Upper Tribunal for Scotland

[2019] UT 50
UTS/AP/19/0001

DECISION NOTICE OF SHERIFF PINO DI EMIDIO

in the case of

DR PETER DYMOKE and MRS BETH DYMOKE, Rossie Priory, Inchture, PH14 9SH

Appellants

and

(FIRST) FIRST-TIER TRIBUNAL FOR SCOTLAND HOUSING AND PROPERTY CHAMBER, Glasgow Tribunals Centre, 20 York Street, Glasgow, G2 8GT

and

(SECOND) MRS CAROLINE BEST, Rossie Farm House, Estate Office, Inchture, PH14 9SH

Respondents

Appellants: C McColl, Thorntons, Dundee, and both personally present
First named Respondent: No appearance
Second named respondent: D. Ogilvy, Solicitor, Edinburgh, and personally present

FTT Case Reference FTS/HPC/EV/18/1098

17 July 2019

Order

[1] The Upper Tribunal, having resumed consideration of the appeal:

1. Refuses same and upholds the decision of the First tier Tribunal for Scotland dated 24 August 2018 that the second named respondent is entitled to an order for possession of the property known as and forming Rossie Priory, Inchture, PH14 9SH

and in consequence Orders that the appellants shall vacate the property at Rossie Priory, Inchture, PH14 9SH;

2. Refuses to extend the period within which the appellants will require to remove from the said property;
3. Refuses the second named respondent's application for an award of expenses in respect of the hearing before this Tribunal on 9 May 2019.

Note of reasons for decision following appeal hearing on 10 June 2019

Introduction

[2] This appeal concerns a decision of the First-tier Tribunal Housing and Property Chamber ("FtT") dated 24 August 2018 in which the FtT decided that the conditions in section 33 of the Housing (Scotland) Act 1988 were met and that it was appropriate to grant an order for possession in respect of the property Rossie Priory, Inchture, PH14 9SH ("the property"). The application to the FtT arose out of a lease by the Hon. Mrs. Caroline Best of the property to Doctor Peter Dymoke and Mrs. Beth Dymoke. In what follows I refer to Doctor and Mrs. Dymoke as the appellants and the Hon. Mrs. Caroline Best was the second named respondent. The first named respondent did not participate in the appeal. I heard argument in the appeal on 10 June 2019 at Perth Sheriff Court. Additional breaks were allowed during the hearing to assist the second named appellant. I have decided to refuse the appeal for the reasons set out below.

Procedural history

[3] In a written decision dated 24 August 2018 following a Case Management Discussion ("CMD") the FtT found the second named respondent entitled to an order for possession of

the property. On 7 September 2018 the appellants sought review of that decision and submitted a detailed letter explaining the reasons why the decision should be reviewed. On 15 October 2018 the FtT refused to alter its decision. The appellants then sought permission from the FtT to appeal the FtT decision of 24 August 2018. On 23 November 2018, in a further written decision, the FtT granted the appellants permission to appeal on certain grounds only. The FtT refused permission to appeal on a number of other proposed grounds of appeal. Those other proposed grounds were as set out in the letter from the appellants' former solicitors dated 7 September 2018. The appellants did not seek permission to appeal from this Tribunal in respect of the other proposed grounds in respect of which the FtT refused them permission. The appellants have appealed on the grounds on which they had been granted permission by the FtT.

[4] A hearing in the appeal was fixed for 9 May 2019. On that date on the application of the appellants I granted a postponement to 10 June 2019 on certain conditions. I issued a short Summary of Reasons for that decision soon after making it. That Summary was appended to the written order postponing the hearing to 10 June 2019. On 24 May 2019, at the request of the second named respondent, I issued a Supplementary Note of Reasons for my decision after the hearing on 9 May 2019.

