



DECISION OF

SHERIFF IAN HAY CRUICKSHANK

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

Ms Kimberly Baff, 17 Gordons Mills Place, Aberdeen, AB24 2YQ

Appellant

- and -

Mr Rex Thorsson, 16 Tedder Street, Aberdeen, AB24 2SS

Respondent

FtT case reference FTS/HPC/EV/21/0498

6 April 2022

Decision

Refuses permission to appeal the decision of the First-tier Tribunal Housing and Property Chamber dated 11 June 2021.

Introduction

[1] Ms Kimberly Baff (“the appellant”) has sought permission to appeal a decision of the First-tier Tribunal Housing and Property Chamber (“the FtT”) dated 11 June 2021. Leave to appeal was refused by the FtT on 25 October 2021.



- [2] Following lengthy procedure this matter was determined at a hearing conducted remotely by WebEx on 16 March 2022. The appellant appeared and represented herself. The respondent was represented by Mr Kiddie, Advocate. In terms of Rule 29 of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 (“the 2016 Rules”) I considered it was sufficient in the first instance to give an oral decision at the hearing. In terms of Rule 29(3) of the 2016 Rules the appellant has requested that written reasons for my decision should be provided.
- [3] This appeal raises issues about the fairness of remote participation in hearings before both the FtT and the Upper Tribunal. Whilst ultimately the matter of remote participation was not material to the decision I have reached it is perhaps pertinent to provide general observations about the use of remote methods of participation and when that could give rise to an arguable point of law for appeal purposes.

Background to this Appeal

- [4] The respondent, as landlord of the subjects tenanted by the appellant, sought an order for possession of the property in terms of section 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”). The appellant had been served with Notice to Leave in terms of section 50(1)(a) of the 2016 Act. This had been served by Sheriff Officer. The Notice confirmed the landlord’s intention to raise proceedings for possession under Ground 5 of Schedule 3 of the 2016 Act, namely that a member of the landlord’s family intended to live in the property.



- [5] The FtT first considered matters substantively at a Case Management Discussion (“CMD”) on 30 April 2021. The CMD was conducted remotely by conference call with contact details being provided to the parties in advance. The appellant was present as was a Mr Fraser who is referred to in the CMD note as the appellant’s supporter.
- [6] The CMD note records that Mr Fraser argued that the FtT did not have jurisdiction to deal with the landlord’s application. He submitted the landlord had failed to provide a property which met a tolerable standard. As such no contract existed between the parties. The landlord’s failure to remedy defects at the property meant the landlord could not make an application for eviction as the contract had been made under duress. After a brief adjournment in proceedings the FtT assigned the case to a hearing on 11 June 2021 where evidence would be led.
- [7] Following the CMD a written direction notice was issued directing the appellant to produce written submissions referring to relevant case law and to provide a copy of any legal authorities to be relied upon to support the proposition that the FtT had no jurisdiction to consider the application. Written submissions were to be lodged with the FtT no later than 14 May 2021. Neither the appellant, nor Mr Fraser, complied with the direction notice.
- [8] On 10 June 2021, the day before the scheduled hearing, the appellant contacted the FtT seeking a postponement. The decision of the FtT does not record whether a particular reason was advanced in support of an adjournment (and no reason was confirmed in the written or oral submissions before the Upper Tribunal). The decision of the FtT states that the appellant was advised to request a postponement in writing and to email her request.

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The appellant stated she would be unable to do this given security issues with her email account. She was advised to attend the hearing and request a postponement then. The appellant was informed that the FtT would be made aware of her request for a postponement but the hearing would go ahead unless otherwise notified.

[9] On 11 June 2021 the hearing commenced at 10am. The hearing was again to be conducted remotely by conference call. The landlord and his representative were present but neither the appellant nor Mr Fraser were in attendance. The FtT waited until 10.10am and then decided to proceed with the hearing in the appellant's absence. The FtT was satisfied that the appellant had been notified of the hearing. Further it was noted that the appellant had not complied with the direction notice and had neither lodged any productions nor a note of defence for the consideration of the FtT.

[10] In the absence of the appellant, the FtT both considered, and answered, the appellant's previous submission that it had no jurisdiction to consider the application. The FtT was satisfied that it had jurisdiction by virtue of section 51 of the 2016 Act. Thereafter the FtT proceeded to consider evidence given by the landlord together with the affidavit of his son and an affidavit from the resident of the flat above the tenanted property. The FtT was satisfied that a valid notice had been served by Sheriff Officers on the appellant. It noted there was no challenge to the landlord's assertion that the flat was required for his son and son's family to live in and the FtT was satisfied that the landlord required the property for that purpose. The FtT concluded that the landlord's son intended to occupy the property



as his principal home for at least 3 months. Finally, the FtT concluded that it was reasonable to grant the order.

