



DECISION OF

Tony Kelly

**ON AN APPEAL
IN THE CASE OF**

William Richardson, Debbie Kenny, Caroline Thompson, Madeleine Rooney, Dawn MacTaggart
per Mr William Richardson,
Flat 4/1, 120 Clyde Street, Glasgow, G1 4LH

Appellant

- and -

Residential Management Group Scotland Ltd, Unit 6, 95 Morrison Street, Glasgow, G5 8BE
per BTO Solicitors,
48 St Vincent Street, Glasgow, G2 5HS

Respondent

FTS Case references: FTS/HPC/PF/20/2019, 2020, 2021, 2023, 2024

Glasgow, 6 June 2023

Decision

The Upper Tribunal refuses the appeal.

Introduction

[1] Homeowners at a development made application to the First Tier Tribunal (FTS) alleging



that the respondents, the property factor, had breached its duties as property factor. This was said to comprise of a failure to provide information on year end deficit charges; a failure to respond to complaints and concerns raised by owners; and failures in respect of accounting statements. Various owners appointed Mr Richardson to act as their representative. After a lengthy hearing, the FTS issued a decision on 28 August 2022. It broached a number of potential procedural avenues for the case to follow (at paragraphs 87 to 92) and invited representations. It outlined the terms of a proposed Property Factor Enforcement Order (PFEO).

[2] In response, the appellants lodged a detailed critique of the FTS decision. The FTS construed that submission as an application for permission to appeal. By decision dated 3 November 2022 it granted permission to the appellants to appeal to the Upper Tribunal and suggested the following question for the Upper Tribunal's decision:

“Did the First Tier Tribunal err in law in deciding that it did not have the jurisdiction to determine the final amount owed by the applicants to the property factor?”

[3] The appellants did not at that time take forward any appeal to the Upper Tribunal. On 1 March 2023 the FTS noted that no appeal had been taken and finalised the terms of the PFEO. On 3 March 2023 each of the appellants lodged applications to the Upper Tribunal. They acknowledged that the appeals were out of time and sought an extension of time.

Hearing: 11 May 2023

[4] Mr Richardson appeared in his own case and on behalf of each of the other appellants. Mr Kane, solicitor, represented the respondents. I was assisted by detailed chronologies lodged



by parties regarding the progress of the application and the submission of the notice of appeal. It was agreed that the Upper Tribunal would deal firstly with the issue about whether an extension of time to proceed with the appeal ought to be allowed and thereafter hear submissions on the substance or merits of the ground of appeal.

Timeliness

[5] It was acknowledged by Mr Richardson that the appeal was strictly out of time. Permission to appeal had been granted on 3 November 2022. A notice of appeal had to be lodged within 30 days of the receipt of that decision by the appellants – rule 3(9), Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016. Mr Richardson explained that in each of the communications from the FTS and the Upper Tribunal, there had been helpful guidance notes about the procedure to be followed in taking the case further. Mr Richardson frankly acknowledged that he had assumed, wrongly, that the matter would be passed directly to the Upper Tribunal and that he would be contacted. He reminded the Upper Tribunal of the time taken for the application to be determined by the FTS. Against that background he felt aggrieved and submitted that strict adherence to the consequences of failure to abide by this time limit would be unjust.

[6] On behalf of the respondents Mr Kane acknowledged that procedurally the case had gone awry with the FTS granting permission to appeal before it had arrived at a final decision. Subsequently, on 1 March 2023 a further and final decision had been issued where the PFEO had been made.



Decision - Timeliness

[7] Rule 3(9) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations provides a time limit within which a notice of appeal requires to be provided to the Upper Tribunal by an appellant who has been granted permission to appeal from the FTS. That 30 day time limit has not been complied with here. There is a power to extend the time limit in terms of rule 3(5). In all the circumstances I consider that it would be just so to do. I am informed by the following factors:

- i. Mr Richardson's impression that the matter would flow straight to the Upper Tribunal was not simply based upon his lack of experience as a party before the FTS. In its decision granting permission the FTS states at paragraph 18 that it "agrees to remit the appeal to the Upper Tribunal". There is, however, no such power available to the FTS to "remit" an application to the Upper Tribunal. It was not unreasonable for Mr Richardson to infer that the process was being transferred to the Upper Tribunal.
- ii. It may not have been appropriate for the FTS to grant permission to appeal when it had not yet reached a final decision. The point that the appellants wanted to review had been decided by the FTS. No matter the decision of the Upper Tribunal on the ground of appeal granted permission to proceed, the FTS still had to decide on what terms it would strike the final PFEO. When an appeal was not pursued, the FTS decided to take that further, final decision. Whilst the FTS is not expressly precluded from granting permission before reaching a final decision it would be rare for an application to be made prior to the conclusion of procedure before the FTS. The disadvantages are clear in that the parties here were left in some doubt about where



the case was procedurally. That was cleared up when a final decision was reached on 1 March 2023.

- iii. It would be artificial to require the appellant to return to the FTS to seek permission afresh in respect of the final PFE0 when it is clear that he has taken action timeously to bring the matter to the Upper Tribunal after that final decision.

[8] In all the circumstances I extend the time limit for the lodging of the appeal and will deal with the substance of the appeal.

