



DECISION OF

Sheriff Ian Hay Cruickshank

**ON AN APPLICATION TO APPEAL
IN THE CASE OF**

Mr Angus O'Donoghue

Appellant

- and -

Celtad Limited

Respondents

FTS Case reference: FTS/HPC/EV/22/1099

14 May 2024

Decision

Refuses the appeal against the decision of the First-tier Tribunal for Scotland, Property and Housing Chamber dated 19 June 2023.

Introduction

[1] The First-tier Tribunal for Scotland Housing and Property Chamber (“the FTS”) gave consideration to applications by Celtad Limited (in this appeal “the respondents”) against Angus O’Donoghue (“the appellant”). Initially two applications were lodged by the respondents in



pursuance of orders under sections 51(1) and 71(1) of the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016” Act”). These were under Rules 109 and 111 of the First-tier Tribunal for Scotland (Housing and Property Chamber) (Procedure) Regulations 2017 (“the 2017 Regulations”). One application sought an eviction order (pursuant to section 51(1) and under Regulation 109). The second was an application for civil proceedings in relation to a private residential tenancy and specifically sought an order for payment of rent arrears and associated expenses (pursuant to section 71(1) and under Regulation 111).

[2] A Case Management Discussion was held by the FTS on 6 September 2022. Thereafter, in relation to the two applications, a hearing was assigned. This took place over two days being 26 January and 25 April, both 2023. On the second day of the hearing the FTS was advised that as the appellant had vacated the property the respondents did not seek an order for eviction. An order for payment of outstanding rent and expenses continued to be sought. The expenses were described as various invoices from the respondent’s lawyer and sheriff officers regarding the eviction process.

[3] On 19 June 2023 the FTS issued its written decision with statement of reasons. The FTS issued a detailed and lengthy decision extending to 198 paragraphs over 32 pages. The FTS found in favour of the respondents and granted an order for payment against the appellant in the sum of £11,691.17. This comprised the sum of £11,385 in rent arrears and £306.17 which the FTS determined were recoverable as a result of the respondents having to serve notices to leave on the appellant.



[4] The appellant sought permission to appeal from the FTS and advanced 8 grounds. On 15 September 2023 the FTS issued a written decision in which it granted permission to appeal on all grounds. It is important to replicate the part of that decision to show the grounds of appeal and what the FTS said when granting permission on each ground. The following is how that appears in the decision granting permission at part 3 thereof:

“The grounds of appeal founded upon by (the appellant) are as follows:

1. It makes findings in fact without a basis in evidence. **The ground of appeal raises an arguable point of law. Leave to appeal is granted.**
2. It omits relevant facts established at the hearing. **The ground of appeal raises an arguable point of law. Leave to appeal is granted.**
3. It overlooked important evidence. **The ground of appeal raises an arguable point of law. Leave to appeal is granted.**
4. It makes errors in the application of the law to the facts. **The ground of appeal raises an arguable point of law. Leave to appeal is granted.**
5. It makes facts contrary to the evidence. . **The ground of appeal raises an arguable point of law. Leave to appeal is granted.**
6. Fairness of the process. The landlord and assistant presented their case. The respondent alleges that they were allowed to interrupt the respondent during his evidence. **The ground of appeal raises an arguable point of law. Leave to appeal is granted.**
7. Fairness of the process. The respondent alleges that the applicants subjected him to unpleasant comments on his character during his evidence. He remained silent through their presentation. **The ground of appeal raises an arguable point of law. Leave to appeal is granted.**
8. The tribunal relied on evidence dated 18 April 2023 which it is alleged was not presented or recorded in the record of the hearing as part of the case. The respondent



alleges he was given no chance to respond to that evidence. **The ground of appeal raises an arguable point of law. Leave to appeal is granted.**

[5] In the decision granting permission to appeal, other than referring to recognised categories as to what might constitute “a point of law” on appeal with reference to *Advocate General for Scotland v Murray Group Holdings Ltd* [2017] UKSC 45, and with reference to the threshold for “arguable grounds of appeal” as set out in *Indigo Square Property Ltd v Mark Welsh* [2023] UT22, no further comment or observation was passed by the FTS as to why on each of the 8 grounds it had granted permission to appeal.