Main issues for decision at the hearing

[5] The appeal concerned the question of whether the FtT had erred in law in finding the second named respondent entitled to an order for possession at the CMD on 24 August 2018. The appellants have challenged this decision on a number of grounds. There was a further issue in that on 9 May 2019 I continued consideration of a motion for expenses made by the

second named respondent for the expenses of abortive hearing on that date under both Rule 12(1) or (2) of the Upper Tribunal Rules of Procedure ("the UT Rules").

Grounds of appeal

[6] On 23 November 2018 the FtT granted the appellants permission to appeal on four separate grounds. These were listed as grounds (a), (b), (d) and (e) in the application to the FtT for permission. For the avoidance of doubt there never was a ground (c). The same numbering was used when the appellants lodged their form UTS-1. Therefore I will continue to use the same scheme. References to rules in the quoted grounds are to The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the FtT Rules"). The grounds are expressed in a rather discursive style in the application to the FtT. It is important to understand that the appellants accepted before the FtT that the conditions set out in section 33 of the Housing (Scotland) Act 1988 were met but wished to argue that the second named respondent was personally barred from obtaining an order for possession.

Ground (a)

[7] This is in the following terms.

> "The Tribunal made a final decision at a Case Management Discussion ('CMD') under rule 17(4). It therefore exercised its power, under rule 18, to determine the proceedings without a hearing. In order to exercise that power, the Tribunal must consider, under rule 18(1)(a)(ii) that to do so 'will not be contrary to the interests of the parties'. There is no reference to rule 18 in the Tribunal's decision, and no indication of the basis on which it considered that the determination of the case at the CMD would not be contrary to the interests of [appellants]"

Grounds (b) and (d)

[8] These two grounds were taken together and were expressed as follows.

"(b) The Tribunal noted that the [appellants] sought to insist upon an argument that the [second named respondent] was personally barred from seeking an order for possession. That was made in a handwritten annex to the [appellants] written submission of 22 August (2 days before the date of the hearing). As to that defence, the Tribunal said:

> The Solicitor for the [second named respondent] argued that the [second named respondent] had not been given fair notice of any specific averment in relation to the question of personal bar. He highlighted that the written submission was not specific in its terms and, accordingly, not capable of being answered.
>
> The solicitor for the [appellants] accepted that the written submission now lodged by the [appellants] was not specific in its terms. He did not seek to amend the written submission to further specify the [appellants]' argument on this point.
>
> Having heard parties Solicitors, the Tribunal determined that the [appellants] had not given any clear specification as to the actions of the [second named respondent] which they sought to rely upon as evidence in support of a submission of personal bar. They had given vague notice that they considered the Landlord had acted in a manner which had led them to believe that she would not be insisting on recovery of the property. They did not, however, provide any detail or specification of when or how the Landlord had so acted.
>
> The Tribunal had regard to the overriding objectives to deal with proceedings justly (and in particular to the objectives to deal with proceedings in a manner which is proportionate to the complexity of the issues, and avoiding delay).
>
> The Tribunal determined that the Respondents had failed to give fair notice of any specific case of personal bar and that accordingly no such argument should be considered by the Tribunal.

Here the Tribunal, and the [second named respondent]'s solicitor, treat the CMD as if it were a debate in the sheriff court. The Tribunal, in effect, refuses to consider any case of personal bar, or to fix a hearing, because the [appellants]' averments are lacing in specification.

(d) That is not an approach to the CMD that the Tribunal was entitled to adopt. In terms of rule 2, the overriding objective to deal with proceedings justly also includes 'seeking informality and flexibility in proceedings'. The Tribunal's

> approach to the CMD was formal, and inflexible. In terms of rule 17: 'The purpose of a case management discussion is to enable the First-tier Tribunal to explore how the parties' dispute may be efficiently resolved', including 'discussing whether or not a hearing is required'. The approach of the Tribunal was not exploratory, in relation to the resolution of the dispute between the parties. Its decision contains no indication of any discussion as to whether or not a hearing is required."

Ground (e)

[9] The ground was as follows.

