



Determination of application for permission to appeal under Rule 37 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”)

Chamber Ref: FTS/HPC/LA/20/1410

Re: Property at 46, Parkdyke, Stirling, FK7 9LS (“the Property”)

Parties:

Mr. Adam Kindreich, 3 rua Nossa Senhora do Carmo, Bemposta, Almoester, Alvaiazere, 3250-024, Portugal (“the Applicant”)

Slater, Hogg & Howison, 44-46, Port Street, Stirling, FK8 2LJ (“the Respondent”) per their representative, Mr. T. McEntegart of TLT LLP, 140, West George Street, Glasgow, G2 2HG (“the Respondent’s Representative”)

Tribunal Members:

Karen Moore (Legal Member)

Frances Wood (Ordinary Member)

Determination

The Tribunal grants permission to appeal to the Upper Tribunal

Background

1. This is an application (“the Rule 37 Application”) for permission to appeal a decision of the First-tier Tribunal (“the FtT”) to the Upper Tribunal (“the UT”) in terms of Section 46(2) of the Tribunals (Scotland) Act 2014 (“the 2014 Tribunals Act”) and Rule 37 of the Rules.
2. In terms of Section 46(2) of the 2014 Tribunals Act, such an application is to be made (a) by a party to the case and (b) on a point of law only.
3. In terms of Rule 37 of the Rules, such an application is to be made in writing and must (a) identify the decision of the FtT to which it relates, (b) identify the alleged point or points of law on which the person making the application wishes to appeal and (c) state the result the person making the application is seeking.

4. It is then for the FtT to decide whether the Rule 37 Application satisfies the requirement in terms of Section 46(4) of the 2014 Tribunals Act that there are arguable grounds for the proposed appeal.
5. Therefore, in considering the Rule 37 Application, the FtT has to deal with five criteria:
 - i) Is the application in writing and made by a party to the case?
 - ii) Is the decision of the FtT to which it relates identified?
 - iii) If so, does the application identify a point or points of law?
 - iv) If it does, is the point of law, or are the points of law, arguable?
 - v) Does the application state the result the person making the application is seeking?
6. The first, second and fifth are matters of fact, the third a matter of fact and law and the fourth a matter of the exercise of a judicial discretion.

The first, second and fifth criteria

7. The Rule 37 Application is in writing, runs in the name of the Applicant as a party to the case, being the Applicant's application to the FtT in terms Section 48(1) of the Housing (Scotland) Act 2014 ("the 2014 Housing Act") and Rule 95 of the Rules ("the Rule 95 Application"), and identifies the decision of the FtT as the FtT's decision in respect of that Rule 95 Application ("the Decision") to which it relates. The Applicant states that he would like to have the case heard by the UT and that this is the remedy he seeks in respect of all matters raised by him. Accordingly, the first, second and fifth criteria are satisfied.

The third criterion

8. To satisfy the third criterion, the Rule 37 Application must identify the alleged point or points of law which the FtT fell into legal error in the Decision. Therefore, the FtT is required to consider the detail of the Rule 37 Application in light of the Decision.
9. In the FtT's view, the essential fact is that this is an appeal and not a review. Therefore, the FtT is not required or, indeed, able to reconsider how it assessed the facts presented to it at the hearing of the Rule 95 Application ("the Hearing")

or to consider if another tribunal might have reached a different decision on the same facts or if it should have reached a different decision on the same facts.

10. The FtT had regard to the detail of the Rule 37 Application and took the view that most of the elements of the Rule 37 Application, being mainly the points raised in respect of the Decision at paragraphs 90, 91, 94, 96, 97, 98, 100, 101, 104, 106, 108, 109 and 113, are not points of law but are the Applicant's view of the evidence heard at the Hearing. These parts of the Rule 37 Application set out the Applicant's opinion of the way in which the FtT should have assessed and should have given weight to the evidence with regard to his various complaints as set out in the Rule 95 Application. Accordingly, the FtT is of view that these elements of the Rule 37 Application do not satisfy the third criterion.