[6] Accordingly, with permission to appeal having been granted by the FTS, the appellant lodged his application for appeal with the Upper Tribunal for Scotland (“the UTS”). In addition to the completed Form UTS-1 the appellant lodged what he referred to as Appeal Documents 1, 2 and 3. The 3 Appeal Documents in total extended to 69 pages. The overall initial bundle, including the decisions of the FTS extended to 118 pages. Shortly after submitting this the appellant then supplemented papers with what was referred to as Appeal Documents 4 and 5. These documents added a further 21 pages to the appellant’s initial bundle for consideration albeit Appeal Document 4 (effectively accepted as and being headed “new evidence”) was not ultimately insisted upon at the appeal hearing.

[7] Faced with the above, and having difficulty in understanding why permission to appeal on all grounds had been granted, I decided to issue an Order to the FTS. In terms of that Order, made in terms of Rule 7(3)(o) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 I deemed it necessary to request a Supplementary Note from the FTS in order



that it could provide me with detailed reasons explaining the basis upon which leave to appeal had been granted in relation to each ground of appeal. I further ordered that whereas the FTS should provide its observations on all grounds of appeal it should particularly direct the note towards grounds of appeal 6, 7 and 8 which called into question the fairness of the proceedings at first instance. In this respect the FTS was ordered to provide its observations in relation to the conduct of the hearing before it having particular regard to the issues of fairness raised by the appellant. I was also curious to learn what documents had been before the FTS when the application for permission to appeal had been made. Had the FTS seen the documents referred by the appellant as Appeal Documents 1, 2 and 3 or, if not, what other documents had been presented to the FTS at that stage.

[8] The FTS complied with the order and provided the UTS with a Supplementary Note of Appeal. The Note extended to 28 pages and comprised 161 paragraphs. I will return to the Note in more detail. In the Note the FTS confirmed it had not had sight of the appellant's Appeal Documents 1, 2 and 3. The FTS did not specifically confirm what documents it had received when considering permission to appeal.

[9] The appeal proceeded to a hearing on 20 March 2024. It proceeded by WebEx. The appellant was represented by his mother, Mrs. Susan O'Donoghue and the respondents were represented by Mr. Malone. Both had lodged further written submissions in advance of the hearing and both supplemented this with oral submissions for my consideration. There proceeded before me a relatively lengthy hearing.



Grounds of Appeal and decision on each

[10] Given the material before me I will proceed to summarise the various points explored in this appeal so far as I assess as relevant to the various grounds. I consider the most expeditious way to achieve this is by looking at each ground of appeal separately and reach a conclusion on each ground as we move forward. In order to do so logically I will consider the various grounds out of order as presented in the appeal.

Grounds of Appeal 6 and 7 – Fairness of process

[11] I will commence consideration of the grounds of appeal by concentrating on grounds 6 and 7. These relate to the overall fairness of the proceedings before the FTS. I do so on the basis that if there was material unfairness in the conduct of the hearing then the appeal would succeed without the necessity of considering all of the remaining grounds in particular detail.

[12] In the original decision the FTS records that Mr. Malone and Mr. Cheshmehdoost appeared for the respondents. On the first day the appellant appeared alone. On the second day the appellant appeared with his mother as a supporter.

[13] In Ground of Appeal 6 the appellant submits that the landlord and his assistant presented the case and the appellant alleges that they were allowed to interrupt him during his evidence. It was submitted by the appellant in his written reply to the respondent' notice of appeal response that the FTS erred in this respect. It resulted in an unfair hearing and therefore offers strong grounds for appeal. In advancing this submission the appellant founds upon the 2017



Regulations. It is the appellant's position that the case could only be presented by one representative and not by two (Regulation 10(1)). If Mr. Malone was the representative then Mr. Cheshmehdoost could only have had a role as either a witness or a supporter. The appellant refers to frequent interventions made by them and submits this led to inherent unfairness and disadvantaged the appellant.