> "Although the Tribunal states that the [appellants]' agent did not seek to amend the written submissions to further specify the defence of personal bar it does not say whether it made any effort to explore whether further specification could be provided. Its decision does not state whether it considered any process by which the [appellants] could have been invited to provide further specification. That could have been done, for example, by fixing a hearing, and making a direction under rule 16, requiring the [appellants] to specify the basis of their personal bar case, in advance of the hearing. Without that question being explored, it was not possible for the Tribunal to consider, under rule 18(1)(a)(ii), that granting an eviction order at the CMD, would not be contrary to the interests of the [appellants]. Such a consideration might be justified, if the Tribunal was satisfied that further specification was not going to be provide. Then, the Tribunal might have concluded that no purpose was served by a hearing, which would therefore not be in the parties' interests. Without exploring whether further specification might be provided, the Tribunal's approach was unduly peremptory, and contrary to the interests of justice."

Appellants' written and oral submissions

[10] On 9 May 2019 I ordered the appellants to lodge a written note of their submission in the appeal as a condition of being granted a postponement. That order was complied with. The appellants' counsel, who did not appear for them before the FtT, adopted the written submission and elaborated on aspects of it in her oral submissions. The issue relating to the proposed defence of personal bar was a matter of specification and not relevancy, though she did accept that lack of specification could amount to irrelevancy. The FtT had gone too far too fast. The appellants had stated a sufficient basis for an inquiry having regard is to the

well-known description of personal bar by Lord Chancellor Birkenhead in *Gatty* v *Maclaine* 1921 SC (HL) 1. The CMD was not the equivalent of a debate in sheriff court ordinary cause procedure. The case was at a relatively early procedural stage in the FtT as at the date of the CMD. The appellants accepted that, aside from the treatment of the issue of personal bar, the FtT had correctly concluded, as it did at the top of page 3 of its decision of 24 August 2018, that certain issues raised by the appellants as possible grounds for opposing the grant of an order for possession were irrelevant.

Response for the second named respondent

[11] The solicitor for the second named respondent contested all of the grounds of referral. He submitted that the appellants' written and oral submissions may be going beyond the grounds on which permission had been granted by the FtT. In so far as the appellants' submissions sought to stray beyond the grounds on which permission was granted they should not be permitted to do so.

[12] As regards ground (a), Rule 18 is irrelevant, it relates to other situations and not to a CMD. Rule 17(4) is not made subject or connected to it. In respect of grounds (b) and (d) the FtT did not err and quite properly had regard to the relevant aspects of the overriding objective and Rules 2 and 3. Reference was made to *Neary* v *Governing Body of St Albans Girls' School and another* [2010] ICR 473 (EWCA) (at paragraphs 49 and 64) and *Aslam* v *Travelex UK Limited* 2015 WL 5702801 (EAT) (at paragraph 40) in relation to the argument that the FTS did not err in its treatment of the overriding objective. Ground (e) was misconceived. The appellants' argument is formalistic in nature, in contrast to the FtT which took a flexible approach to the issues that it required to address. There was no foundation to the criticisms made in the grounds of appeal.

Reasons for decision

[13] The grounds on which the FtT granted permission to appeal are rather lengthy and discursive. They are written in a style that is not to be encouraged. The points of law which they purport to identify as involving error of law by the FtT could have been stated much more succinctly and indeed in one or two focused short paragraphs. Despite this I disagree with the second named respondent's solicitor's submission that the written and oral submissions of counsel for the appellants went beyond the terms of the grounds on which permission to appeal was granted by the FtT. The submissions made to this Tribunal on behalf of the appellants were a legitimate expansion of the written grounds on which permission was granted. It is to be expected that as points are examined in debate and discussion their full implications may be reformulated and the implications more fully understood.