[11] On 14 July 2021 the appellant lodged an application for permission to appeal. She cited “abuse of process” in relation to the CMD. Exception was taken to the reference made to Mr Fraser as a supporter. The clerk to the FtT had misunderstood that Mr Fraser was to represent the appellant. The issue of not being allowed to record proceedings was also raised. This had been necessary given the appellant’s disabilities. The appellant submitted that she had suffered both direct and indirect discrimination under Equality legislation. The FtT had not acted as an impartial tribunal. The main point of appeal was that the appellant and Mr Fraser had been present and awaiting entry to the conference call arranged for the hearing on 11 June 2021. They had evidence to prove this and, in all the circumstances, the appellant had been denied a fair hearing.

[12] In its written decision the FtT refused permission to extend the time limit for receipt of the appellant’s application for permission to appeal. The application had been lodged outwith the 30 day period provided for in terms of the relevant rules of procedure. Notwithstanding this, the FtT proceeded to answer the various grounds of appeal raised by the appellant. Consideration was given to the claim that the appellant had been unable to join the hearing but this was rejected and the evidence submitted by the appellant was not considered to be conclusive. The FtT did not consider there was any merit in the grounds of appeal as no error on a point of law had been identified.



Grounds of appeal

- [13] When the Upper Tribunal received the appellant's application for permission to appeal I found the extent and basis of the proposed grounds confused and not at all clear. The Form UTS-1 was accompanied by a lengthy attachment which made oblique reference to a number of diverse statutory provisions but provided no coherent or succinct argument as to the relevance of these provisions. Given my difficulty, and the fact that the Upper Tribunal Clerk advised she was receiving a huge number of emails and attached documents from the appellant on an unrelenting basis I considered it necessary to issue the first of a number of orders in this case. The order scheduled a procedural hearing by WebEx on 5 January 2022 to explore and identify the extent of the proposed grounds of appeal which were to be insisted upon. The hearing was to be conducted remotely by WebEx.
- [14] The procedural hearing was unable to progress substantively. The appellant connected remotely but technical difficulties with the connection to the appellant were encountered. I will comment on this in my general observations. It is suffice to state that a permission to appeal hearing eventually proceeded remotely on 16 March 2022. The appellant sought to advance some of the grounds of appeal that had been argued before the FtT. In summary the first ground of appeal related to the contention that the FtT did not have jurisdiction to consider the application before it. Further grounds of appeal related to the inability of the appellant to effectively participate in the hearings before the FtT and the perceived or real bias and non-impartiality of the FtT.



Discussion

- [15] The appellant advanced the submission that the FtT had erred in not giving consideration to her Compatibility Minute. I took this to mean that the FtT had erred in concluding there was jurisdiction to consider the application before it. Separately the appellant submitted the technical difficulties which had arisen had prevented her from receiving a fair hearing on 11 June 2021. The appellant outlined all the difficulties she had experienced with IT equipment and how this had prevented effective communication with the FtT. The appellant submitted that the same difficulties had been experienced with the Upper Tribunal and all her concerns about “hacking” had not been fully or properly investigated.
- [16] In response to my enquiry as to what, if any, substantive defence the appellant had sought to advance before the FtT I was surprised by the response given. The appellant confirmed there had been no intention to advance a substantive defence. Indeed it had never been her intention to remain in the property and she had been content to vacate the subjects. The only matter which had prevented this was a Minute of Agreement had never been finalized and this remained outstanding. By this I understood the appellant to refer to a Minute of Agreement which had been in the process of negotiation between the parties which, if final agreement had been reached, would have resolved matters on an extra judicial basis. This involved payment of a sum of money to the appellant but agreement had not been reached as to when that was to be paid.
- [17] Mr Kiddie, Advocate for the respondent submitted the FtT had sought to establish whether the appellant intended to advance a substantive defence to the application. At the CMD



the only matter advanced was that the FtT had no jurisdiction. This led to the FtT issuing directions which were not complied with. At the hearing of 11 June 2021 the FtT addressed the issue of jurisdiction and rejected this. The FtT then dealt with the substantive merits of the landlord's application and, having adopted an inquisitorial approach as outline in the FtT's written decision, concluded that the evidence supported the application and the granting of the order was reasonable. Mr Kiddie submitted there were no errors of law in the FtT's conduct or in its reasoning for the decision reached.

