Upper Tribunal for Scotland 

**[2020] UT 32**
UTS/AP/19/0048

DECISION NOTICE OF SHERIFF I FLEMING

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

in the case of

MR JOHN GARRETT, 553 Mosspark Drive, Mosspark, Glasgow, G52 1QP

Appellant

and

YOUR PLACE PROPERTY MANAGEMENT LIMITED, Wheatley House, 25 Cochrane Street, Glasgow, G1 1HL

Respondent

**FTT Case Reference FTS/HPC/PF/19/0680**

15 January 2020

**Decision**

The Upper Tribunal refuses permission to appeal because the appellant has been unable to identify a point of law.

**Introduction**

[1] The First Tier Tribunal for Scotland (Housing and Property Chamber) (hereafter "the FtT") sat at Glasgow on 19 August 2019. The appellant, who is the home owner, represented himself. The factor who is the respondent did not appear. The homeowner had complained

that the factor was in breach of a number of sections of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors (hereafter referred to as "The Code") in terms of sections 14(5) and 17(1)(b) of the Property Factors (Scotland) Act 2011 (hereafter referred to as "the 2011 Act"). Following the hearing of evidence and submissions the FtT made the unanimous decision that the factor had failed to carry out it its property factors' duties as it did not comply with sections 6(1) and 6(9) of the Code. The FtT did not uphold the homeowners claim that the factor had failed to comply with sections 1A, 1B, 2.1, 2.2, 2.4, 2.5, 3.3, 4.1, 4.2, 4.4, 4.9, 5.4, 5.6, 5.7, 6.3, 6.5 and 7.1 of the Code. The FtT made a Property Factor Enforcement Order (hereafter referred to as "PFEO") which included an order for payment to the homeowner to reflect what was stated as the serious nature of the breaches of the Code and the property factor's duties. The specified sum was £1,000. The homeowner made application to appeal the decision of the FtT. Leave to appeal was refused by the FtT. It was concluded by the FtT that the ground of appeal raised no point of law. The homeowner has now appealed to the Upper Tribunal requesting permission to appeal the decision of the FtT.

**Grounds of Appeal**

[2] In terms of the application to appeal the decision of the FtT the homeowner accurately refers to Rules 37 to 39 of the First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulation 2017. In terms of Rule 37 it is necessary for the homeowner to identify the alleged point or points of law on which he wishes to appeal.

[3] It is important to emphasise that the process which the Upper Tribunal undertakes is not a re-hearing of the evidence. The FtT which heard the case is an expert tribunal. It made findings in fact which are contained within paragraphs 29 to 42 of its written decision. The

FtT had the benefit of hearing the evidence and submissions and an appeal can only be considered on a point of law. Section 46(4) of the Tribunals (Scotland) Act 2014 ("the 2014 Act") provides that permission to appeal is to be granted where:-

> "… the Upper Tribunal is satisfied that there are arguable grounds for the appeal."

[4] In approaching the terms of section 46(4) of the 2014 Act, I have had regard to the decision in *Czerwinski* v *HM Advocate* 2015 SLT 610 at paragraph [9] together with the authorities cited therein (*Hoseini* v *Secretary of State for the Home Department* 2005 SLT 550 and *Campbell* v *Dunoon & Cowall Housing Association* 1992 SLT 1136). While that case related to a different statutory context, I have found it helpful in construing the terms of section 46(4). I conclude that the "arguability" test for permission is a relatively low hurdle for the homeowner to overcome.

[5] The grounds of appeal founded upon by the homeowner are initially identified as follows:

> "Making a mistake about the meaning of the legislation; overlooking the important evidence; making a decision for which there is no evidence or not enough evidence; unfairness in the way matters proceeded."