Ground (a)

[14] Rule 17(3) and (4) of the FtT Rules provide as follows:-

> "(3) The purpose of a case management discussion is to enable the First-tier Tribunal to explore how the parties' dispute may be efficiently resolved, including by—
>
> (a) identifying the issues to be resolved;
> (b) identifying what facts are agreed between the parties;
> (c) raising with parties any issues it requires to be addressed;
> (d) discussing what witnesses, documents and other evidence will be required;
> (e) discussing whether or not a hearing is required; and
> (f) discussing an application to recall a decision.
>
> (4) The First-tier Tribunal may do anything at a case management discussion which it may do at a hearing, including making a decision."

Rule 18(1)(a) and (2) of the FtT Rules provide as follows

> "(1) Subject to paragraph (2), the First-tier Tribunal—

(a) may make a decision without a hearing if the First-tier Tribunal considers that—

(i) having regard to such facts as are not disputed by the parties, it is able to make sufficient findings to determine the case; and

(ii) to do so will not be contrary to the interests of the parties; and …

(2) Before making a decision under paragraph (1), the First-tier Tribunal must consider any written representations submitted by the parties."

[15] The FtT did not make a procedural error in the approach it took at the CMD on 24 August 2019. Rule 17(4) entitled the FtT to proceed in the way as it specifically empowers the FtT to do anything at a case management discussion which it may do at a hearing, including making a decision that determines the application. Rule 18 relates to other situations where there is no oral hearing of any kind and provides safeguards in relation to those situations. A CMD is not a "hearing" for the purposes of the FtT Rules. Rule 18 deals with other circumstances such as where it is evident from the material that has been submitted to the FtT that there is sufficient agreement on the facts that appropriate findings can be made to determine the application without further procedure. Rule 18(1)(a)(ii) contains a safeguard against the FtT making an unnecessarily peremptory decision where parties do not have the opportunity to make submissions. Rule 18 does not apply to a case where the FTT holds a CMD. Although a hearing is defined in such a way as to exclude a CMD, at a CMD parties have the opportunity to the heard by the FtT. Rule 17(4) empowers the FtT to do anything it could do at a hearing. Rule 18 did not require to be considered by the FtT at the CMD. It did not apply as the FtT was proceeding under Rule 17. This ground of appeal fails.

Grounds (b) and (d)

[16] It is convenient to discuss these grounds together as in effect they are part of a single line of argument. The appellants had raised the issue of personal bar in a short passage added in manuscript to their response to the application for an order for possession which said the following:

> "...since service of the s.33 Notice and Notice to Quit the Landlord has positively led them to believe that she would not be insisting on recovery, engaging the tenants in discussions that would require them to carry out work over a long term in relation to the continued renovation of Rossie Priory. As a result the tenants have incurred costs they would not have otherwise incurred. She is personally barred from now insisting on recovery of possession. ".

This passage was criticised for lack of specification by the second named respondent at the CMD. As quoted in ground (b), the FtT stated that the solicitor then acting for the appellants did not seek to expand on what he had stated in his initial response when he raised the issue of personal bar. At the appeal hearing counsel stated that she had been told that the appellants' former solicitor had asked for additional time to expand on the personal bar argument at the hearing on 24 August 2018. If he had made an application for additional time to expand on his opposition based on personal bar this ought to have been recorded as having been made and the reasons for its rejection stated in terms. Counsel was of course not involved at the time when proceedings were taking place before the FtT. Both the application for review of the decision of 24 August 2018 (which the FtT rejected on 15 October 2018) and the grounds of appeal on which the FtT granted permission to appeal proceed on the basis that the appellants' former solicitor accepted he had not asked for additional time to expand on the personal bar argument at the hearing on 24 August 2018.

[17] Counsel for the appellants submitted that the elements of the classic statement by Lord Chancellor Birkenhead in *Gatty* v *Maclaine* (cited above) were present in what was

stated in the notice of opposition to the application. The Lord Chancellor said the following at page 7:-

> "...the rule of estoppel or bar, as I have always understood it, is capable of extremely simple statement. Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time."