11. The FtT then had regard to the detail of the Rule 37 Application and the points raised in respect of the Decision at paragraphs 92 and 93 and the application of Rule 2 of the Rules. In the Rule 37 Application, the Applicant states that, not having upheld his complaints in respect of specific parts of the Letting Agent Code of Practice ("the Code") as stated by him in the Rule 95 Application, *"the FtT should have determined a decisionunder a different section of" the Code*. The Applicant sets out two instances where the FtT, on its own initiative, should have considered breaches of the Code not complained of by him. The Applicant cites Rule 2(1), Rule 2(2)(a) and (2)(d) of the Rules as the FtT's power to take this approach.

12. Rule 2 of the Rules is the overriding objective and states:

"(1) The overriding objective of the First-tier Tribunal is to deal with the proceedings justly.

(2) Dealing with the proceedings justly includes—

(a) dealing with the proceedings in a manner which is proportionate to the complexity of the criteria and the resources of the parties;

(b) seeking informality and flexibility in proceedings;

(c) ensuring, so far as practicable, that the parties are on 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;

(d) using the special expertise of the First-tier Tribunal effectively; and

(e) avoiding delay, so far as compatible with the proper consideration of the criteria."

13. Rule 3(2) of the Rules states that the FtT “*must manage the proceedings in accordance with the overriding objective*”. Therefore, the FtT was bound to apply Rule 2 of the Rules in its dealing with the Rule 95 Application and at the Hearing.

14. The Rule 95 Application was made under Rule 95 which refers to the 2014 Housing Act and states:

“Where a ... landlord makes.... an application under section 48(1) of the 2014 Act, the application must (a)state, in addition to the applicant’s reasons as required under section 48(3) of the 2014 Act... (b)be accompanied by a copy of the notification to the letting agent as required under section 48(4) of the 2014 Act;.”

15. The Sections 48(1), 48(3) and 48(4) of the 2014 Housing Act state:

“(1) A .. landlord ... may apply to the First-tier Tribunal for a determination that a relevant letting agent has failed to comply with the Letting Agent Code of Practice.

(3) An application under subsection (1) must set out the applicant’s reasons for considering that the letting agent has failed to comply with the code of practice.

(4)No application may be made unless the applicant has notified the letting agent of the breach of the code of practice in question.”

16. Therefore, the point made by the Applicant in the Rule 37 Application is that Rule 2 of the Rules permits the FtT to either override the requirements of Section 48 of the 2014 Housing Act in respect of notification of a breach of the Code or to exercise a discretion in respect of this notification. This is a point of law and so the Rule 37 Application satisfies the third criterion in this respect.

17. The FtT then had regard to the detail of the Rule 37 Application and the points raised with regard to the Decision at paragraph 105 and the Respondent in the Rule 95 Application proceedings not lodging documents. In the Rule 37 Application, the Applicant’s point is that FtT, on its own initiative, should have applied this Rule to obtain documents on his behalf.

18. The broad principles of litigation in Scots Law are that it is for the party making a claim to prove the claim and it is not for the other party to disprove a claim. The role of the court and the tribunal is to apply rules of natural justice and to remain impartial.

19. The point made by the Applicant in the Rule 37 Application in this regard is that Rule 2(2)(3) of the Rules obliged the FtT to anticipate that documents might have been required to prove the Applicant's case and to oblige the Respondent to lodge these. The Applicant contends that the FtT did not do this and so the FtT erred in law. This is a point of law and so the Rule 37 Application satisfies the third criterion in this respect.

The fourth criterion

20. Having taken the view that the Rule 37 Application satisfies points of law, the FtT then required to consider if these points of law are arguable points of law. The points of law raised by the Applicant both relate to the FtT's application of the overriding objective and relate to the extent to which the overriding objective can and should be used to overcome both statute and convention. The view of the FtT is that these are arguable points.

Conclusion

21. Accordingly, the FtT grants permission to appeal.

Legal Member/Chair

19 February 2021
Date