Conclusion

- [18] In terms of Rule 3(6) of the 2016 Rules the Upper Tribunal may, where the FtT has refused permission to appeal, either refuse or give permission. Alternatively, the Upper Tribunal may give permission to appeal on limited grounds or subject to conditions.
- [19] This appeal is in terms of section 46 of the Tribunals (Scotland) Act 2014. As such, an appeal is to be made on a point of law only. In terms of section 46(4) permission to appeal may be given if I am satisfied that there are arguable grounds for appeal. The appellate function of the Upper Tribunal is limited. It is not an opportunity to rehear the factual matters previously argued before the FtT. I was at pains to remind the appellant of this during the course of her submissions.
- [20] The appellant's first ground of appeal has no merit. Whereas at the CMD it was submitted the FtT had no jurisdiction, no reasoned or detailed argument was presented in support of that proposition. None was submitted at the permission to appeal hearing before me. Following the CMD the FtT issued the written direction as above outlined. For whatever

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reason this was not complied with. Notwithstanding that to be the case, at the hearing on 11 June 2021, in the absence of the appellant, the FtT addressed this matter. The FtT considered this matter *pars judicis*. It concluded that it had jurisdiction to consider the application in terms of the 2016 Act. I entirely agree with the conclusion of the FtT.

[21] In neither written nor oral submissions did the appellant submit the FtT had erred in reaching the factual conclusions it did. The appellant did submit that it was no longer reasonable to grant the application but I reject that argument. At the time the decision was made the FtT was entitled to reach the findings in fact it did on the evidence presented by the respondent. Based on those findings in fact the FtT was entitled to conclude it was reasonable to grant the order sought. Furthermore, on the submissions before me the appellant accepted she had never intended to advance a substantive defence to the order being sought. Reference to the failure of parties to reach an extra judicial settlement is entirely irrelevant to the decision reached by the FtT.

[22] The appellant's submission that there had been bias or prejudice in the conduct of proceedings before the FtT entirely lacked any substance. She continued to make reference to various statutory provisions, including the Scotland Act 1998, but entirely failed to explain the direct relevance of these provisions to the points the appellant sought to advance. There is no merit to this ground of appeal.

[23] I am also at a loss to understand what relevance any ground of appeal has so far as it relates to the inability of the appellant to participate in the hearing of 11 June 2021. I have no concluded view as to how or why the communication difficulties came about. The



appellant has failed to advance any basis upon which her participation in the hearing would have led to the FtT to reach a decision different to the one it reached. The appellant has not identified any arguable ground of appeal based on a point of law.

[24] The overriding objective of the FtT is to deal with proceedings justly (First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, Schedule 1, Rule 2(1)). Dealing with proceedings justly includes those matters listed in Rule 2(2). This was acknowledged by the FtT in its decision in this case. In terms of Rule 3 the FtT must seek to give effect to the overriding objective when exercising any power under the Rules and when interpreting any rule. It must manage proceedings in accordance with the overriding objective. Of equal importance is the duty of the parties to assist the FtT to further the overriding objective (Rule 3(3)).

[25] Where a party or their representative does not attend a hearing, provided the FtT is satisfied that the requirements of notice have been complied with it may proceed with the application upon the representations of any party present and all the material before it (Rule 29 of the 2017 Regulations). The FtT gave careful consideration to this matter and concluded it was appropriate to proceed in the appellant's absence. The FtT cannot be criticised for doing so. Furthermore, in terms of Rule 30 of the 2017 Regulations a party may apply for a decision to be recalled where that decision was made in absence provided the application is made within 14 days of the decision. The application must state why it would be in the interests of justice for the decision to be recalled. The Rule limits a party to apply for recall only once in the same proceedings but provided that recall is not



precluded on this basis inability to participate in a hearing due to difficulties caused by technology would be sufficient reason to recall a decision provided always that the interests of justice test has been satisfied.

[26] Having given full consideration to submissions for both the appellant and respondent I am not satisfied that there are any arguable grounds of appeal in this case. I refuse permission to appeal for the reasons above stated.