There are, of course, later and more complex analyses of personal bar in the authorities and academic discussion. For present purposes it is sufficient to have regard to the well-known statement in *Gatty* v *Maclaine* which was used by both parties in this case. The brief statement submitted on behalf of the appellants at the CMD did not meet the requirements of this statement.

[18] The appellants accepted both before the FtT and before this Tribunal that the other points originally put forward as grounds of opposition to the application to the FtT for an order for possession did not amount to potentially valid lines of defence. As a result, as it was accepted that the conditions entitling the second named respondent to an order for possession under section 33 were present, the only proper basis for resisting the making of an order for possession depended on the personal bar argument. The information provided to the FtT was of the scantiest kind to support the proposed line of argument of personal bar. No dates or details of the content of discussions said to have formed the basis of reliance and no information as to amounts said to have been expended in reliance have been put forward. The FtT were entitled to consider, as they were invited to do by the second named respondent at the CMD, whether the proposed defence was so lacking in content as to be irrelevant. In the absence of any offer to explain in more detail, that it was appropriate to proceed to determine the application. No purpose could be served by the fixing of further

procedure where the only proposed defence was devoid of any content on which findings could properly be made.

[19] For these reasons the FtT was entitled to proceed in the way it did at the CMD. The FtT did not fail to take account of all the parts of the overriding objective. The fourth paragraph of the text of the reasons for decision of the FtT which is quoted in full in ground (b) above makes that quite clear.

[20] Even if I am in error in reaching this conclusion on what the FtT did on 24 August 2018, there has been no prejudice to the appellants. Extensive further information was provided to the FtT on behalf of the appellants as to the content of the proposed personal bar argument when they asked the FtT to review its decision. On 7 September 2018 very detailed further particulars were put forward on behalf of the appellants in their application to the FtT for review of its decision of 24 August 2019. This was contained in a detailed letter sent on their behalf by their former solicitors. The FtT rejected the application in its review decision of 15 October 2018. The letter of 7 September is very lengthy running to 8 pages of single spaced type. Point 5 of that letter addresses the issue of fair notice of the proposed personal bar argument. There is a narration of the correspondence that took place in the following months. Following the service of the notice to remove on behalf of the second named respondent in about May 2018, the solicitors then acting for the appellants wrote to her solicitors on a number of occasions seeking clarification of her intentions as landlord. The responses sent by second named respondent's solicitors were short to the point of being curt. There is nothing in those responses to suggest that the second named respondent was prepared to depart from her determination to seek vacant possession in pursuance of the notice. The described correspondence does not provide a basis for arguing that the appellants have acted to their prejudice in reliance on the words or actions of the

second named respondent. The letter of 7 September 2018 makes clear that the appellants' proposed personal bar argument lacks substance. The FtT was correct to refuse to change its decision on review on the basis of the detailed submission made to it as no relevant line of defence was identified.

[21] On 23 November 2018 the FtT also refused to grant permission to appeal on the matters set out in the letter of 7 September 2018. The appellants did not seek to make a further application for permission to appeal to the Upper Tribunal in relation to those proposed grounds on which they were refused permission by the FtT. No arguable basis for seeking permission to appeal was disclosed in the grounds in respect of which the FtT refused to grant permission. The FtT was correct to refuse permission on the issues set out in the letter of 7 September 2018.

[22] When the appeal was argued before me on 10 June 2019 I was advised that if the appeal was successful the appellants proposed to expand on the ground of opposition based on personal bar after the matter was remitted to the FtT. No information was put before me as to what exactly the proposed expanded ground of opposition would say or whether it would have been any different from what was stated the letter of 7 September 2018.

[23] So far as relevant Rule 2 of the 2017 Rules provides as follows: -

> "(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 issues 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 issues."

So far as relevant Rule 3 of the 2017 Rules provides as follows: -

"(1) The … First-tier Tribunal must seek to give effect to the overriding objective when—
(a) exercising any power under these Rules; and
(b) interpreting any rule.