[14] In written submissions the respondents' position was that the landlord was represented by Mr. Malone with Mr. Cheshmehdoost acting as supporter on both days. The appellant represented himself with his mother acting as a supporter on day 2. The respondents acknowledged that there were interruptions from both parties during the hearing and this contributed to the extended duration of the hearing. The respondents submitted that the FTS managed the hearing professionally and ensured both parties were heard.

[15] In its supplementary note the FTS comments (at paragraph 11) that both parties interjected whilst the other was giving evidence. The FTS refers to the fact that on day 1 the appellant appeared alone and on day 2 of the hearing he appeared with his mother as a supporter. It is recorded that the appellant's mother assisted him in giving evidence during the second day and this included on a number of occasions advising the appellant on what to say and included giving advice to the appellant to refuse to answer a question which she considered to be irrelevant. In summary the FTS states that as neither party was legally represented it gave parties a certain amount of leeway in how they presented their cases but, ultimately, the hearing followed a reasonably traditional and formal procedure whereby the respondents (as applicants at first instance) presented their evidence first, followed by the respondent (now the appellant)



and that both parties had the opportunity to cross-examine the other after evidence-in-chief. It is clear from the supplementary note that the FTS considered the procedure adopted to be fair in respect of both parties and that each party had the opportunity to present their case fully.

[16] In Ground of Appeal 7 the appellant submits that the respondent's subjected him to unpleasant comments on his character during his evidence. He remained silent through their presentation. The appellant does not in this appeal provide any specification as to what he considered the unpleasant comments to be. In the supplementary note the FTS acknowledges that both parties became heated at times and had to be reminded by them as to their respective conduct of the hearing. The FTS comments that it was clear there was a degree of animosity on both sides.

[17] Looking at the original decision I note that the respective roles of Mr. Malone and Mr. Cheshmedoost for the respondents is not clarified. The appellant's mother is designated as a supporter. It is clear that all parties appear to have contributed in different ways at the hearing. Indeed, it is clear that the appellant's mother interjected in ways which surpassed her role as a supporter (see Regulation 11 of the 2017 Regulations). Equally, it appears likely that Mr. Cheshmedoost interjected in ways which also surpassed his role as a supporter.

[18] It is common place before courts and tribunals that hearings involving party litigants can become heated and this can pose issues which must be controlled and managed appropriately. Certain leeway will be afforded by the decision maker in the presentation of a case in such circumstances. Acrimony and animosity often become self-evident and it is the task of the decision maker to control tempers and remind parties of the propriety of presentation of their



respective positions. In this respect the overriding objective of any decision maker is to deal with proceedings justly. That is in any event the overriding objective of the FTS as encapsulated in Regulation 2(1) of the 2017 Regulations. In terms of Regulation 2(2) dealing with proceedings justly includes seeking informality and flexibility in proceedings and ensuring, so far as practicable that parties are on an equal footing procedurally and are able to participate fully.

[19] Reading the decision of the FTS as a whole it is very clear that over a two day hearing both parties presented detailed evidence, both orally and in written form. Setting aside what the evidence was, and what the FTS made of that, the original decision carefully records the case as presented by both parties. This includes the respondent's submissions/evidence (paragraphs 13 - 65), the appellant's questions to the respondent (paragraphs 67 - 80), the appellant's submissions/evidence (paragraphs 82 - 119) and the respondent's questions to the appellant (paragraphs 120 - 128). What this discloses is a detailed and extensive presentation of evidence on the part of both parties. It records a particularly robust and detailed cross-examination on the part of the appellant focused on attacking the credibility of the respondent. Based on this there can be no sustainable argument that the fairness of the hearing prevented the presentation of the appellant's case. The terms of the decision, as recorded by the FTS, does not support the claim that the appellant was in any way materially disadvantaged. There is nothing which suggests or supports the contention that the hearing was inherently unfair.

[20] For the above reasons I will refuse Grounds of Appeal 6 and 7.

Ground of Appeal 1 – It makes findings in fact without a basis in evidence.