The homeowner has applied this form of words as identifying the points of law upon which he relies in relation to all of the issues upon which he seeks permission to appeal thus resulting in the use of this particular form of words within the application on no fewer than 14 occasions. Thereafter in a document which extends to 19 pages various other matters are raised. I have had a little difficulty in following aspects of the application. Many of the matters raised within the application appear to be comments or aspirations on the part of the homeowner rather than an identification of the points of law upon which he relies. Further, with reference to the decision to refuse leave to appeal by the FtT the homeowner states "the

way matters have proceeded suggests that the outcome was predetermined and further that the outcome amounts to a travesty of justice".

**DISCUSSION**

[6] The decision about which evidence to accept and which to reject is one for the FtT. It heard the evidence. It assessed the witnesses. Even in those circumstances where an appeal is not confined to a point of law it is only in a very few highly exceptional circumstances that an appellate tribunal will be prepared to displace the evaluation of evidence by the First-tier Tribunal. There may be some circumstances where a point of law arises out of the treatment of the evidence by the First-tier Tribunal; for example it may be said that a point of law arises out of the treatment of the evidence by the First-tier Tribunal in circumstances in which a factual conclusion depends not on what a witness said but on speculation for which there was no foundation in the evidence. For an appellant simply to restate the same factual position that was adopted at the First-tier Tribunal and expect a different outcome from the Upper Tribunal is to fail to recognise the purpose of the appeal procedure. It is for the homeowner to identify a point of law upon which he relies.

[7] One ground of appeal stated by the homeowner is that the FtT failed to consider or rule upon the opening statement from him. There is no point of law raised in this ground of appeal. The FtT stated quite clearly the basis of its decision. In paragraph 62 of its written decision the FtT stated that it had regard to the written submissions and the documents lodged in support of the application. It identified two sections of the Code with which the factor had failed to comply. Simply to state that the opening statement not been considered or ruled upon is not a point of law upon which permission to appeal can be granted, particularly when the FtT states that it did consider the statement.

**Section 1A of the Code.**

[8] The appellant takes issue with the factor's authority to act. It would appear that the homeowner took possession of the property in 2013. At that stage the current factors' predecessors namely Glasgow Housing Association were the factors. Glasgow Housing Association set up a company namely GHA (Management) Limited to carry out the factoring and that company changed its name in 2016 to Your Place Property Management. The homeowner expressed the view to the FtT that upon a change of ownership such that Glasgow City Council ceased to own any of the properties within the development the factoring arrangement ought then to have been reviewed. The FtT addresses this issue at length in paragraph 43 of its original decision. It fully explains its reasoning.

[9] The legitimate authority challenged by the homeowner is derived from the Deed of conditions referable to the property. While a change of name took place the original authority maintained. The point at issue appears to be whether the duty to comply with the Code and consequent property factor duties under section 17(5) of the 2011 Act arises from 1 December 2012 or 6 September 2017. Leave to appeal is refused. The appellant claims that the "First-tier tribunal was meant to consider and rule upon the legitimate authority or otherwise of any particular company to act as Factor" and it failed to do so. The FtT considered the issues raised. The FtT did give effect to the overall claim of the homeowner because it considered the actions of the factor both before and after the name change. No point of law is identified. Permission to appeal is refused.

**Section 1B of the Code**

[10] The FtT considered whether the written statement provided sufficient detail to the homeowner of the service provided. The FtT clearly saw and read the written statement. It

referred specifically to response times and core services available. As an expert tribunal in the exercise of its discretion and having seen and read the written statement it considered no breach had taken place. No point of law has been identified. For the avoidance of doubt it was no part of the function of the FtT in this case to investigate the "conduct" of a named employee of the factors as is suggested by the appellant. The FtT stated at paragraph 43 that the homeowner was unable to confirm if he ever received a copy of the Property Services Schedule. It is alleged by the homeowner this is factually incorrect. Matters of fact are for the FtT. It is not a point of law upon which permission to appeal can be granted.

[11] The homeowner complains that it is "factually incorrect of the Tribunal to state that the homeowner felt the factor lacked the necessary expertise to be able to provide the services offered". Again this is a matter of fact for the FtT it is not something that can be revisited by an appellate court.

