Upper Tribunal for Scotland

2022UT16
Ref: UTS/AP/21/0008

DECISION

of Upper Tribunal Judge Pino Di Emidio

in an Appeal against a

Decision of the First-Tier Tribunal for Scotland (Housing and Property Chamber)

in the case of

Mr Adam Kindreich,

Appellant

And

Countrywide Residential Lettings Limited trading as Slater, Hogg & Howison

Respondent

First-tier Tribunal ref: FTS/HPC/LA/20/1410

Act: party
Alt: McEntegart, Anderson Strathern, Solicitors, Glasgow

7 June 2022

The Upper Tribunal for Scotland Refuses the appeal against the determinations of the First-tier Tribunal for Scotland made in paragraphs 92, 93, 104, 105 and 106 of its decision dated 6 January 2021.

Note of reasons for decision

[1] This appeal raises a question about the operation of the overriding objective where a party is unrepresented. In particular, whether the First-tier Tribunal Housing and Property Chamber erred in law by not allowing an unrepresented party to succeed on grounds of complaint which were not put forward by him and where he did not at any stage make an application to amend the grounds of complaint. It also deals with two other questions. The

second question mirrors the first and is whether the Tribunal erred in law by not assisting the unrepresented appellant by giving him guidance by suggesting he make an application for disclosure of documents held by the respondent. The third question is whether the Tribunal erred in law in the way it interpreted certain provisions of the Letting Agent Code of Practice in the light of the evidence led before it. The appellant represented himself at all stages of the proceedings in both Tribunals.

[2] The appellant made a comprehensive set of complaints to the First-tier Tribunal about the alleged failures of the respondent to comply with a large number of aspects of the Letting Agent Code of Practice. He enjoyed partial success before the First-tier Tribunal but a number of his other complaints were rejected. He sought permission to appeal on the points on which he had not succeeded. On 19 February 2021 the First-tier Tribunal granted permission in relation to the points dealt with in paragraphs 92, 93 and 105 of its principal decision of 6 January 2021.

[3] The appellant then sought permission to appeal from this Tribunal in respect of those points on which he had been refused permission by the First-tier Tribunal. On 12 April 2021 I issued a Note regarding the interpretation of the earlier grant of permission by the First-tier Tribunal. On 8 September 2021, following a hearing, the appellant was granted permission to appeal in respect of the matters dealt with by the First-tier Tribunal in paragraphs 104 and 106 of its principal decision dated 6 January 2021. These grounds raise the third issue discussed in paragraph [1]. In all other respects (11 further matters) he was refused permission.

[4] It is appropriate to give some explanation for the designation of the respondent as there has been correspondence about this matter in the course of the appeal. The respondent was designed simply as "Slater, Hogg & Howison, 44-46 Port Street, Stirling, FK8 2LJ" in the original decision of the First-tier Tribunal. An issue having arisen about a change in the

designation in documents submitted in the appeal process, the solicitors for the respondent advised that the respondent was incorrectly designed in earlier submissions sent to this Tribunal. Slater, Hogg & Howison is a trading name of Countrywide Residential Lettings Limited. It is not a standalone business entity. The appellant had brought the application against the trading name only but in its submissions to the First-tier Tribunal and its more recent submission to this Tribunal the solicitors for the respondent have made reference to the correct trading entity which has legal personality. The terms of business document which was entered into by the parties and which was before the First-tier Tribunal confirms that Countrywide Residential Lettings Limited is the correct designation. I have proceeded on the basis that the respondent is now correctly designed for the purposes of this appeal. If the appeal had succeeded the question of designation may have had greater significance.

[5] Following the issue of my decision of 8 September 2021 the parties provided written submissions on the grounds of appeal. The respondent made a further detailed submission on the issue of the overriding objective after the Tribunal asked whether each party wished to comment on that issue. The appellant opted not to add to his submission. I have proceeded to deal with the appeal without a hearing.

[6] The First-tier Tribunal is a specialist tribunal which has the statutory function of determining factual disputes that fall within its jurisdiction. The First-tier Tribunal has drawn inferences in order to reach some of its conclusions based on its extensive primary factual findings which are set out in paragraph 86 of its decision.

[7] There are some features common to the three grounds on which the appellant was granted permission to appeal by the First-tier Tribunal. The appellant asserts that the First-tier Tribunal has erred in its treatment of the overriding objective. He did not make any application at any stage in the proceedings before this Tribunal to seek to amend his application on the first two grounds on which he was granted permission by the First-tier

Tribunal even though he now seeks to rely on different provisions of the Code that were not raised before the First-tier Tribunal.

