 15 March 2021 even though it bore the date of 18 March 2021. The appellant's postal submission that is date stamped 17 March 2021 is correct. I am satisfied that this is the correct sequence of correspondence.

[4] The letter in which the appellant advised she wished to seek PTA from this Tribunal remained in the hands of the FtT clerks from the point of its receipt until 6 May 2021 when it was passed to the clerks for this Tribunal. The appellant did not submit the form UTS-1 which is the usual way to seek PTA from this Tribunal. On 7 May 2021 the Upper Tribunal clerk wrote to the appellant and invited her to submit the form UTS-1 and other necessary documents. On 11 May 2021 the appellant complied with that request. By that time the application for PTA was out of time.

[5] There are two questions to be considered in this decision.

- a. Should time be extended to allow the appellant's application to the Tribunal for PTA to be lodged though late?
- b. Should PTA be granted in whole or in part?

Question a.: The request for an extension of time

[6] The appellant had submitted her request within the statutory time limit but this was received by the clerking team of the wrong tribunal. This is understandable as it was addressed to "Upper Tribunal Housing and Property Chamber." The application was incomplete. The documentation was not identified as relating to a matter that required to be dealt with by the Upper Tribunal clerks. It would appear that by reason of oversight this

was not appreciated for some weeks. If the appellant's letter had been passed on receipt to the correct Tribunal clerks, then the incomplete nature of the application would have been made clear to the appellant soon after 17 March 2021. The appellant responded promptly after the matter was drawn to her attention on 7 May 2021. I am satisfied that had she been made aware of the need to submit the form UTS-1 and other missing documents the appellant would have submitted a full application within the statutory time limit. In the circumstances, the appellant's request for an extension of the time limit to seek PTA is granted as the matter was delayed in part for reasons not attributable directly any fault on her part.

Question b.: The request for permission to appeal

[7] Section 46(4) of the Tribunals (Scotland) Act 2014 ("the 2014 Act") provides that PTA is to be granted where:

"... the Upper Tribunal is satisfied that there are arguable grounds for the appeal."

The function of the Upper Tribunal is a limited one. An appeal under the 2014 Act is not an opportunity to rehear the factual matters argued before the FtT but rather to correct any errors of law that may have been made in the decision of the FtT.

[8] The FtT held a lengthy hearing on a very considerable number of complaints by the appellant of breach of the Code. The Code was made under section 48 of the Housing (Scotland) Act 2014 ("the HSA 2014"). Paragraph 2 of the Letting Agent Code of Practice (Scotland) Regulations 2016 (SSI 2016/133) made under the HAS 2014 gives statutory authority to the Code which is set out in the Schedule to the Regulations. The respondent provided written evidence but did not participate in the hearing. It could not be compelled to take part even though the appellant is aggrieved that they did not do so. The FtT was

fully entitled to take account of such submissions as the respondent made to it. The respondent has been found in breach of a number of the provisions of the Code and ordered to pay a sum in compensation. Those adverse findings may have significant ramifications for the respondent in the future. They are a matter of public record. The FtT has provided a full set of reasons for its decision to reject the other complaints made by the appellant and also for its decision to refuse PTA in respect of those complaints on which the appellant sought PTA.

[9] The appellant has expressly sought to provide a great deal more evidence in her application to this Tribunal. Her subsequent correspondence included the submission of numerous documents and photographs said to support her complaints. Her letter which was received on 17 March 2021 referred to the additional material. She asserted that the FtT had misunderstood the evidence and requested that this Tribunal reconsider it. She has not understood the strictly limited nature of the right of appeal under the 2014 Act. The proposed grounds of appeal disclose merely that the appellant simply disagrees with the conclusions of the FtT in relation to the matters on which she has been unsuccessful. Despite submitting more information she has made no serious attempt to demonstrate that there has been any error of law made by the FtT in respect of those matters she wishes to bring under review in her proposed appeal. In effect, she has sought a rehearing of certain of her rejected complaints. That is not the statutory function of this Tribunal. It was the function of the FtT to determine her complaints and it did so.

[10] The appellant has also alleged apparent bias and conflict of interest on the part of the FtT. She has attempted to impugn the motives of the members of the FtT who heard her application. The same allegation was made to the FtT which dealt with her allegations robustly and clearly in its decision to refuse PTA. She has accused the FtT members of bias

in so far as it has not made findings of which she approves. She has stated that she considered that she has been libeled by a passage in the FtT decision. The English Court of Appeal provided general guidance on the approach to be taken when hearing an appeal where it is alleged that there has been bias or misconduct in the case of *Sarabjeet Singh v Secretary of State for the Home Department* [2016] EWCA 492; [2016] 4 WLR 183. The following passage from the postscript to the judgement of Davis LJ, with whom the other members of the court concurred, gives guidance in the context of appeals to the UK Upper Tribunal and is of relevance:

“53. ..., the problems that have been highlighted by the course of events in this particular case do for the present permit at least some observations to be made: and they are ones which, I think, should be made.

(1) An allegation of bias or misconduct can only too easily be raised by a disgruntled litigant. It is therefore important that any application for permission to appeal, if based (in whole or part) on such a ground, is closely scrutinised when consideration is given as to whether permission to appeal should be granted. Such an allegation, if to be sufficient to merit the grant of permission at all, should ordinarily be expected to be properly particularised and appropriately evidenced ...”

[11] I consider that this is guidance that I should follow in dealing with that part of the present application that alleges bias. I consider that the appellant has failed to provide any evidence to justify her allegations. The allegations of conflict of interest are not properly particularised and are not appropriately evidenced. They consist of mere assertion. As such they provide no basis for the grant of PTA.

Result

[12] For these reasons, the questions a. and b. posed above at paragraph [5] are answered respectively “Yes” and “No”. On cause shown, the time for lodging the notice of appeal is extended and the appeal notice admitted. The approach taken by the FtT in both its

decisions was careful and discriminating. The application does not contain any stateable ground of appeal on a point of law. PTA is refused in respect of all points raised in the notice of appeal.

Notice to the Appellant

[13] In terms of Rule 3(7) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 (No. 2016/232) where the Upper Tribunal refuses to grant permission to appeal, the appellant may make a written application within 14 days of the receipt of the notice of this decision to the Upper Tribunal for the decision to be re-considered at a hearing before a different member or members of the Upper Tribunal.