Observations – remote participation in hearings before the FtT and Upper Tribunal

[27] I applaud the Upper Tribunal staff for their efforts to allow the appellant to participate effectively in the hearings before me. From ongoing correspondence being received by the Upper Tribunal from the appellant whilst I have been preparing these written reasons I do not consider she accepts this to have been the case. Given that a ground of the appellant's permission to appeal brought into question whether there had been unfairness in the proceedings before the FtT due to inability to participate in remote hearings I consider it is appropriate to make the following observations.

[28] Courts and Tribunals have had to develop and promote remote means by which hearings can be conducted. This was primarily brought about so that business could be progressed whilst observing and complying with restrictions introduced as a result of the Covid pandemic. From personal experience remote hearings have been successful and I have encountered few difficulties in conducting them. I have not found that remote hearings have created a barrier to justice and that has been so even in relation to hearings where evidence has required to be led and assessed. That is not to say that all hearings can be

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conducted remotely. The interests of justice may require an “in person” hearing to be assigned. That will depend on the particular circumstances of each case.

[29] As I understand matters, prior to the pandemic all Upper Tribunal hearings were either “in-person” or conducted by telephone. The current default position of the Upper Tribunal is to conduct hearings by WebEx, although there have been a limited number of “in-person” hearings if requested by parties or by the presiding Upper Tribunal member. The FtT chambers have their own procedures but in general they are conducting hearings on the same default basis as the Upper Tribunal. Moving forward it is likely that WebEx hearings will remain in use together with “in-person” and telephone hearings.

[30] The present appeal has been plagued with difficulties brought about by communication technology so far as the appellant has been concerned. Whether all or some of the difficulties were purported or real is of no consequence to the decision I have reached. Whereas I sought to make enquiry to ascertain whether the difficulties before both the FtT and the Upper Tribunal could be substantiated I reached no concluded view as to their true cause. That said, given these difficulties led to a relatively substantial delay in determining whether leave to appeal should be granted I consider it is appropriate to outline the exceptional efforts which the staff of the Upper Tribunal went to in order to allow the hearing on 16 March to proceed to a conclusion.

[31] The appellant claimed it was interference with her various IT devices that led to her being unable to email documents or participate in hearings remotely. In relation to the proceedings before the Upper Tribunal this was first experienced at the procedural hearing



which had to be adjourned on 5 January 2022. Following that hearing I issued an order that in advance of the next scheduled hearing on 2 February 2022 both the appellant and the respondent, or his agent, were ordered to participate in two WebEx practice sessions to be arranged in advance of the said hearing. Furthermore the order stated that should difficulties be encountered, either at a practice session or at commencement of the hearing itself, notice was given that the procedural hearing would proceed by telephone conference call. In such circumstances both the appellant and the respondent, or his agent, were required to participate in one telephone conference call practice session in advance of the said hearing.

[32] The respondent's agent complied with the order and participated in both a WebEx and telephone practice session. Mr Fraser contacted the Upper Tribunal to advise that the appellant had no communication device available for the hearing. This was due to the issues of interference and hacking which continued to prevent available devices or email addresses being used. As a consequence of these claims I issued a third order stating that facilities would be made available at Aberdeen Sheriff Court for the appellant to participate in a test session and hearing.

[33] The appellant attended at Aberdeen Sheriff Court for a test session on 2 February 2022. In order to further assist the appellant an SCTS laptop was provided to allow her to connect remotely into the hearing. The hearing proceeded and no communication difficulties were encountered. In the first instance I granted permission to appeal on limited grounds and principally on the ground as to whether the First-tier Tribunal had erred in law by arriving



at the decision it did in the absence of the appellant in circumstances in which the First-tier Tribunal knew, or ought to have known, that the appellant had attempted to participate in the hearing of 11 June 2022 but had been unable to participate by remote means. After reflection I concluded I had erred in reaching this decision. I thereafter reviewed my decision in terms of Rule 30(1) of the 2016 Rules having decided at my own instance to review the decision I reached on that date. Following reflection, and given information which was brought to my attention immediately after the hearing on 2 February I considered that it is was in the interests of justice to do so.

[34] The information which led me to review my decision was as follows. Unbeknown to me whilst engaged in the remote hearing on 2 February an email communication was received by the Upper Tribunal from Mr Fraser. Because I was engaged in the hearing I did not become aware of this email until after the hearing had concluded. The email stated:

“I am James Fraser. I am here if needed by Miss Baff. As to hacks Miss Baff has placed all files relied upon on this terminal. Should Miss Baff find herself in a position of requiring any file in order to facilitate the “procedural hearing” Miss Baff will request for my introduction for the purposes of opening files on the screen in order to facilitate Miss Baff and for sharing and the Sheriff’s perusal. Thank you. James Fraser.”