(2) In particular the Chamber President and the First-tier Tribunal must manage the proceedings in accordance with the overriding objective."

[24] The case of *Neary* (cited above) related to a question of employment tribunal practice, in particular the approach that requires to be taken by an employment judge in the preliminary consideration of an application for review. The relevant rule provided that the employment judge had to refuse the application for review of a decision to strike out unless he considered that the interests of justice required a review or he considered that there was a reasonable prospect that, if a review hearing were held the strike-out might be revoked. The Court of Appeal concluded that certain provisions of the English civil procedure rules that required express consideration of certain listed factors did not apply to employment tribunal practice. Smith LJ said the following at paragraph 49:-

> "It is often said that decisions of this kind are discretionary. It seems to me that a decision such as this is not so much an exercise of discretion as an exercise of judgment. But this may be a distinction without a difference in that, in both cases, there is a duty on the judge to decide the case rationally and not capriciously and to make his decision in accordance with the purpose of the relevant legislation, taking all relevant factors or circumstances into account. He must also avoid taking irrelevant factors into account. In both cases there may be two correct answers or at least two answers which are not so incorrect that they can be impugned on appeal. Whereas with the exercise of discretion the question will be whether the judge's decision was permissible on the evidence, with an exercise of judgment the question will be whether his decision was fair. But provided that the judge has met these requirements, his judgment should not be impugned merely because the appellate court would or might have reached a different conclusion."

He went on at paragraph 64 to add the following:-

> "The overriding objective requires that the management of the case should result in the case being dealt with justly as between both parties. It also requires the judge to consider the appropriate use of the resources of the court or tribunal. It is entirely within the overriding objective for a judge to take the view that enough is enough. That stage will more readily be reached in a case of deliberate and persistent failure to comply than one where there is some excuse for it."

The other judges in the Court of Appeal delivered concurring judgements. The second named respondent derived further support from *Aslam* v *Travelex UK Limited* 2015 WL 5702801 (EAT) at paragraph 35 where a similar approach was taken (and *Neary* was expressly relied on) by the Employment Appeal Tribunal. I regard these passages as helpful though they require to be treated with some caution as they arise in a different context of procedure and practice. The overriding objective is not stated in exactly the same terms in the employment tribunals rules, though there are there are substantial similarities to Rule 2 of the FtT Rules.

[25] The FtT took an appropriate approach to the overriding objective. It took account of all the material factors and did not take account of irrelevant factors. The decision of 24 August 2018 is rather brief in its reasoning but there is no failure to take account of the matters which required to be taken into account. The review decision of 15 October 2018 expands on that reasoning in the light of the additional information provided. The appellants chose to peril their initial position on a very vague and unspecific response. Their reticence about setting out a fully detailed position changed when they applied for review when they set out a lengthy account of their position. Even if the appellants had been taken by surprise at the approach of the FtT at the CMD, they had ample opportunity to put their true position forward when they applied for review. They took full advantage of that opportunity but I find no error of law in the conclusions reached by the FtT on review. These grounds of appeal fail.

Ground (e)

[26] This ground might be thought to be a re-formulation of at least part of ground (b) and (d). The FtT has not acted in an unduly peremptory manner. The original decision following the hearing on 24 August 2018 was rather short in its terms but I conclude that the reasoning was adequate. The FtT took an appropriately inquiring approach that was not unduly formalistic. The FtT also had the opportunity to consider a very detailed account of the appellants' proposed line of defence in personal bar when it was asked to review the original decision. The FtT engaged with the more detailed material and did not make any error of law in its approach to it. The FtT was entitled to refuse to change the original decision on the information before it. There is no substance to this ground of appeal and I refuse it.