**Section 2(1) of the Code**

[12] The homeowner complains that in terms of section 2(1) of the Code that the factor had provided information that was misleading or false. This was addressed by the FtT in paragraph 45 of its decision. The reasoning is clear and does not provide a basis for appeal. The homeowner states within his application that he provided examples. However, the FtT formed the opinion, subject to one addressed exception, that the examples given by the homeowner did not provide misleading or false information. In so far as there was inaccurate or misleading information provided the FtT explains that that is in relation to a matter outwith the Code. No point of law is identified.

**Section 2(2) of the Code**

[13] The homeowner complains that paragraph 2(2) of the Code was breached by the factor. The homeowner seems to be repeating comments that were made at the hearing. He invites the Upper Tribunal to the view that the FtT failed to consider the dignity of the homeowner, the nature and circumstance of the abusive behaviour, how that abuse might be perceived by the homeowner and any adverse effect it had upon the working relationship or level of service provided by the factor. The decision of the FtT clearly addressed whether the communications were abusive, intimidating or threatening in terms of the Code. The FtT concluded that the correspondence produced was not abusive, intimidating or threatening in terms of the Code. The FtT explains its reasoning in paragraph 46 of its decision. No point of law arises.

**Section 2(4) of the Code.**

[14] Insofar as the allegation about section 2(4) of the Code is concerned, this was addressed in paragraph 47 of the original decision. The FtT clearly noted it had been accepted by the factor at the stage of the complaint that there had been a failure on its part and that a meeting should have been convened. This having been acknowledged by the factor prior to the application to the FtT, it concluded that it would be inappropriate for it to make a finding against the factor. That was a view the FtT was entitled to take. The ground of appeal raises no point of law.

**Section 2(5) of the Code**

[15] The homeowner complains that the root cause of the factor failing to respond to the nature of the enquiry is the lack of resource capacity capability and competence to exercise

sound engineering judgment. Permission to appeal is sought because the FtT makes no mention of this. This issue is addressed within paragraph 48 of the FtT decision. It rather appears that the homeowner's complaint is directed towards insufficient evidence being placed before the FtT to entitle it to make the finding sought by the homeowner. Identified correspondence that was provided by the homeowner was responded to timeously. The FtT had regard to the written documents provided by the homeowner and his oral evidence. It rather appears that certain issues trespassed outwith this section of the Code but in terms of the available evidence to the FtT it is clear that it formed an opinion which it was entitled to form. The ground of appeal raises no point of law.

[16] The homeowner also invites a statement from the Tribunal to be "stricken from the record" claiming it was not stated by him. The evidence is a matter for the FtT. That ground of appeal raises no point of law.

**Section 3(3) of the Code**

[17] The homeowner appears to be making reference to it being reasonable for the factor to provide costs for proposed works as opposed to charges for works carried out. As is correctly identified by the FtT this section of the Code refers to factors providing, at least once a year, a detailed financial breakdown of charges made and a description of the works carried out. It does not refer to "proposed work". Indeed, in its written decision at paragraph 49 the FtT formed the view that the documents provided by the homeowner and his oral evidence tended to support the position that the factor did provide a detail financial breakdown of the charges made and a description of the activities carried out. No point of law is raised.

**Section 4(1) of the Code**

[18] In terms of its original decision the FtT is satisfied that the factor did have a written procedure for debt recovery and it was referred to in the written statement of services which could be accessed by the homeowner on the factor's website. The complaint from the homeowner is that there is no mention in the procedure about policy whenever a homeowner disputes payment of any bill. The FtT clearly considered the homeowner's concerns and noted that the factor had thus far taken no steps to recover the disputed debt. What the application for permission to appeal does is dispute whether the factor has taken steps to recover the monies due. This is a matter of fact which is for the FtT to determine. The issue is addressed both within the original FtT decision and within the decision by the FtT to refuse leave to appeal. No point of law is raised. The homeowner has sent correspondence to the Upper Tribunal following the submission of this application. The correspondence appears to be an advising as to the current state of the communications between the homeowner and the factor. It is not relevant to the decision which requires to be made.

