



DECISION NOTICE OF SHERIFF IAIN FLEMING

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

in the case of

MR JAMES MALLOCH, Homeless NFA, Edinburgh

Applicant

and

BERNISDALE HOMES LIMITED, 1A Rosebery Crescent Lane, Edinburgh, EH12 5JR

Respondent

FTT Case Reference FTS/HPC/CV/20/2576

21 September 2021

Decision

The Upper Tribunal refuses permission to appeal.

[1] The applicant lodged an application under Rule 70 of the First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 seeking payment from the respondent of the sum of £13,980 categorised as rent arrears in respect of the property at Flat 3, 9 Rosebery Crescent, Edinburgh EH12 5JP (“the property”) After sundry procedure involving the holding of a case management discussion a hearing took place before the First Tier Tribunal (“the FtT”) by teleconference on 12 March 2021. The FtT

heard evidence and legal submissions before making findings in fact and issuing its decision. The FtT has the function of deciding facts and thereafter deciding legal rights by reference to the established facts. The decision-making process is limited to the powers and jurisdiction conferred on the FtT, the underlying law which it must apply, and the facts as it has found them.

[2] Having considered evidence and submissions the FtT issued a written decision dated 12 March 2021 which was adverse to the interests of the respondent and within which it indicated that the background to the action could only be fully understood by making reference to previous tribunal application hearings both before the FtT and the Upper Tribunal which featured the same parties.

[3] The respondent sought permission from the FtT to appeal against its decision of 12 March 2021. He set out two grounds of appeal. On 27 April 2021 the FtT refused permission to appeal upon the basis that neither ground of appeal raised a point of law.

[4] In terms of an application dated 27 May 2021 the respondent has now lodged a notice of appeal against the decision of the FtT. In terms thereof respondent now seeks to propose three grounds of appeal and refers to section 46(2)(b) of the Tribunals (Scotland) Act 2014. The respondent is seeking to introduce a third ground of appeal, which ground was not before the FtT at the point at which the FtT was considering whether to grant permission to appeal its decision of 12 March 2021. The respondent relies on the decision of *Advocate General for Scotland v Murray Group Holdings Ltd* 2016 S.C.201 wherein it is stated, he submits, that it is competent for a court to entertain a ground of appeal which has not been argue before the FtT.

[5] Since there is an issue of competence I deal with that firstly. There is now a ground of appeal which was not before the FtT and which has now been introduced by the

respondent for the first time. Ground of appeal numbered three (the new ground) challenges the entitlement of the FtT to make a finding in fact made contained within paragraph 8 of its decision. The submission is that the FtT made this finding in fact without a basis in evidence. I have not had the benefit of submissions from a contradictor in this case to allow the point of competence to be fully considered and decided. To assist parties I have canvassed within this opinion certain factors which will require to be considered.

[6] An application by the respondent containing two grounds of appeal seeking permission to appeal the decision of the FtT of 12 March 2021 was submitted timeously by him. The respondent now seeks to introduce a further ground of appeal. He relies upon paragraph 39 of the decision in *Advocate General for Scotland v Murray Group Holdings Ltd* 2016 S.C. 201 at paragraph 39

“[39] We are of opinion that in a statutory appeal of this nature it is competent for the court to entertain a ground of appeal that has not been argued in the First-tier or Upper Tribunals, although it should be slow to do so in any case where additional findings of fact are required, and should not do so if unfairness results.”

That third ground of appeal has not been considered by the FtT. An application for permission to appeal required to be brought before the FtT within a period of 30 days on which either the decision appealed against was sent to the appellant (I have designed him as the respondent in this decision) or the Statement of Reasons for the decision was sent to the appellant (Rule 2(3) of the Scottish Tribunals (Time Limits) Regulations 2016.) The 30 day period in respect of each has expired. If that permission is refused then permission to appeal can be sought from the Upper Tribunal. No such permission has been specifically sought. There are various procedural safeguards in relation to determining upon such applications.

[7] Rule 3 of The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 (“the Rules”) provides for the procedural requirements for an appeal to the Upper Tribunal from the FtT. A notice of appeal is required, identifying the decision of the FtT and the errors of law in the decision – Rule 3(2). That notice must be produced together with the permission of the FtT to appeal or notice of the refusal of such permission – Rule 3(3)(c). Thus, if permission to appeal is sought from the Upper Tribunal, the FtT will require to have refused permission – Rule 3(6). For an appeal to proceed before the Upper Tribunal either the FtT grants permission to appeal, or if it refuses such permission, the Upper Tribunal will have granted permission to appeal.

[8] I recognise that Rule 7 of the Rules allows the Upper Tribunal to regulate its own procedure. The Upper Tribunal would require to be addressed on whether application of that Rule will allow for a ground of appeal in respect of which the FtT has not made any decision (because it was not before it) to be introduced and thereafter to be considered by the Upper Tribunal. There are specific Rules which govern the procedure adopted by the respondent in this case. In effect the procedure adopted in relation to the third ground, whether consciously or unconsciously, seeks to circumvent the FtT.

