

Upper Tribunal for Scotland



2022UT30
Ref: UTS/AP/22/0011

DECISION OF

Sheriff Iain Fleming

APPEAL IN THE CASE OF

Mr Shoukat Ali Khan, 5 Woodyett Road, Glasgow, G76 8SA
per Jones Whyte LLP,
3rd Floor, The Connect Building, 59 Bath Street, Glasgow, G2 2DH

Appellant

- and -

Addington Formwork Limited, Kiln Lane, Bracknell, RG12 7WF
per Davidson Chalmers Stewart LLP,
12 Hope Street, Edinburgh, EH2 4DB

Respondent

FtT Case reference: FTS/HPC/PR/21/2215

23 November 2022.

Decision

[1] The appeal is allowed. The Upper Tribunal quashes the decision of the First Tier Tribunal, dated 10 November 2021. The whole matter is remitted to a freshly constituted First-tier Tribunal for redetermination.

Background

[2] The relevant property is Flat 0/1, 18 Naburn Gate, Glasgow, G5 0SQ. The appellant is Shoukat Ali Khan against whom an action was raised under the Tenancy Deposit Schemes (Scotland) Regulations 2011 by Addington Formwork Limited (hereafter "AFL"). The named respondents in the action were both the appellant and City Centre Lets Limited (hereafter "CCLL"). The appellant is designed within the application as "Shoukat Ali Khan 5 Woodyet Road, Clarkston, Glasgow G76 8SA." CCLL are designed as "City Centre Lets Limited, 71-75 Shelton Street, London, WC2H 9JQ." After sundry procedure before the First Tier Tribunal (hereafter the "FtT") the case management conference (hereafter "the CMD") took place by teleconference on 10 November 2021. AFL was represented. Neither of the respondents was represented and neither participated in the telephone conference hearing.

[3] The FtT determined that an order for payment be made against the now appellant and CCLL Limited in the sum of SIX THOUSAND POUNDS (£6,000.00) STERLING. The FtT issued its decision of 10 November 2021 to the appellant on 11 November 2021 by recorded delivery. This was apparently signed for on 15 November 2021, although the postal package was thereafter returned.

[4] Thereafter AFL instructed sheriffs' officers to seek recovery of the sums due by the now appellant and CCLL Limited. A charge was served on the appellant on 25 January 2022.

[5] Agents representing the appellant made an application to recall the decision of the FtT in terms of the letter of 1 February 2022. It is the appellant's position that he was unaware of the previous proceedings and had only become aware when sheriffs' officers attended upon him and served a charge on 25 January 2022. The application to recall was

refused in terms of a decision of the FtT dated 21 February 2022. The FtT held that the appellant had failed to provide specification in relation to the chronology of matters and to provide a *prima facie* explanation in respect of the stated failure by the appellant to receive the initial service copy papers. The FtT held that no “cause shown” was evidenced by the appellant which would justify an extension to the time period within which to make the application for recall. The appellant thereafter sought permission to appeal against the FtT’s decision of 11 November 2021 in terms of a letter of 20 April 2022.

[6] On 22 April 2022 the FtT refused the appellant permission to appeal because no cause had been shown as to why the time period for seeking permission to appeal ought to be extended beyond the statutory 30 day period from 11 November 2021.

[7] The appellant thereafter, sought permission to appeal from the Upper Tribunal. In terms of a decision of 6 July 2022 the Upper Tribunal granted the appellant permission to appeal.

[8] The Upper Tribunal has now had the benefit of further submissions made on behalf of the appellant. The Upper Tribunal has considered these which are undated but which were received by the Upper Tribunal with an accompanying email on 20 October 2022.

[9] AFL have been provided with an opportunity to make written representations to the Upper Tribunal. They have indicated that they have no representations to make. It is unclear whether AFL are in fact opposing the appeal. They have made no representations urging the Upper Tribunal to refuse the appeal but have not indicated that they consent to the grant of the appeal.

[10] Both parties have consented to the Upper Tribunal dealing with this appeal hearing by means of written submissions rather than by oral hearing.