**Section 4(2) of the Code**

[19] It is the position of the FtT that the homeowner stated at the hearing that he was not insisting on his complaint in relation to this section. The homeowner in his application for permission to appeal states "the case relating to debt was accepted for investigation by the chair and it is vexatious of him to allege it was not". No point of law is identified or raised. Simply to contend that the FtT was "vexatious" without any further specification does not constitute a point of law.

**Section 4(4) of the Code**

[20] Section 4(4) of the Code states that the factor must provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowners does not fulfil their obligations. The homeowner's complaint does not relate to common property. It is mutual property. There is no obligation on the factor in respect of mutual property. The homeowner contends that the FtT erred as the Deed of Conditions overrules the Tenements (Scotland) Act 2004 and as such any property mutual with one and the other owner will be deemed common property and the cost of repairs shared between all owners in the block. The FtT recognised the ambiguity within the Deed of Conditions but is of the view that the relevant soffit is mutual to the ground and upper floor proprietors only and therefore the cost of repairs should not be shared between all four proprietors on the block. This was a decision which the FtT was entitled to make. It may be that the homeowner does not accept the position but that is not a ground of appeal which raises a point of law.

**Section 4(9) of the Code**

[21] This section of the Code is referred to within the homeowner's application for leave to appeal. It presents as a commentary rather than a ground of appeal. The FtT in considering leave to appeal has considered that the homeowner submitted that by failing to take reasonable steps to apply its own procedures in investigating disputed bills the factor misrepresented its authority or the correct legal position. It appears that the submission made by the homeowner at the hearing was that the emails to him from a representative of the factors referable to disputed sums were intimidating and did not show respect. It was not suggested that the factor misrepresented its authority. The FtT in terms of paragraph 53 considered the exchange of emails referred to by the homeowner but could not conclude

that the factor was acting in an intimidating manner and neither was it the case that the factor carelessly misrepresented its authority or legal position. That is a position which the FtT is entitled to take. It requires to exercise its discretion. There is no point of law.

**Section 5(4) of the Code**

[22] I interpret this ground of appeal as being firstly that it is contended that the factor had a duty of care to arrange for proper insurance and secondly that the factor was reasonably required to supply all relevant information to homeowners, to consult with them and provide assurance to them that the common insurance policy negotiated with the insurer was proper, fit for purpose and compliant with the requirements of the Deed of Conditions. Following an escape of water on 27 June 2016 the factor was "passive" throughout legal proceedings, it is claimed. This has been interpreted by the FtT in considering whether to grant leave to appeal as an appeal whereby the homeowner suggest the factor provided inadequate insurance and the homeowner has misconstrued the meaning of this section of the Code. I agree with the FtT that there is a requirement for the factor to have procedures in place for submission of claims on behalf of homeowners or alternatively for provision of required information to homeowners to allow them to submit their own claims. The adequacy of the policy in force is not relevant to the section of the Code. In terms of paragraph 54 of the original FtT decision the opinion is that the homeowner confused the requirement in the Deed of Conditions for a comprehensive insurance policy to cover the cost of the full reinstatement of the property with the requirement for the policy to cover the full cost of damage from water ingress. That appears to be an accurate summary of the position. No point of law arises.

**Section 5(6) of the Code**

[23] It is clear from the original decision of the FtT and the decision as far as the leave to appeal is concerned that the homeowner was unable to direct the FtT to any documentation or correspondence to show that he had firstly requested information and secondly requested detail as to how and why particular insurers had been chosen. It may be that the homeowner now wishes to introduce such evidence but since it was not before the FtT no point of law is raised.

