Upper Tribunal for Scotland

2024UT60
Ref: UTS/AP/24/0064

DECISION OF

Sheriff P Di Emidio

On an application for permission to appeal
(Decision of the First-tier Tribunal for Scotland)

in the case of

Mr Stephen Anderson,
per Holmes Mackillop Solicitors,

Appellant

- and –

Mr George Stevenson,

Respondent

FTS Case reference: FTS/HPC/PR/24/1388

Representation
Appellant: R. McAdam, Holmes McKillop
Respondent: no appearance

21 October 2024

Decision

The Upper Tribunal for Scotland refuses permission to appeal the decision of the First-tier Tribunal for Scotland dated 19 June 2024.

Reasons for Decision

[1] The appellant seeks permission to appeal a decision of the First-tier Tribunal for Scotland ("FTS") dated 19 June 2024 in which he was ordered to pay the sum of £2,100 for failure to place a deposit received from the respondent in an approved Tenancy Deposit Scheme. The appellant

attended a Case Management Discussion ("CMD") before the FTS where he accepted that he had received the deposit and had failed to place it in an approved Tenancy Deposit Scheme.

[2] The appellant asserts that after he received the FTS decision he discovered that he had not actually received a deposit from the respondent. On 2 August 2024, the FTS refused his application for permission to appeal. A hearing on the question of permission to appeal to this Tribunal took place on 9 October 2024. The respondent received due intimation but did not opt to attend.

[3] Section 46 of the Tribunals (Scotland) Act 2014 sets out the test for the grant of permission from a decision of the FTS. The appellant must identify a point of law based on which it is arguable that the FTS has erred. The test of arguability is a relatively low one. The issue in this case is whether the appellant has identified a point of law on which it is arguable that the FTS may have erred.

[4] The appellant's solicitor referred to paragraph [43] of the Opinion of the Court delivered by Lord Drummond Young in *Advocate General for Scotland v Murray Group Holdings* 2016 SC 201. He said the following:

> "The third category of appeal on a point of law is where the tribunal has made a finding 'for which there is no evidence or which is inconsistent with the evidence and contradictory of it.' (Inland Revenue Commissioners v Fraser, [1942 SC 493] per Lord President Normand, pp 497, 498.) This runs into a fourth category, comprising cases where the First-tier Tribunal has made a fundamental error in its approach to the case: for example, by asking the wrong question, or by taking account of manifestly irrelevant considerations, or by arriving at a decision that no reasonable tax tribunal could properly reach. In such cases we conceive that the Court of Session and the Upper Tribunal have power to interfere with the decision of the First-tier Tribunal as disclosing an error on a point of law (Edwards v Bairstow, [[1956] 3 AC 14] per Lord Radcliffe, p 36).

[5] The appellant submitted that there was an error of law because the appellant had in fact not received the deposit. The FTS had moved too swiftly at the CMD to determine the whole application when the appellant was at a disadvantage as he was unrepresented. The appellant

accepted he had told the FTS that he had received the deposit and that he had agreed that the matter could be determined at the CMD.

Decision on Ground of Appeal stated in Form UTS-1

[6] The appellant has supplied no explanation as to why he failed to present the position he now wishes to put forward to the FTS. The only error was of his own making. The appellant's proposed ground of appeal does not come into either category described by the Court in the passage quoted above. He has not identified a point of law on which it could be argued that the FTS erred in law. It proceeded on the evidence put before it. It did not err in its approach to the case. It carried out a carefully reasoned assessment of the appropriate level of sanction. There is a further important principle that there should be finality in litigation in the public interest. The appellant had the opportunity to dispute the respondent's assertion that he had paid the deposit before the FTS. He failed to take that opportunity. The FTS was the appropriate forum to determine this factual dispute. The appellant accepted he received the deposit and agreed that the FTS should proceed to determine the outstanding issues at the CMD. There is no suggestion that he was misled or induced in some dishonest way by the respondent or anyone else to act as he did before at the CMD. It is too late to seek to reopen the matter now

The proposed alternative ground of appeal.

[7] In the course of his submissions, the appellant's solicitor developed an alternative or *esto* argument based on paragraph [39] of the Opinion of the Court in the *Advocate General for Scotland* case. At paragraph [39] the Court referred with approval to a passage in the judgement of Sedley LJ in *Miskovic and anr v Secretary of State for Work and Pensions* [2011] EWCA Civ 16 in which he said the following at paragraph 124:

> 'None of these cases sets out a golden rule for the admission of new issues on appeal, but all proceed on the assumption that there is no jurisdictional bar to their being entertained in proper cases. It is an assumption which in my judgment can be made good on a simple constitutional basis. The Court of Appeal exists, like every court, to do justice according to law. If justice both requires a new point of law to be entertained and permits this to be

done *without unfairness*, the court can and should entertain it unless forbidden to do so by statute.' [emphasis added]

[8] The appellant's solicitor submitted that even if his first submission was misconceived, he should be granted permission to appeal to allow a new issue to be considered. The appellant should have the opportunity to have a fact-finding exercise to determine whether he received the deposit even though the argument was never put to the FTS. The grant of permission for this new ground was required to do justice in the case. The appellant submitted that this Tribunal should balance the respective interests of the parties. Unless permission was granted to argue this new ground, the prejudice suffered by the appellant would far outweigh any prejudice to the respondent.

[9] In *Advocate General for Scotland* the Court of Session allowed the HMRC to introduce a new ground of appeal on a point of law in circumstances where there was no need to make any more factual findings. It is assumed for present purposes, in the absence of an express prohibition in section 46 of the 2014 Act that this Tribunal has power to allow a new point of law to be entertained for the reason given by Sedley LJ. If the appeal is successful on the proposed new ground, it is inevitable that there would require to be an evidential hearing so that the appellant can attempt to establish he did not receive the deposit despite his previous admission. The circumstances of this case are very different from the position envisaged by Sedley LJ or that arose in the *Advocate General for Scotland* case. The proposed new ground of appeal depends on the appellant's desire to withdraw the admission that he received the deposit. This does not amount to a point of law that should be entertained at this stage of proceedings. Even assuming that the appellant's alleged error in his factual admission to the FTS amounts to a point of law, it runs into very similar problems as the principal proposed ground of appeal in that unfairness would result from its being entertained.

[10] The appellant has not identified an arguable point of law on either proposed ground of appeal. Permission to appeal is refused.

Sheriff P. Di Emidio
Member of the Upper Tribunal for Scotland