[11] In reaching its decision the Upper Tribunal has considered the written submissions provided by the appellant on 4 May 2022 and those submissions provided by the appellant on 20 October 2022. The Upper Tribunal has also had regard to the decisions of the FtT dated 10 November 2021, 21 February 2022 and 22 April 2022.

[12] The appellant is the first named of two respondents in the application raised before the FtT by AFL under Rule 103 of Regulation 9 of the said Tenancy Deposit Schemes (Scotland) Regulations 2021. The respondents within the original application before the FtT are designed as “Shoukat Ali Khan, 5 Woodyet Road, Clarkston, Glasgow G76 8SA and City Centre Lets Limited, 71-75 Shelton Street, London, C2H 9JQ.” Service of the original application and intimation of the CMD was effected upon both of the respondents. In particular, the original application was served upon the now appellant by I J Beim and Associates, process servers, on 7 October 2021. It is clear that in respect of each respondent service of the FtT documentation was carried out at the premises of the second respondent, namely CCLL at the London address of “71-75 Shelton Street, London WC2H 9JQ.” Accordingly, it would appear that although designed at an address in Glasgow, the now appellant was cited at an address in London.

[13] The first issue relates to the time limits which apply. The FtT’s decision was dated 10 November 2021. The time limit for lodging an appeal was within a period of 30 days beginning with the date that the decision was sent to parties. It is the position of the appellant that he did not know about the proceedings and was unaware of the decision of the FtT at the CMD on 10 November 2021 until such time as a charge was served upon him by sheriffs’ officers, namely 25 January 2022. The appellant then made application for recall of the FtT decision on 1 February 2022.. The application for recall was refused in terms of the FtT’s decision of 21 February 2022. A further period of two calendar

months elapsed before the appellant made a further application on 20 April 2022 under Rule 37 of the 2017 Regulations seeking permission to appeal the decision of 10 November 2021. Before the FtT no reasons were advanced to why there had been such a delay.

[14] The FtT would have been entitled to extend the 30 day time limit subject to cause being shown and subject to this extension being in the interests of justice in terms of the Scottish Tribunals (Time Limits) Regulations 2016, section 2(2). The appellant did not place before the FtT a chronology explaining the delay between 25 January 2022 and 20 April 2022. In the absence of any such chronology or explanation, perhaps understandably, the FtT refused permission to appeal on the basis that no cause had been shown as to why the time for seeking permission ought to be extended.

[15] Thereafter, the appellant appealed to the Upper Tribunal. The Upper Tribunal was favoured with a comprehensive explanation in terms of a letter dated 4 May 2022 whereby it was explained that the appellant had been outwith the UK for a period of time and that counsel required to be instructed. The Upper Tribunal considered that it was arguable that both that the cause had been shown and it was in the interests of justice to extend the time limit.

[16] Having considered the submissions of the appellant the Upper Tribunal considers that cause has been shown and it is in the interests of justice that the time period of 30 days be extended for the reasons stated. The Upper Tribunal has sympathy for the decision of the FtT judge in not extending the period of 30 days. It was perhaps not the wisest course for the appellant to go abroad while he knew that his late application for recall was before the FtT. However, given the explanation provided and the significance of the issues the Upper Tribunal considers that the extension to the time period should be granted. The letter which was provided to the Upper Tribunal by those acting on behalf

of the appellant on 4 May 2022 was both detailed and comprehensive and it was evident that the matter had been carefully addressed.

[17] In the particular circumstances of this case, the Upper Tribunal extends the 30 day period for the appellant to intimate his application seeking permission to appeal to 4 May 2022, being the date when the appellant's detailed submissions were submitted. The Upper Tribunal requires to be satisfied not simply that cause has been shown to grant the extension but also that it is in the interests of justice to do so. The appellant has an award made against him by the FtT involving a sum of £6,000. His position is that he has not had the opportunity to make submissions or representations before the FtT which made the award. It is a matter of undisputed fact that the appellant did not appear at the CMD when the award was made. Further, the lease which is the subject of the decision by the FtT does not include reference to the appellant. The lease itself is of potentially questionable legality. In the circumstances, cause has been shown and it is in the interests of justice that the time limit for lodging the application for permission to appeal is extended to 4 May 2022. It is recognized that the FtT was not aware of all of the circumstances now before the Upper Tribunal.