[8] There is long established authority to the effect that when a decision-making body is exercising a judicial function it is for the party before it to make its own case. In *R v C.I.C.B. ex parte Milton* [1997] PIQR 74 at 81 Buxton J said:

> "…It is of course possible that there might be circumstances in which either the applicant persuaded the Board, or it became clear to the Board, that an applicant had particular difficulty in obtaining information or evidence about which it needed the Board's assistance. That is a different matter. But I cannot accept that it is the duty of the Board, of its own motion, if it considers that a case has not been made out on the matter put before it, then to consider whether the applicant's case might be better put than she had put it herself, and itself go out and seek evidence to support that case."

More recently the Court of Session has considered, at an authoritative level, the question of the extent to which the court should assist an unrepresented party in the conduct of cases before the civil courts. In *Khaliq v Gutowski* 2019 SC 136 (IH) at paragraph [41] the court observed that the court should not act as the law agent of an unrepresented party as otherwise it would fall foul of the principle that it should not act in a manner by which the fair-minded and impartial observer would conclude there was a real possibility of bias. At paragraph [35] the court cited with approval passages from the judgments of Lord Sumption (at paragraph 18) and Lord Briggs (at paragraph 42, his dissent was not on this point) in *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, an English appeal to the UK Supreme Court, to the effect that the fact that a party was unrepresented was not a reason to refrain from enforcing sanctions under rules of procedure against him. This in turn has been followed in Scotland in *AW* 2018 Fam LR 60 at paragraph [14] where Lady Paton said in a family law context that the fair balance achieved by the rules of court will inevitably be disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent.

[9] *Khaliq v Gutowski* is a civil case in which the overriding objective did not apply at first instance. The present appeal arises in the Tribunal world where the First-tier Tribunal was subject to the overriding objective. There is precedent to the effect that it does not make any difference to the way in which an unrepresented party should be treated. In the context of UK tribunals, in *BPP Holdings Ltd v Revenue and Customs Comrs* [2017] 1 WLR 2950 (SC (E)), it was made clear in the UK Supreme Court that a similar approach to time limits and sanctions was appropriate in the application of tribunal rules of procedure as applied in the civil courts. No authority has been placed before me that suggests that a different, more relaxed, approach should apply in the Scottish Tribunals.

[10] The authorities referred to above are about the enforcement of time limits and sanctions where unrepresented parties are conducting proceedings in the courts and tribunals. The present case raises a slightly different point in that the appellant has submitted that the overriding objective required that the First-tier Tribunal ought to have been proactive to assist him in the conduct of his case. The authorities tend to suggest that an unrepresented party has to take responsibility for the presentation of his or her own case.

[11] The First-tier Tribunal Housing and Property Chamber Rules of Procedure 2017 are designed to secure fairness and due process. They require a party to give fair notice of any complaint made. If a party is uncertain whether a complaint should be made under one provision or another of the Code it is open to the party to complain under both provisions thereby giving fair notice of the matters complained of. The Rules also provide parties with a facility to seek to amend any complaints being made before final determination.

[12] Rule 3(1) of the First-tier Tribunal Housing and Property Chamber Rules of Procedure 2017 requires the First-tier Tribunal to deal with the proceedings justly. Rule 3(2)(c) provides that this includes:

> "ensuring so far as practicable that parties are on an equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of the party's case without advocating the course they should take."

The final words of this provision are significant. The First-tier Tribunal is not required to act as an unrepresented party's lawyer when he chooses not to instruct a lawyer to look after his interests. The First-tier Tribunal is not required to provide free legal advice to private landlords who, on the face of it, could afford if they chose to seek such advice.

[13] The appellant's complaints are misconceived in so far as he maintains that that the First-tier Tribunal should have found in his favour even though he brought the matters dealt with at paragraphs 92 and 93 under the wrong provisions of the Code. The appellant has implicitly accepted that he proceeded under paragraphs of the Code on which he was not entitled to succeed. If, after having heard evidence and submissions, the First-tier Tribunal treated a complaint brought under one provision of the Code as a complaint under a different provision there would be a fundamental breach of natural justice by failure to hear the other side.

[14] If a party considers in advance of a final determination of his case that he may have relied on the wrong rule then it is his responsibility to apply to the First-tier Tribunal and seek to change the basis of his claim. The First-tier Tribunal can then determine, exercising its discretion, whether it should allow the change after taking account of the interests of all parties and heard their submissions on the proposed amendment. If amendment is allowed the First-tier Tribunal could consider the new argument having allowed both sides the opportunity to lead evidence and make submissions about it.