[21] The appellant seeks to expand a large number of examples where he submits the FTS made findings in fact without evidence to support that. In particular, with the appeal application the appellant lodged a document referred to as an annotated decision document (appeal document 3). Under each of the disputed findings in fact the appellant added in bold what he described in the document as his comments regarding “failures and errors in the record and required corrections based on evidence which are required if a true summary of the case is to be achieved”.

[22] The findings in fact of the FTS can be found at paragraphs 129 to 157 inclusive. Of the 29 findings in fact the appellant challenges, or comments on, 19 of these findings. Some of the appellant’s comments are elaborate and lengthy. I will not replicate the appellant’s comments in detail. It is unnecessary to do so. By way of example however, this is some of what the appellant states about the findings in fact at paragraphs 134, 135, 141, 151 and 152:

“134. Clause 7 of the tenancy agreement provides that the rent for the property is £495 per calendar month. It is payable in advance and due on the 1st of each month

No. Because there is no written agreement, there is a fake agreement produced by the applicant for the FTT case and backdated to 10 May 2021. We know that he presented me with a short assured tenancy agreement on 24 May 2021. See point 9 in document 2. There was a verbal agreement that rent of £495 was to be paid at the beginning of each month.

135. There were rent arrears outstanding at 24 April 2023 or appeared to be rent arrears outstanding which totaled £11,691.17.

No this is wrong. The majority of this sum, £9,633, is withheld rent. To call it rent arrears at this stage in prejudicing the case.....

141. That the respondent was dismissed from his employment with the applicant in May 2021.



No. This statement is untrue. I resigned from my employment. Please see detailed entry in Appeal document 1 – specifics – D: end of employment facts and time-line.

151. That the respondent has acted in a manner which is obstructive to the applicant's contractors trying to arrange access to the property to carry out inspection and repair works since at least February 2023.

No. This statement is completely wrong. The information used here by the Judge is discussed in Appeal Document 2 point 7.

152. That the tenancy lodged stated that the start date was 10 May 2021, this is because the tenant had refused to sign a tenancy agreement and the landlord decided that one should be issued to provide both parties with a note of the terms and conditions of the tenancy.

No. This statement is completely wrong. There is not enough detail in this point for it to be accepted as a correct finding in fact. This matter has been addressed in point 9e."

[23] In relation to this ground of appeal the respondents commented that the appellant's Appeal Document 3 was an attempt to reword the decision. The document should be disregarded. The FTS had been justified in making the findings in fact which it did.

[24] In the original decision the FTS commented that it found the evidence of the respondents in this appeal to be credible and reliable in their explanation of their evidence (paragraph 159). Furthermore, at paragraph 161, the FTS recorded that they did not find the appellant in this appeal to be credible or reliable in a number of areas, neither did they accept he had been a victim of harassment and concluded that he had exploited the inexperience and naivety of the landlord. In this latter paragraph the FTS also commented that they found the appellant to be evasive in evidence on any points that did not serve his interests.

[25] In its supplementary note the FTS confirms that in coming to its decision it had before it written evidence, oral evidence and oral submissions as presented by both parties. The FTS



confirms that it considered all of the evidence. At page 3 of the supplementary note the FTS states as follows;

“the tribunal did not consider that this was a very complicated case. It involved non-payment of rent. The evidence presented by the respondent (applicant and landlord) was supported by a number of written documents including WhatsApp messages, these messages were extracted to make it easier to read them, and they were also provided in message form to show the actual message. The explanation by the landlord in his evidence was credible, albeit we do accept that his approach as a landlord was not helpful in terms of record keeping and discharging duties as a landlord. We note this in the decision. There were responses to the messages submitted by the appellant (tenant) which indicated that he accepted that there were rent arrears. There was further correspondence about the end of the employment contract between the parties. There was evidence about the issues raised about repairs to the property and access to the property. We preferred the evidence of the landlord over the evidence of the appellant. We did not consider that the appellant had been bullied, intimidated or gas lighted by the landlord....We consider that the decision is balanced, reasoned, and addresses the material matters. Having heard from both parties we consider that we were well placed to determine matters of credibility and reliability, and to this end we preferred the landlord’s evidence.”