[18] In terms of its findings and reasons following the CMD on 10 November 2021 the FtT held that the Tenancy Agreement was entered into between the landlord, being CCLL, and the tenant being AFL. The title information held in the Land Register of Scotland under Title Number GLA142152 referable to the property disclosed that the heritable proprietor is the now appellant. Service of the proceedings upon the appellant was carried out at the address of CCLL. The FtT "concluded and found that CCLL had the authority to act on behalf of and legally bind Mr Khan (the appellant) as an undisclosed principal."

[19] It is submitted on behalf of the appellant that in terms of the First Tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) Regulations 2017 (“the 2017 Regulations”) that service should have been made on the appellant personally. It is emphasised that in the absence of any mandate authorising another party to act on his behalf that there was no evidential or legal basis for the FtT to reach the conclusion that CCLL was the appellant’s undisclosed principal and entitled to accept service on behalf of the appellant.

[20] It is submitted that in the circumstances whereby the now respondent failed to serve the application on the appellant that an error of law took place. The FtT thereafter proceeded on the basis that CCLL acted as an agent for the appellant, without any evidential basis in reaching that conclusion. In these circumstances and having failed to serve the application on the appellant it is submitted that a further error of law took place.

[21] In terms of the 2017 Regulation, the rules referable to service can be found in Rule 6. Rule 6 provides as follows:

6.— Service

(1) Where any formal communication requires to be served on any person, it is deemed to be served if—

(a) it is sent to the proper address of the person—

(i) by a registered post service (as defined in section 125(1) of the Postal Services Act 2000); or

(ii) by a postal service which provides for the delivery to be recorded; or

(b) it is sent to the email address provided by the person.

[22] It is clear from the terms of Rule 6 of the 2017 Regulations that where any formal communication requires to be served on any person, it is deemed to be served if it is sent to the proper address of the person or by a postal service which provides for the delivery to be recorded. In this case the application was not served upon the appellant but rather upon the second respondent (CCLL). It is clear that the terms of rule 6 were not adhered to. Thereafter, the FtT held that CCLL had authority to act on behalf of and legally bind the appellant as an undisclosed principle. One basis stated by the FtT for that was the fact that the appellant is named as the proprietor within the Land Register for Scotland. No other evidential basis for reaching that conclusion is referred to within the FtT decision.

[23] An appeal can only succeed if an error of law has taken place. *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])

[24] The appellant argues that in not properly serving the proceedings upon the appellant and thereafter finding that CCLL was the appellant’s undisclosed principal where there was no evidence to that effect, or if there was such evidence failing to set out what it was, the FtT erred in law. The Upper Tribunal sustains that submission. The FtT has made a finding without any evidential basis to do so. Without such an evidential basis the FtT erred in law.

[25] The fact that the appellant is the registered proprietor is in and of itself not sufficient to entitle the FtT to proceed as it did. Firstly, there is no evidence of the relevant date of the information from the Land Register for Scotland. Secondly, even if were the case that the information is both timeous and accurate, there was no evidential basis to allow the FtT to conclude that CCLL had authority to act on behalf of and legally bind the appellant. This is particularly the case given that the appellant’s name does not feature on the lease which was agreed between the parties.

[26] The appellant made extensive representations to the FtT in terms of the agent’s letter of 4 May 2022. In terms thereof it is clear that the position of the appellant is that while he is the owner of the property the arrangement entered into between the respondent and CCLL is one which did not involve him because what had taken place was effectively a sub-lease.

[27] The position which the Upper Tribunal faces is that a party who had not been served with the documentation has a finding made against him in the sum of £6000.00. No opportunity has been afforded to the appellant to appear before the FtT. In the

apparent absence of evidence the FtT then proceeded to hold that CCLL had legal authority to act on behalf of and legally bind the appellant. It is clear that an error of law has taken place and the appeal must succeed.

[28] That is sufficient to decide upon the appeal. A separate argument was tabled by the appellant referable to the FtT decision to refuse to recall the decision of 11 November 2021. A consideration of the documentation lodged on behalf of the appellant on 4 May 2022 discloses that no appeal has been lodged in relation to that decision. The application is confined to the FtT decision of 11 November 2021.

Conclusion

*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.*

Member