**Section 5(7) of the Code**

[24] In paragraph 22 of his application the homeowner contends that "Mr Cuthill was aware of requests from the homeowner to see tender documentation". In paragraph 56 of the original FtT decision it appears the homeowner confirmed that he had not requested sight of any insurance tender documentation. Standing the decision of the FtT and the position adopted apparently by the homeowner at that stage, there is no point of law that arises for consideration by the Upper Tribunal. It is suggested in refusing leave to appeal by the FtT that the homeowner is changing his position. Matters of fact are for the FtT. No point of law is identified.

**Section 6(1) of the Code**

[25] Although referred to within application for leave to appeal it rather appears that the FtT upheld this aspect of the homeowner's complaint. No point of law arises.

**Section 6(3) of the Code**

[26] The homeowner submits that it is reasonable for the factor to provide detailed information on how and why contractors were appointed. However, it appears clear that at the hearing before the FtT the homeowner was unable to produce any documentation to show he had requested any such information from the factor. No point of law arises.

**Section 6(4) of the Code**

[27] Although the homeowner refers to this section of the Code in his application it appears that this was not a live issue before the FtT. Permission to appeal is therefore refused on this point.

**Section 6(5) of the Code**

[28] The complaint from the homeowner appears to be that the FtT made no mention of any reference to public liability insurance. The argument seems to be that a Mr Hanlon undertook work on behalf of the factor. The work carried out was of poor quality. The factor must therefore take responsibility to pursue Mr Hanlon for the cost of damages. This section of the Code states that the factor must ensure that all contractors appointed by it must have public liability insurance. The FtT is of the view that this section of the Code has nothing to do with the pursuit of contractors in respect of inadequate services. That view is correct. No point of law arises.

**Section 6(9) of the Code**

[29] This was upheld by the FtT. However, the homeowner complains that and asserts that the FtT is reasonably required to pursue the factor to ensure a collateral warranty is

obtained from the contractors. Leave to appeal was refused by the FtT upon the basis that the homeowner does not give any indication as to why such a collateral warranty would be appropriate or necessary in the circumstances or whether he had submitted any evidence in this regard. No further information was provided by the homeowner. Leave to appeal is refused.

**Section 7(1) of the Code**

[30] This is addressed in paragraph 60 of the original FtT decision. The FtT was satisfied the factor did have a written complaints resolution procedure that was satisfactory in terms. In his application the homeowner provides further information. In refusing leave to appeal the FtT makes is clear that homeowner made no mention of either of these points at the hearing and therefore they could not be addressed by the FtT in its decision making process. If a point is not made before the FtT it cannot found a basis for permission to appeal absent any explanation as to why it was not previously raised. Permission to appeal is refused.

**Property Factors Duties**

[31] In relation to property factors duties it is contended by the homeowner that the property factors duties were not addressed by the FtT. The basis of the ground of appeal was that the FtT failed to consider same. The homeowner then lists five specific paragraphs in which he maintains that the FtT did not consider the duties of the factor. It is clear from paragraph 62 of the FtT decision that it carefully considered all of the oral submissions made at the hearing by the homeowner and the lengthy written submissions and documents lodged in support of his application. The FtT was satisfied that the factor was in breach of sections 6(1) and 6(9) of the Code and failed to carry out its property factor duties. It

appears clear from paragraph 61 of the application for leave to appeal to the Upper Tribunal made by the homeowner that a written statement separating out the property factor's duties was compiled. The basis of the ground of appeal was that the FtT failed to consider same. In refusing leave to appeal the FtT emphasizes that it is in no doubt that the factor had failed in certain specified duties. There is no point of law and permission to appeal is refused as far as that aspect is concerned.