(Thereafter a hyperlink was added)

[35] What was of significance was the email address used to send the email. This was given as the email address previously used by the appellant in connection with these proceedings and the email address which the appellant professed at the hearing could not be used as it



was not available to her for the reasons previously given. Furthermore, I was later advised that at the hearing the appellant was seen looking at items on a tablet. Again, this was during a hearing when I was specifically advised by the appellant that she had no reliable device available which would allow her to communicate.

[36] I was very concerned with the information which was brought to my attention. I considered it was in the interests of justice to set aside my decision and I determined that I would assign a full hearing to determine whether permission for leave to appeal should be granted. It was in the interests of justice to do so in fairness to both parties. I ordered that the hearing would be conducted remotely on a date and time to be confirmed. If the appellant wished to request to attend remotely from facilities at Aberdeen Sheriff Court that would be arranged by the Upper Tribunal administration. The appellant made no contact with the Upper Tribunal administration requesting such facilities but the administration made the necessary arrangements by securing a room, provision of an SCTC laptop and for a clerk to be in attendance, in the event that she attended Aberdeen Sheriff Court on the day of the hearing.

[37] The hearing was assigned for 16 March 2022. The appellant again attended at Aberdeen Sheriff Court and was provided with an SCTS laptop to allow participation. No communication difficulties were encountered. The appellant continued to profess that there was interference by parties unknown in relation to her communication devices. She stated this had continued to cause her difficulties in communicating with the Upper Tribunal. Despite efforts on my part to ascertain how Mr Fraser had been able to



communicate with the Upper Tribunal using the email account I had been told was effectively corrupted by being “hacked” I was unable to elicit any satisfactory response from the appellant.

[38] The present case is an extreme example of an appellant claiming that communication difficulties or IT interference had prevented her from effective participation in proceedings before both the FtT and the Upper Tribunal. I have had one previous application for permission to appeal where a similar issue arose ([2021] UT 39). In that case where communication was lost towards the end of the remote hearing before the FtT I concluded the appellant was not deprived of a fair opportunity to present his case at a Case Management Discussion. Whereas there had been communication difficulties during the hearing it was clear from the written decision of the FtT that all of the information which the appellant presented was fully recorded. The interference which occurred in communication had not prevented the appellant in that case from presenting further material information which could have persuaded the FtT to reach a different decision.

[39] At the hearing before me in the present appeal the appellant did not provide any further relevant factual information which was not recorded by the FtT in their written decision. The FtT determined the issue of jurisdiction in the appellant’s absence. On that basis, whilst it is unfortunate that the appellant could not participate in the hearing on 11 June 2021 I was unable to conclude that her participation in the remote hearing would have led to any other outcome than the FtT reaching the decision which it reached in the appellant’s absence. The appellant confirmed that she had no intention of presenting a substantive



defence to the orders sought. Accordingly, setting aside the issue of jurisdiction which the FtT correctly concluded it had to determine the application before it, the appellant had no defence to present to the FtT to the order being sought.

[40] As I have noted a decision made by the FtT in the absence of a party can be recalled if it is in the interests of justice to do so. The interests of justice would require an explanation as to why a decision reached in absence was unfair. The interests of justice test before the FtT would require an explanation as to why non-attendance caused by difficulties in remote participation had led to a decision being unfair. Just to state that technology prevented remote participation would not in itself render a decision reached to be automatically unfair. It would be necessary to outline the prejudice which had been caused by remote participation being thwarted by technology.

[41] Similarly, I do not consider it is enough for an appellant to appeal on the basis that communication difficulties had prevented their participation in a hearing before the FtT. In any case where an appellant advances such a ground of appeal, in my view, the appellant must persuade the Upper Tribunal that the FtT reached a decision in absence and had failed to address or consider any pertinent issue which was essential in law to the decision reached. Alternatively, or additionally, the appellant must persuade the Upper Tribunal that where participation was thwarted by communication difficulties the hearing had been conducted in such a way that the FtT had failed to observe its overriding objective, namely it had not dealt with proceedings justly. Finally if the appellant considers a decision was reached in absence and that communication difficulties had prevented participation then

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it must be established that the appellant had been prevented from providing submissions or materials which could have led the FtT to reach a different decision.

Sheriff Ian Hay Cruickshank

Member