Expenses motion by second named respondent

[27] This motion related to expenses from the abortive hearing on 9 May 2019. The appellants opposed the order but the second named respondent submits that Rule 12(2) provides a lower test in that it focuses on the person who had to pay the expense. The appellants say that this was just something the landlord has to put up with in the context of this process where expenses are not normally recoverable. The second named respondent says she should not have to pay.

[28] The second named respondent relied on Rule 12(1) and (2) of the UT Rules which provide as follows:-

> "(1) The Upper Tribunal may make an order for expenses as taxed by the Auditor of the Court of Session in proceedings on appeal from the First-tier Tribunal if the First-tier Tribunal had the power to make an order for expenses, and only on the basis on which the First-tier Tribunal had the power to award expenses.

(2) Notwithstanding paragraph (1) and without prejudice to that paragraph, the Upper Tribunal may make an order for expenses as taxed by the Auditor of the Court of Session against a party if that party's act, omission or other conduct has caused any other party to incur expense which it would be unreasonable for that other party to be expected to pay, with the maximum recoverable expenses being the expenses incurred."

[29] Rule 12(1) is not engaged but Rule 12(2) is engaged in this case. Consideration of a motion of this kind requires the Tribunal to identify the conduct which is said to justify an award of expenses, say what was unreasonable about it and say what effect it had. The purpose of an award is to compensate the party who incurred the expenses and not to punish the party that occasioned the expenses. I have approached this issue by asking whether the appellants' conduct permits of a reasonable explanation.

[30] I have decided I should not make an award of expenses. A breakdown in confidence between a professional adviser and client can occur at any time. I am satisfied that the appellants genuinely lost confidence in their former solicitor and did not dispense with his services in order to create delay in reaching a final determination of this matter. Viewed objectively there is no reason to think that their former solicitor was at fault. He had displayed considerable professional skill and ingenuity in pursuing their interests in this case. There was a subjective loss of confidence in him. I conclude that there was a reasonable explanation for their actions and therefore I refuse the motion for the expenses occasioned by the postponement granted to the appellants on 9 May. If I had concluded that the appellants had dispensed with his services as a delaying tactic I would have granted the motion for expenses.

Form of order on refusal of the appeal.

[31] At the conclusion of the hearing on 10 June 2019 there was a short discussion about whether, if the appeal was unsuccessful, I required to revoke any order suspending the order of the FtT. It is not uncommon for such orders for suspension to be made in cases of this kind pending the determination of an appeal by this Tribunal. Upon later inquiry it has been established there is no order suspending the made by the FtT. I understand that no order for suspension was sought by the appellants because the FtT simply found the second named respondent entitled to an order for possession and did not expressly make such an order. Therefore, in line with what was agreed in correspondence by the clerk of this Tribunal the parties' solicitors after the hearing on 10 June 2019, I have not only upheld the decision of the FtT but also made explicit the order for possession to which the second named respondent is entitled as a consequence of the decision that has been upheld. While it might be arguable that the form of order made by the FtT did at least infer or imply that it was making the order for possession and not merely stating that the second named respondent was entitled to such an order, the FtT ought to have expressed itself in more definite terms as the terms of its order left some room for doubt.

[32] In the event that the appeal was unsuccessful the appellants also asked me to specify an extended period during which they would not require to vacate the property. I have decided not to make such provision. The appellants have known for a long time that an order for possession might be granted and be capable of enforcement. I appreciate the property is extensive but the second named respondent should not be subject to further delay in securing possession once the appeal has been refused.

[33] I am indebted to both Mrs. McColl and Mr. Ogilvy for their assistance in this case which I know is of very great concern to both parties.

Appeal provisions

[34] If the appellants are aggrieved by this decision they may seek permission to appeal to the Court of Session on a point of law only. To do so the appellants must seek permission to appeal within 30 days of receipt of this decision. Any request for permission to appeal 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 2014 Act what important point of principle or practice would be raised or what other compelling reason there is that shows the appeal should be allowed to proceed. Further guidance can be found on the Scottish Courts and Tribunals Service website.