[26] In order to determine this ground of appeal, I have carefully considered the findings in fact challenged by the appellant. I have cross-referenced his various comments and observations as contained in his various appeal documents with the original decision. That has not proved to be an easy task given the complexity of the documents prepared by the appellant. That said, it is clear to me that the foundation for the findings in fact as challenged are found in the evidence presented for the landlord. As I have already commented that evidence was challenged robustly by the appellant in cross-examination and in his evidence-in-chief. The findings in fact which the



appellant seeks to correct are based on the evidence that he presented, that being the evidence in large part which was not accepted by the FTS.

[27] In relation to this ground of appeal I have concluded that the appellant, to a substantive degree, is asking the UTS to prefer his evidence as it was presented before the FTS over that of the respondent. That is not the function of the UTS as has been repeated in many appeal decisions. There was clearly an evidence base for the FTS to make the findings in fact that it did following its evaluation of the evidence. Put simply, it preferred the evidence of the respondents. It did not accept the background as presented by the appellant. The FTS is not open to criticism in that regard. For the above reasons Ground of Appeal 1 is refused.

Ground of Appeal 2 – It omits relevant facts established at the hearing

Ground of Appeal 3 – It has overlooked important evidence

[28] I will consider grounds 3 and 4 together. Whilst the appellants submissions, both written and oral, were voluminous on these grounds I had considerable difficulty in understanding the relevancy of these arguments on appeal. Reference was made to the FTS's consideration and assessment of rent arrears, issues regarding inspection of the property and the true nature of the ending of the appellant's employment. There was also the issue of sums borrowed and repaid by the appellant, sums still outstanding and the issue of whether rent had been retained because of repair issues.

[29] In the supplementary note the FTS comments that it considered the evidence properly. It refutes the suggestion that it overlooked important evidence. The FTS concludes in the note that



there was an effort on the part of the appellant to try to confuse matters but, ultimately the FTS still considered that this was a “fairly straightforward case” (paragraph 8, page 5).

[30] Looking at the original decision it is clear that the FTS gave careful consideration to the points in issue at the case management hearing. The applicant’s position is summarised at paragraph 8 of the decision. At paragraph 9 the appellant’s position is summarised which includes that he disputed the legitimacy of the tenancy agreement, the extent of alleged rent arrears and records a detailed explanation as to why the appellant considered the case should not succeed.

[31] The FTS recorded the evidence and submissions made by each party. All matters in contention were considered and appropriately commented upon. In my judgement if facts were omitted they were not relevant and the appellant has failed to persuade me otherwise. I do not accept that evidence directly relevant to the matters in dispute was in any way overlooked.

[32] I refuse this appeal in relation to grounds 2 and 3.

Ground of Appeal 4 – It makes errors in the application of the law to the facts

[33] The appellant’s Appeal Document 2 is referred to as “an annotated decision document listing comments regarding failures and errors in the record and required corrections based on evidence which are required if a true summary of the case is to be achieved”. As in Appeal Document 3 the appellant adds comments in bold. These are substantial and in some respects very subtle when compared against the wording which is being challenged. The vast majority of these comments seek to challenge the content of the reasons given for the decision of the FTS.



[34] In essence the appellant is submitting that the FTS erred in applying the law to the facts not that it made but to the facts that it should have made. It should have applied the law to the facts as presented by the appellant and, had it done so, it would not have concluded that there were rent arrears, or that if there were rent arrears the rent had lawfully been withheld. That of course is not what the FTS did because it did not accept the evidence presented by the appellant. It accepted the evidence presented by the respondents. Having done so it applied the law correctly to the facts it found proved. On that basis this ground of appeal is not arguable and falls to be refused.

Ground of Appeal 5 – It makes findings of fact contrary to the evidence

[35] In all respects this ground of appeal has been commented upon as above. It would serve no useful purpose in this appeal to revisit what has already been stated which adequately covers the points relied upon by the appellant under this ground of appeal. This ground is not arguable and falls to be refused.

