UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 00162 (LC)

UTLC Case Number: LC-2021-415

Location: Liverpool Civil and Family Courts

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – CIVIL PENALTY – particulars of offence - adequacy of the local housing authority's statement of reasons for imposing a financial penalty – when does a local housing authority have "sufficient evidence" of a breach of the mandatory condition in paragraph 1(2) of Schedule 4 to the Housing Act 2004 to produce to the authority annually for their inspection a gas safety certificate obtained in respect of the property within the previous 12 months – proper approach to appeals on questions of fact – Permission to appeal refused

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL

(PROPERTY CHAMBER)

BETWEEN:

MAHENDRA MAHARAJ

Appellant

-and-

LIVERPOOL CITY COUNCIL

Respondent

Re: 68 Fazakerley Road,

Liverpool,

L9 2AL

His Honour Judge Hodge QC

Heard on: 20 April 2022

Original Decision Date: 20 May 2022

Decision on permission to appeal: 21 June 2022

Determined on the appellant's written representations

Mr Nathan Goldstein (instructed directly) for the appellant

Introduction

1. On 20 May 2022 the Tribunal handed down its substantive decision: (1) allowing the landlord's appeal from the FTT's decision to confirm a final notice in respect of the breach of licence condition 1.2 and quashing the resulting financial penalty of £3,375; but (2) dismissing his appeal from the FTT's decision to confirm the final notice in respect of the breach of licence condition 5.6 and affirming the resulting financial penalty of £5,625.

2. By email timed at 14.10 on 17 June 2022 the Tribunal received the appellant's application for permission to appeal the Tribunal's substantive decision, settled by Mr Nathan Goldstein (of counsel) who had appeared for the appellant on the hearing of the appeal (but not before the FTT). The application notes that the Tribunal's decision relates to an appeal against a decision of the First-tier Tribunal (**the FTT**) confirming two separate financial penalty notices (**FPNs**) issued by the respondent council on 29 January 2020 with respect to alleged breaches of landlord licence conditions imposed under Part 3 of the Housing Act 2004 Act (**the 2004 Act**) relating to the appellant landlord's property at 68 Fazakerley Road, Liverpool L9 2AL (**the property**). The FPNs concerned allegations that the appellant had failed: (1) to provide Gas Safety Certificates as required under licence condition 1.2 (**FNP 1**), and (2) to inspect the property at least 6 monthly as required by licence condition 5.6 (**FNP 2**). Having heard the appeal on 20 April 2022, the Tribunal allowed the appeal with respect to FPN 1 but dismissed the appeal with respect to FPN 2. The application states that the appellant seeks permission to appeal the decision relating to FPN 1 alone but it is clear that it is the Tribunal's decision to uphold FPN 2 that the appellant really seeks to challenge.

The application for permission to appeal

3. The application notes that it is a trite principle that the scope of an appeal from a decision of the Upper Tribunal is limited to circumstances where: (a) the proposed appeal would raise some important point of principle or practice; or (b) there is some other compelling reason for the relevant appellate court to hear the appeal. The application is limited to the second of these two grounds, namely that "there is some other compelling reason for the relevant appellate court to hear the appeal". It is not suggested that the Tribunal erred in any matter of law. However, it is contended that there is a compelling reason why an appeal should be heard, particularly having regard to the Tribunal's conclusions concerning the FTT's decision with respect to the appeal relating to FPN 1, such that there is said to be a real concern that the FTT's findings of fact with respect to the appeal relating to FPN 2 were, or at least appear to be, tainted by the FTT's erroneous approach to the first matter.

4. Mr Goldstein submits that the following matters are relevant to the application for permission to appeal:

(1) Whilst, at the appeal hearing before the Tribunal, both parties were, at least initially, (mistakenly) of the view that the appeal would be conducted by way of a re-hearing, it was accepted that the Tribunal had made no such direction when granting permission to appeal or otherwise. It was acknowledged by counsel for both parties at the appeal hearing that absent a specific direction providing for a re-hearing, the correct approach was for the appeal to be a 'review' of the decision of the FTT, involving a consideration of the evidence available to the FTT and the reasons for its decision.

(2) At the appeal before the FTT it had heard evidence from the appellant and also from the tenant of the property, Mr Martin Hourston.

(3) On the issue of FPN 1, the FTT "found as a fact that the Applicant failed to supply a gas safety certificate for the year ending 4 July 2018". The Tribunal overturned this decision, concluding that there were several problems with this aspect of the FTT's decision:

(a) at paragraph 18, that "… the particulars of offence were the failure to produce a copy of a valid gas safety certificate by 13 June 2019, when the appellant had been requested to do so within seven days by Mr Farey's letter dated 5 June 2019. These particulars did not constitute the offence alleged, and they were therefore defective."

(b) at paragraph 19, that “Any breach of licence condition 1.2, as at 13 June 2019, which is the date identified in the notice of intent and the final notice, could only relate to the licence year ending 4 July 2018 because the notice for the licence year ending 4 July 2019 was not then overdue. However, by paragraph 2(1) of Schedule 13A to the 2004 Act, notice of intent must be given before the end of the period of six months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates.” The Tribunal found that more than six months had elapsed since the date upon which the ‘charge’ could have been laid as it had sufficient evidence of the offence by 4 July 2018.

(4) Further, the Tribunal was particularly critical of the FTT’s reasoning process, and went on to observe (at paragraph 18), in relation to the first problem, that:

“The Tribunal does not regard this point as a mere technicality because it gives rise to the risk that a landlord might be found guilty of a non-existent offence, or of one that has not been properly identified to the landlord; and because, in the present case, it has fed seamlessly into the FTT’s second error, which was to fail to identify the fact that the offence which it did find to have been proved was in fact time-barred.”