**Compensation**

[32] Paragraph 65 of the FtT decision refers to the figure of a £1,000 in compensation. The FTT explains that it adopted a "broad brush approach to cover what it concluded was a fair amount to reflect the trouble, inconvenience and expense experienced by the homeowner". It is maintained that the PFEO is inadequate and that "justice has not been served." I have had regard to paragraph 63 of the original decision. This sets out the various factors which were taken into account in terms of trouble, inconvenience and expense. Paragraph 65 of the original FtT decision further amplifies the reasoning behind the selection of the figure of £1,000. In all of the circumstances it is considered the FtT reasonably explained its decision to award £1,000. It must be remembered that the FtT is an expert tribunal. In deference to the status of the FtT as an expert tribunal the figure awarded will not be interfered with lightly. Were it the case that no explanation was provided by the FtT as to how the selected figure had been reached that would entitle the Upper Tribunal to interfere but in circumstances where the appropriate factors have been taken into account and the level of compensation is explained no point of law arises.

**The law of agency**

[33] There is no suggestion within the original FtT decision that the law of agency was considered or ruled upon. There is no suggestion that the homeowner made submissions on the law of agency before the FtT. Given that the FtT decision identifies its basis with reference to statute, subordinate legislation and the Code the absence of a reference to the law on agency does not form the basis to allow permission to appeal.

**Refusal by the FtT to grant leave to appeal**

[34] With reference to the refusal by the FtT to grant leave to appeal the homeowner claims that

> "the FtT proceeded to pose of itself a series of questions under the pretext of impartiality and objectivity, then answered it ostensibly in support of the Homeowner , but invariably in the interests of its own decision making."

The homeowner then states;

> "The first-tier Tribunal is reasonably required to clarify and explain which property factor duties ( if any) the Factor failed to comply with in terms of section 17(5) of the 2011 Act. And the law of Agency."

The Upper Tribunal is considering whether to grant permission to appeal. There is no mechanism for the FtT to answer calls or requirements from the homeowner. In any event the FtT, in considering whether to grant leave to appeal, has clearly identified the various heads of appeal and explained its decisions. Importantly, the FtT has explained its decision to refuse leave to appeal with reference to the written decision which it is required to produce.

[35] There is no basis identified for the suggestion that the outcome was predetermined or that the FtT in refusing leave to appeal was acting in the interests of its own decision making. In cases where the homeowner alleges that there was a substantial procedural

defect because bias was shown the question to be asked is whether the fair minded and informed observer, having considered the facts, would conclude that there is a real possibility that the FtT was biased, had reached a predetermined decision or was acting with its motive as ex post facto self justification.

[36] The test is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" (*Magill* v *Porter and Weeks* [2001] UKHL 67 at [103]). The fair-minded and informed observer, "is neither complacent nor unduly sensitive or suspicious". It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach (*Lawal* v *Northern Spirit* [2003] UKHL 35 at [14] and must be taken to be able distinguish between what is relevant and what is irrelevant and decide what weight should be given to facts that are relevant (*Gilles* v *Secretary of State for Work and Pensions* [2006] UKHL 2 [17]). The homeowner does not state what matters justify the conclusion he has reached. The fact that the homeowner does not agree with the outcome is not a sound basis in law upon which to grant permission to appeal.

[37] In refusing permission to appeal account has been taken of the whole of the documentation which was partially included in the Form UTS-1 and in the paper attached. While all of the facts and circumstances stated by the homeowner have been considered all have not necessarily been specifically referred to within this decision. The fact that the material is not referred to does not mean it has not been considered. Having considered the application for permission to appeal I cannot find an identifiable point of law which would entitle the Upper Tribunal to grant permission to appeal and furthermore I cannot infer from them any identifiable point of law. There is nothing identified by the homeowner which

could turn a factual finding into an error of law. Accordingly, I require to refuse the application.

[38] The homeowner has sent documentation to the Upper Tribunal following upon the refusal of leave to appeal and his decision to seek permission to appeal from the Upper Tribunal to appeal the decision of the FtT. Much of the documentation provides a running commentary on the dispute the homeowner continues to have with the factor. It is of no relevance to the decision which requires to be taken which is whether to grant permission to appeal upon an identified point of law.