Ground of Appeal

Appellants

[9] Mr Richardson on behalf of the appellants explained his concerns in relation to the conduct of the respondents. An action had been raised at Glasgow Sheriff Court by the property factor. When he attended there to explain the position of the appellants, the presiding sheriff had indicated that his criticisms of the conduct of the respondents ought to feature in an application before the FTS. Mr Richardson explained, with reference to documents he had obtained and presented to the FTS, that the real problem was the year end deficit charges applied by the respondents. He had arrived at a view as to the basis upon which these charges had been applied by the respondents. The FTS ought to have determined upon the submission that sums were due by the appellants to the respondents. When it was put to Mr Richardson that this may not have been part of the functions of the FTS – the very crux of the appeal – he submitted that in light of the nature of the dispute between parties, the FTS ought to have expressed a view upon it in order that its decision could be utilised by the appellants in the Sheriff Court proceedings.



Respondents

[10] On behalf of the respondents Mr Kane submitted that the FTS was correct in deciding that it could not adjudicate upon the sums that were due to the property factor by the appellants. The FTS decision on this point is to be found at paragraphs 30, 31 and 61.

[11] Mr Kane referred to the Property Factors (Scotland) Act 2011. The FTS had reached the correct decision. The appeal ought to be refused.

Decision

The Property Factors (Scotland) Act 2011

[12] Section 17 provides:

“Application and referral

17 Application to the First-tier Tribunal

(1) A homeowner may apply to the [F9First-tier Tribunal] for determination of whether a property factor has failed—

(a) to carry out the property factor's duties,

(b) to ensure compliance with the property factor code of conduct as required by section 14(5) (the “section 14 duty”).

(2) An application under subsection (1) must set out the homeowner's reasons for considering that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty.

(3) No such application may be made unless—

(a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, and



(b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern.

(4) References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard.

(5) In this Act, "property factor's duties" means, in relation to a homeowner—

(a) duties in relation to the management of the common parts of land owned by the homeowner, or

(b) duties in relation to the management or maintenance of land—

(i) adjoining or neighbouring residential property owned by the homeowner, and

(ii) available for use by the homeowner."

[13] The application to the FTS about the respondents' averred failures was made in terms of section 17 of the 2011 Act. Section 20 makes provision for the FTS to make a PFEO. It may make a positive order ordaining the property factor to do something and also order payment to the homeowner of a sum of money it considers reasonable.

[14] The FTS does not have jurisdiction to deal with every dispute between property factors and homeowners. The jurisdiction given to it is delineated by statute and relates to applications made by homeowners for a decision about whether there has been a failure on the part of a property factor to perform its duties or comply with the code of conduct. It is provided in section 19 what the FTS must decide upon in connection with such an application. It requires to decide whether there has been a failure and thereafter whether to make a PFEO. There are procedural protections afforded to parties before the PFEO is finalised. This is a jurisdiction exclusive to the FTS (section 19(4)).



[15] The power to make an order for payment to the homeowner “as the First Tier Tribunal considers reasonable” must also be seen in light of the jurisdiction the FTS enjoys in connection with an application such as this. There must exist a nexus between the power to order payment and the matters which may be brought before the FTS for a decision. That is an alleged failure to carry out property factor duties or compliance with the property factor code of conduct. In the course of the hearing, the sum of money to be awarded against the property factor for payment to the homeowner was described as a compensatory payment. It is not described as such in the 2011 Act. Whatever the nature of that payment may be, the power to order payment of a reasonable sum to the homeowner must be related to the subject matter of the application before the FTS.

[16] The appellants appear to have been encouraged to follow a number of different procedural routes. Mr Richardson complains of the time during which this application has been in dependence. He wants to bring before an adjudicative body his concerns regarding charges applied to year end accounts. He has undertaken considerable work in this regard and has made submissions about this. He explains his defence of a simple procedure action at Glasgow Sheriff Court.

[17] In this application Mr Richardson and the other appellants have brought before the Housing and Property Chamber of the First Tier Tribunal for Scotland an application in terms of section 17 of the Property Factors (Scotland) Act 2011. The Tribunal agreed that the property factor has breached the code of conduct. It awarded a sum of money in recognition of this breach or failure. It is not open to the FTS in an application such as this to go beyond the jurisdiction given to it by Parliament and to venture into matters which are not properly within its domain.



[18] The FTS heard submissions made by all parties as to whether there had been a breach of the duty owed to the homeowners. It found that there were significant failings and proposed to declare that that was the case. Its detailed decision illustrates that it agreed with the homeowners' submission. It eventually made provision for an award in their favour to reflect the failings it had found the property factor had made.

[19] It did not fall into error by failing to take the matter one step further - as it was invited to do and as Mr Richardson submitted before the Upper Tribunal it ought to have done - by arriving at a view as to what sums were properly due by homeowners to the property factor. This was not part of its function.

[20] Mr Richardson's ultimate submission was that the FTS could have found that the homeowners were due to pay the property factor around £173 each. He provided detailed material to both the FTS and the Upper Tribunal to support such a conclusion. To take such a step the FTS would have gone further than it was permitted to do by the 2011 Act in regulating the financial relationship between the property factor and homeowners. The matters that the FTS may decide upon in terms of section 19 of the 2011 Act do not provide a power to the FTS to enter this realm. The FTS was empowered to make the PFEO. The statute provides a power to it to make an order for payment *to* the homeowners not *by* the homeowners. The submission that the FTS somehow accrues to it an overarching jurisdiction to regulate all matters between homeowners and property factors is not supported by the statute.

Conclusion

[21] The Upper Tribunal refuses the appeal.



A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission 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 Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.