Ground of Appeal 8 – The tribunal relied on evidence dated 18 April 2023 which it is alleged was not presented or recorded in the record of the hearing as part of the case and the respondent alleges he was given no chance to respond to that evidence.

[36] On 18 April 2023, being before the second day of the hearing, the respondents lodged email correspondence. The appellant submits that this was not referred to in the oral evidence of the respondents. The appellant was not asked by the FTS if he wished to question the respondents about this correspondence. The appellant states that the FTS used the unchallenged



contents of the email and attachments in their decision making and referred to this in paragraph 188 of the decision.

[37] The respondents submitted that the email correspondence was lodged seven days before the second day of the hearing and state it was referred to by them on the second day. This was available to the appellant should he have wished to respond to it or to cross-examine on its contents.

[38] In the supplementary note the FTS concede that it could have made it clear that the email correspondence had been received thus allowing both parties to comment on it. The FTS accepts that it did consider the correspondence as part of the applicant's case. The FTS considered that the email correspondence was of relevance to finding in fact 151. The FTs considered that it did not misinterpret the evidence.

[39] I have replicated finding in fact 151 above together with the appellant's annotated comments as found in Appeal Document 3. The appellant submits that there were references to the email correspondence throughout both the findings in fact and the reasons for the decision. The appellant is incorrect in his assertion that there is reference to the correspondence in the findings in fact. There is reference in general terms to it in the FTS's reasons for the decision at paragraphs 187 and 188. The comments therein refer to issues regarding access to the property in order to investigate repair issues. The FTS noted with some concern that there was email correspondence between the appellant and contractors which the landlord had tried to send to carry out certification works. The FTS took from this that the appellant had been obstructive. The FTS further noted that two contractors subsequently refused to do work at the property.



[40] Having considered this matter, albeit there is a concession on the part of the FTS that it could have made greater efforts to ensure parties were aware the email correspondence had been received and allowed late I have concluded that this failure was not material. It did not prejudice the appellant in presenting his case in such manner as he wished to do. I refer again to the detailed evidence given, and cross-examination conducted by each party. The issues of gaining access and refusal to allow access was covered in great detail by both parties. This was linked to the issue of withholding rental payments, again covered in great detail.

[41] All of this does not detract from the FTS's assessment of credibility. Given the overall terms of the written decision the importance of the complained of email correspondence would not have been such as to materially affect the FTS's assessment in this regard.

[42] For the above reasons Ground of Appeal 8 is refused.

Observed

[43] Given the nature and extent of the grounds of appeal as presented this was a lengthy appeal process with an extensive volume of papers and submissions to consider. It should not have been so. Nothing has been presented on appeal which causes me to question the FTS's comment that, ultimately, this was a straight forward case relating to rent arrears. Accepted there were many chapters of evidence presented and considered. Whether all the evidence was relevant is questionable. The FTS properly considered all relevant evidence and ultimately, faced with two competing accounts, it preferred the evidence for the respondents.

Upper Tribunal for Scotland



[44] I have some reservation as to why the FTS granted permission to appeal on all grounds at first instance. It is very clear from the Supplementary Note of the FTS that they did not concede there to be any particular merit in any of the grounds as presented.

[45] As I have commented the FTS did not provide any reasoning as to why permission to appeal was granted. I am not seeking to be overly critical of the FTS in this respect. In terms of Regulation 38 of the 2017 Regulations the FTS must decide whether to give permission to appeal on any point of law. In terms of Regulation 38 it is only if the FTS refuses permission to appeal that it has a duty to provide a statement of reasons for such refusal. It could therefore be argued that in granting permission to appeal the FTS does not require to provide a statement of reasons for granting permission. That said, in a case such as this, where the fairness of the process at first instance is challenged it would be expected by the UTS that the FTS should comment on this in the decision granting permission to appeal. If the FTS does not do so then, in most cases, a supplementary note will be necessary in order to inform the UTS as to the FTS's views on the matter of the alleged procedural unfairness.

*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 Ian Hay Cruickshank

Member