(5) On the issue of FPN 2, following the settled principle set out by Lewison LJ in Volpi v Volpi [2022] EWCA Civ 464, [2022] 4 WLR 48 the Tribunal in essence declined to interfere with the findings of fact reached by the FTT, and dismissed the appeal accordingly.

(6) By way of observation, Mr Goldstein notes that before the FTT, the respondent council had been represented by counsel whilst the appellant had been assisted by Mr Sweeney, who was not legally trained and was in fact a civil enforcement officer. It seems clear from the transcript of the hearing that the FTT was to a certain extent unimpressed with the way in which the case was being conducted by Mr. Sweeney. It is also obvious that Mr Sweeney’s cross-examination of Mr Hourston, whilst adequate for a lay advocate, was perhaps not as thorough a test of his evidence as would have been expected from a professional advocate.

(7) Mr Goldstein reminds the Tribunal that in evidence, Mr Hourston accepted that he was suffering from debilitating mental health issues that had a real bearing on his ability to function generally, and which also played a role in his actions in deciding who to allow to enter the property.

(8) Mr Goldstein’s point in raising this is not to rehearse the evidence that was heard before the FTT but simply to highlight the fact that the FTT came to a clear view when accepting the veracity and credibility of Mr Hourston over the appellant. Clearly, this was a conclusion on credibility that was pivotal to the finding that the appellant had not made reasonable attempts to gain entry to the property in order to carry out the required inspections.

5. Against this background, Mr Goldstein submits that as there were clear flaws in the reasoning of the FTT with respect to FPN 1, which resulted in it making significant and serious mistakes of fact and of law, the FTT’s findings of fact with respect to FPN 2 are potentially tainted such that the Tribunal could not have been satisfied that the FTT had made sound factual findings relating to that second notice. Mr Goldstein submits that the FTT’s approach to the fact finding exercise concerning FPN 1 was so skewed against the appellant that there was a real risk that such approach coloured, albeit unintentionally, its approach to the fact finding exercise relating to FPN 2. Mr Goldstein submits that this raises a very real concern, particularly if one were to take a step back, as to whether justice was not only done but was seen to be done.

6. Whilst Mr Goldstein makes no criticism of the Tribunal for not embarking on a re-hearing, he submits that, having regard to its conclusions about the way in which the FTT erred with respect to

FPN 1, at the very least the appellant should be entitled to a fresh re-hearing of the evidence concerning FPN2 so that justice can be seen to be done.

7. In making this submission, Mr Goldstein acknowledges that such a “fruit of the poisoned tree” submission was not advanced at the hearing before the Tribunal. However, it is clear that the Tribunal’s criticism of the FTT’s reasoning went beyond that actually advanced by Mr Goldstein, and this was not a submission that necessarily flowed from the way the appellant’s case had been advanced before the Tribunal. In this way, this is said to be an application for permission to appeal that arises from the very specific way that the Tribunal drew conclusions about the FTT’s approach to FPN 1.

8. In these circumstances, the appellant seeks permission to appeal. Mr Goldstein contends that if an appeal succeeds on this point, the most appropriate order would be for the matter to be remitted for a re-hearing, in which evidence should be heard either before the Tribunal or a freshly constituted FTT. Mr Goldstein does not submit that the Court of Appeal should simply review the evidence that was led before the FTT. To this extent, the observations made at paragraphs 4 (6) to (8) are said to be relevant, and to add further weight to the submission that there should be a re-hearing of the matter.

Decision

9. The Tribunal is satisfied that this is not a proper case in which to grant permission to appeal to the Court of Appeal. The proposed appeal raises no important point of principle or practice; and there is no other reason (still less any compelling reason) for the Court of Appeal to hear any appeal from the Tribunal’s decision. The Tribunal notes that the appellant alleges no error or errors of law in the Tribunal’s decision. For the sake of completeness, the Tribunal also makes it clear that there is no proper basis for the Tribunal to review its decision in accordance with rules 56(1) and 57 of the applicable Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010: when making its decision the Tribunal overlooked no legislative provision or binding authority which could have had any material effect on that decision; and, since the Tribunal's decision, no court has made any decision which is binding on the Tribunal and which, had it been made before the Tribunal's decision, could have had any material effect on that decision.

10. The Tribunal disagreed with the FTT’s decision in relation to FPN 1, and it was critical of its approach and its reasoning in finding that an offence had been made out, to the criminal standard of proof, which had not been alleged or properly particularised, and which was, in any event, statutorily time-barred. However, none of this is of any conceivable relevance to the FTT’s fact-finding processes. Nor does it cast any arguable doubt upon the FTT’s assessment of the relative reliability and credibility of the evidence of the appellant and Mr Hourston. The Tribunal expressly rejects the submissions that: (1) the FTT’s findings of fact with respect to FPN 2 were potentially tainted, such that the Tribunal could not have been satisfied that the FTT had made sound factual findings relating to that second notice; (2) the FTT’s approach to the fact finding exercise concerning FPN 1 was so skewed against the appellant that there was a real risk that such approach coloured, albeit unintentionally, its approach to the fact finding exercise relating to FPN 2; and (3) this raises any real concern as to whether justice was not only done but was seen to be done.

11. The Tribunal therefore declines to review its decision; and it refuses permission to appeal to the Court of Appeal.

His Honour Judge Hodge QC

21 June 2022