[15] The appellant also had the option, if he accepted on receipt of the decision of the First-tier Tribunal that he may have complained under the wrong parts of the Code, of asking the First-tier Tribunal to review its decision under Rule 38 of the First-tier Tribunal

Housing and Property Chamber Rules of Procedure 2017. If he had sought a review he could have asked the First-tier Tribunal to consider allowing him to amend his application to bring his complaint under what he now considered to be the correct paragraphs of the Code.

[16] Even in the course of this appeal process the appellant has not asked to be allowed to amend. As a result his application, so far as it relates to the paragraph 92 and 93 complaints, still proceeds under the "wrong" provisions of the Code. If the First-tier Tribunal had done as he suggests it would not have dealt with the case justly and would have failed to act in accordance with the overriding objective as it is required to do. The appellant's argument is the antithesis of what the overriding objective expressly states and is designed to achieve.

[17] These conclusions are sufficient to lead to the refusal of the first two grounds of appeal relating to paragraphs 92 and 93 of the First-tier Tribunal's decision but it is appropriate to say something about the merits of the points on which the appellant asserts he should have succeeded.

[18] *Paragraph 92 – sending unsolicited marketing material.* The relevant factual findings are at paragraph 86(xix) and (xx) of the First-tier Tribunal's decision. The respondent sent unsolicited marketing material to the appellant and he found this unethical and offensive. The appellant had classified the complaint as occurring under section 2 of the Code which relates to the requirement that the letting agent is honest, open, transparent and fair. The First-tier Tribunal does not identify a breach of any part of the Code. When he sought permission to appeal from the First-tier Tribunal the appellant submitted that the First-tier Tribunal ought to have found in his favour under paragraph 38 of the Code. The respondent submits, correctly, that this amounts to a tacit concession that the First-tier Tribunal had correctly rejected his contention that there had been a breach under section 2 of the Code.

[19] The First-tier Tribunal has made a finding in fact that the appellant found the receipt of the material to be unethical and offensive but that does not assist him as it relates to his

subjective reaction to the material. The appellant's suggestion before this Tribunal that his complaint should now succeed under paragraph 38 is misconceived. Paragraph 38 provides:

> "Your advertising and marketing must be clear, accurate and not knowingly or negligently misleading."

This issue of the clarity or accuracy or the misleading nature (whether knowingly or negligently) of the marketing material was never before the First-tier Tribunal for its consideration. This is hardly surprising as the appellant did not complain about these matters. No explanation is given for the failure to complain under this provision and there is no application to amend. The First-tier Tribunal has not erred in law by failing to consider a complaint not made to it and in respect of which it did not hear evidence. This ground of appeal is refused because there was no failure to apply the overriding objective correctly.

[20] *Paragraph 93 – erroneous omission to advise of the right to apply to the First-tier Tribunal.* The relevant factual finding is at paragraph 86(lvii) of the decision. The First-tier Tribunal accepted that the respondent failed to advise the appellant that if he was dissatisfied with its complaint procedures, he could make an application to the First-tier Tribunal but instead it erroneously referred him to the Ombudsman for England. Section 2 requires that the letting agent is honest, open, transparent and fair. The First-tier Tribunal concluded that although the information provided was inaccurate it was not deliberately dishonest. The appellant accepts that the First-tier Tribunal has not erred in its conclusion on the argument he presented to it, but he submits that it would have been more appropriate for there to be a finding of a breach of section 7 paragraph 113 of the Code. No explanation is given by the appellant for his failure to complain under this provision and there is no application to amend.

[21] On the face of it the respondent may have breached this paragraph. The respondent required to tell the appellant that he might apply to the First-tier Tribunal if he remained dissatisfied once the respondent's own complaint processes had been exhausted. Such a

failure is a matter of concern. It is to be hoped that the respondent will exercise greater care in future to ensure that it does comply fully with the requirements of paragraph 113 but this issue was never before the First-tier Tribunal for its consideration. The First-tier Tribunal has not erred in law by failing to consider an argument that was never made to it. This ground of appeal is refused because there was no failure to apply the overriding objective correctly.