[9] However, having regard to the terms of Rule 3 it does appear that there is nothing which specifically prohibits the course which the respondent has taken. In addition the court in *Advocate General for Scotland v Murray Group Holdings* approved the decision of Sedley LJ in *Miskovic and anr v Secretary of State or Work in Pensions*, [2011] EWCA Civ 16; [2011] 2 CMLR 20 (para 124), where he referred to a number of earlier cases on the point:

“None of these cases sets out a golden rule for the admission of new issues on appeal, but all proceed on the assumption that there is no jurisdictional bar to their being entertained in proper cases. It is an assumption which in my

judgment can be made good on a simple constitutional basis. The Court of Appeal exists, like every court, to do justice according to law. If justice both requires a new point of law to be entertained and permits this to be done without unfairness, the court can and should entertain it unless forbidden to do so by statute.”

In addition within the Rules there is no prohibition on amendment of grounds of appeal at a late stage. It may be if the respondent wishes this aspect of his application for permission to appeal to proceed he will require to make an application to amend, to intimate that application to the applicant, and to make application for the third ground to be considered late, but that is a matter for him. I express no concluded view thereon. At present I assume, for the purpose of this matter only, but do not decide, that the new ground of appeal is competently before the Upper Tribunal. If the issue of competence becomes relevant to the progress of this appeal the Upper Tribunal would benefit from being addressed on the particular issue.

[10] The purpose of the Upper Tribunal is to hear and decide appeals from decisions of the FtT. An appeal may only be on a point of law (section 46 of the Tribunals (Scotland) Act 2014.) The Inner House of the Court of Session in the case of *Advocate General for Scotland v Murray Group Holdings Ltd* (2015) C.S.I.H. 77 identified four different categories of case covered by the concept of an appeal upon a point of law. These are (i) an error of general law, the contents 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 questions or taking account of manifestly irrelevant considerations, or by arriving at a decision no reasonable tribunal could properly reach. The statutory function of the Upper Tribunal is a limited one to correct errors of law.

[11] Ground 1 of the respondent's application for permission to appeal concerns the question of whether the tenancy dated 8 December 2017 was a Short Assured Tenancy or a Private Residential Tenancy. It is claimed by the respondent in a written submission that if the relevant tenancy is a Private Residential Tenancy, then the consequential question is whether one of the requirements within the parties' tenancy agreement is prohibited under section 89 of the Rent Act 1984. The FtT refused permission to appeal upon the basis that this ground of appeal raises no point of law. The written decision of the FtT at paragraphs 63 to 69 addresses the argument. It refers to previous FtT and Upper Tribunal decisions involving the applicant and the respondent whereby the application of section 89 in the previous case was considered. The FtT in the current case considered the reasons given by the previous FtT and the previous Upper Tribunal. After consideration of the particular facts in this case, the FtT confirmed that in its opinion, having considered the factual position, the type of tenancy is not a factor which would have made any difference to its decision.

[12] Relevant to the respondent's argument referable to the application of section 89 is an issue about whether a clause in the tenancy agreement stating that rent was payable 12 months in advance was a requirement which had been imposed as a condition of renewal of lease. In considering the issue the FtT considered a chain of emails between the applicant and the respondent. It concluded that there was no evidence of there being a requirement on the respondent to pay 12 months' rent "up front" as a condition of the grant (FtT decision paragraph 71), renewal or continuance of the tenancy. Having so concluded the FtT followed the earlier Upper Tribunal authority; namely that the type of tenancy is not relevant to the decision in this case and on the established facts section 89 of the Rent Act 1984 does not apply. Since it is the case that the matter would appear to have been judicially

determined and the FtT has made a decision which on the evidence it was entitled to make, no point of law is raised. The FtT requires to apply the law as earlier decided.

[13] The second ground of appeal is constituted by a contention by the respondent that the FtT made an error in the application of the law to the facts and took a wrong approach by asking the wrong questions. From consideration of this ground of appeal it is apparent that what is at issue is the interpretation of the evidence by the FtT. The FtT produced a decision which contained 16 findings in fact. These were findings the FtT was entitled to make. The interpretation of the productions and consideration of the parole evidence is a matter for the FtT to decide.

[14] The respondent seeks to bring the decision of the FtT within the ambit of the decision in *Advocate General for Scotland v Murray Group Holdings Ltd* by asserting that the FtT “made an error in the application of the law to the facts and took a wrong approach to the case by asking the wrong questions. (paragraph 45). The assessment of the evidence is a matter for the FtT. There is no basis within the respondent’s written application for the assertion that the FtT asked itself the wrong question. The Upper Tribunal will only interfere if there has been an error in law. No point of law has been identified. The decision and the interpretation which it took was one which was entirely within the legitimate discretion of the FtT to take and no point of law has been raised.

[15] The third ground of appeal relates to the entitlement of the FtT to make finding in fact 8. There was a sufficiency of evidence to entitle the FtT to make the finding. One of the criticisms made by the respondent which is referred to within paragraph 68 of his application is as follows; “the tribunal appear to have treated some of the submissions made by David Alexander (a witness) in his oral witness evidence as evidence of fact.” The FtT is required to assess the evidence of each witness. It clearly did so. There is nothing to

suggest that the FtT failed to distinguish between factual evidence and submissions.

Criticism is also made of the FtT considering hearsay evidence. It is entitled to do so. The finding in fact made by the FtT was one which it was entitled to make as a reasonable inference from the evidence before it. There is no apparent error. No point of law is raised.

[16] For these reasons permission to appeal is refused.