[22] *Paragraph 105 – alleged breach of Section 2 paragraph 24 of the Code by failure to maintain appropriate records.* The First-tier Tribunal concluded that the appellant had provided no evidence for his complaint that the respondent had failed to provide him with documentary evidence relating to the switch of electricity supplier and the lodging of the tenancy deposit. The appellant does not fault that conclusion but instead he complains that the First-tier Tribunal ought to have asked him to request an order for production of documents. Rule 16 of the First-tier Tribunal Housing and Property Chamber Rules of Procedure 2017 was applicable and the appellant could have made an application under that Rule.

[23] The First-tier Tribunal was entitled to proceed on the basis that the appellant had familiarised himself with the Rules. I refer to the discussion above of the extent to which the First-tier Tribunal requires to assist an unrepresented party. Rule 3(2)(c) of the 2017 Rules has already been quoted above. The overriding objective requires the First-tier Tribunal to assist an unrepresented party in his presentation of his case without advocating the course they should take. There may be cases where the balance that requires to be struck is a difficult one. This is not that kind of case. The First-tier Tribunal did not require to ask the appellant if he wanted to make a formal request for production of documents. It was the responsibility of the appellant, who in any event is a highly intelligent and articulate person, to make such an application. If he had done so, he might have been due some assistance in its presentation but the First-tier Tribunal was not obliged to initiate that request. The First-tier Tribunal has not erred in law. This ground of appeal is refused because there was no failure to apply the overriding objective correctly.

[24] *Paragraph 104 - Alleged breach of Section 2 paragraph 21 of the Code by delaying the transfer of a tenancy deposit to the appellant's preferred approved scheme.* The First-tier Tribunal concluded that the appellant had not established any delay on the part of the respondent. The findings relevant to this matter are set out at paragraph 86(xlvii) to (li). There was no dispute that the tenancy deposit required by law to be placed in an approved scheme within a period of 30 days. The First-tier Tribunal found that: (a) the respondent paid it in to a different scheme from that preferred by the appellant (paragraph 86(xlviii)); (b) the appellant requested it to pay the deposit to his preferred scheme on 10 March 2020 (paragraph 86(xlix)); and (c) it was paid to that scheme on 31 March 2020 (paragraph 86(l)). The appellant alleges the First-tier Tribunal erred because he was placed in danger of not complying with the legal requirement to pay the deposit into an approved scheme. He asserts that there was no evidence for finding (l) which related to the receipt of the deposit in the appellant's preferred scheme so that the First-tier Tribunal was not entitled to reach the conclusion it did on this point. The respondent submits that the First-tier Tribunal was entitled on the evidence to reach the conclusion it did that there was no breach of Section 2 paragraph 21 of the Code and that no evidence was presented to substantiate that the time in fact taken was not reasonable.

[25] The time taken was well within the statutory period of 30 days for deposit of the money in an approved scheme. The First-tier Tribunal required to assess the facts it found in order to come to a conclusion on whether there was a breach of the Code. Its conclusion was based on an absence of evidence which it accepted that would have justified finding that the respondent was in breach of its obligation under Section 2 paragraph 21 of the Code to carry out its services in a timely manner. The appellant accepts that with the benefit of hindsight the deposit was paid to his preferred scheme within the applicable time limit. While the appellant may have been anxious that the deposit would not be paid into his preferred scheme within the statutory time limit, the First-tier Tribunal was entitled to find that this did not amount to a failure to carry out the service in a timely manner where the deposit was put in the appellant's preferred scheme. The First-tier Tribunal took account of relevant

considerations and did not take account of irrelevant ones. It has not erred in law and this ground of appeal is refused.

[26] *Paragraph 106 - Alleged breach of Section 2 paragraph 29g of the Code by not carrying out an identity check at the earliest opportunity*. The First-tier Tribunal concluded that the appellant had misunderstood the terms of the Code as it does not provide a time frame for landlord identity checks. This was a question of interpretation of the terms of the Code and thus of law. The appellant maintains that the First-tier Tribunal misconstrued the Code in that the context is clear that this should occur at the outset. Permission was granted on the basis that it was arguable an error of law had occurred. The appellant complained that the respondent did not carry out identity checks at the earliest opportunity. The Code does not impose an express obligation to do so at the outset. This is a matter of interpretation but there is no basis for adding the words "at the earliest opportunity" or "at the outset" as a gloss to the paragraph 29g. While some implication of a requirement to carry out such checks within a reasonable time may be appropriate, that was not the appellant's argument. The First-tier Tribunal has not erred in law and this ground of appeal is refused.

Appeal provisions

[27] A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission 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) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.

Sheriff Pino Di Emidio
Member of the Upper Tribunal for Scotland