Upper Tribunal for Scotland

[2022] UT03
Ref: UTS/AP/21/0040

DECISION OF

SHERIFF NIGEL ROSS

ON AN APPLICATION TO APPEAL

IN THE CASE OF

Mr Aylmer Millen, 5 Hillpark Grove, Edinburgh, EH4 7AP

Appellant

- and -

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh EH12 5HD

Respondent

FtT case reference FTS/HPC/PF/21/0844

21 January 2022

Decision

The Tribunal refuses the appeal and adheres to the interlocutor of the First-tier Tribunal (Housing and Property Chamber) dated 29 August 2021.

Note

1. This appeal relates to a challenge to the legal basis on which a property factor acted in conducting a meeting of proprietors of a housing development. The meeting was on 19 January 2021. The appellant claims that the respondent acted in breach of the Code of Conduct for Property Factors (the 'Code'), promulgated under section 14 of the Property Factors (Scotland) Act 2011. It is not stated in either the appeal or the original decision what remedy is sought.

2. The First-tier Tribunal (Housing and Property Chamber) (the 'Tribunal') held an evidential hearing by telephone on 9 August 2021 and heard evidence from the appellant, and from an associate director and the managing director of the respondent. In its Decision dated 29 August 2021 (the "Decision") the Tribunal found there to be no breach of the sections founded upon, namely sections 1, 2.1 and 7.1 of the Code. Both the Decision and the appeal refer to other documentation but this is not produced by the appellant.

3. The grounds of appeal are long and repetitive. I will attempt to follow the structure of the grounds of appeal under the headings used by the appellant. These are as follows:-

Ground: "Making findings of fact without a basis in evidence"

4. The finding challenged is that there was "*nothing within the DDC* [the Development Deed of Conditions] *which precludes the property factor being appointed as a mandatory*". This finding is attacked as presumptive. However the appellant accepts that any proprietor may be represented by any other person appointed by written mandate. He discusses conflict of interest at some length. Nothing said, however, contradicts the basic proposition set out by the Tribunal. He does not show that the DDC does include such a provision. The finding is one of many made by the Tribunal in exercise of their fact-finding function. The appellant presents no document or other facts to show that the proposition is incorrect. This ground of appeal is not only unsupported but completely unstateable, because the proposition is true.

5. The second challenged finding is: *"The Property Factor received completed forms from owners requesting that the Property Factor act as their mandatory at the meeting on 19 January 2021"*. The appellant argues that there was no evidence. However such evidence was given by Ms Griffiths (para [21] of Decision). The Tribunal were bound to consider all the evidence and decide what they accepted. They accepted this evidence. This ground of appeal is demonstrably wrong, as this evidence was before the Tribunal.

6. The third challenged finding is: *"The Property Factor accepted these requests and acted as mandatory…19 January 2021"*. Such evidence was given by Ms Griffiths, recorded at para [22]. The same comments apply. The evidence was before the Tribunal. They accepted it.

7. The fourth challenged finding is: "*By accepting requests from owners to act as mandatories, the property factor was acting in accordance with the DDC"*. It is submitted that this could not be a finding in fact. It is in fact a finding both in fact and law. It is also an inference. It is supported by the previous findings in fact and there is no error in law. The appellant's reference to "presumption in anticipation" is incoherent – the

Decision represents a full discussion of all issues, considered together, and applying the law to the facts as found. There is no factual basis for challenging this finding. The Tribunal had both the necessary facts and the legal principles on which to make it.

8. The fifth challenge is: *"The Property Factor apologised for referring to proxy votes"*. The appellant criticises this as being insincere. That does not prove this event did not happen. It was a fact available for the Tribunal to consider, to accept and to deal with. The finding is unchallengeable, because it is true.

9. The sixth challenged finding is: *"At the meeting on 19 January the property factor voted on behalf of the owners on the issues of drainage and ground maintenance only."* It is said no evidence of this was led. That is incorrect – see paras 21 and 22.

10. The seventh challenged finding is: *"The Property Factor represented the interest of owners whom they were authorised to represent*". The appellant appears to attack the legal effect rather than the fact of representation. The latter was spoken to by Ms Griffiths, and was evidence the Tribunal accepted. As before, the challenge ignores that the evidence was given and was therefore available to the Tribunal to consider.

11. The eighth challenged finding is: *"The homeowner's position was that resolution of the complaint could be reached by the property factor declaring that there was a conflict of interest…*". The appellant contradicts this, but in a way that is wholly consistent with this finding. It is therefore not wrong, even if the appellant now wishes to augment the statement.

12. The ninth challenged finding is: "*The property factor followed the complaints procedure set out in its statement of services"*. The appellant challenges this as "technical adherence" only, but this does not detract from the fact that this evidence was given and accepted. What the Tribunal made of it is for assessment overall in reaching its decision. There is no error.

13. The tenth challenge in fact is "general". The appellant refers to findings in law, which have no effect on whether findings in fact are accurate. This ground is too unfocused to form a separate stateable ground of appeal.

<u>Ground: "An error in the application of the law to the facts"</u>

14. The appellant sets out his understanding of the DDC requirement of meetings. That is that repairs and maintenance decisions require majority decision at quorate meetings. A quorum, he states, is 20 proprietors or their mandatories. The DDC itself is not produced. He accepts that the respondent gave evidence that it accepted nomination as a mandatory. He relies on the fact that this could involve voting on a

specific topic in a specific way, in order to show that the respondent lied. The nature of the lie seems to be (the appellant does not expressly analyse this) that a mandate is not the same as a proxy. The Tribunal gave working definitions of each at para 30 of the Decision, namely:
"A proxy vote is a specific instruction on a specific topic to vote in a specific way. A mandatory vote, by contrast, allows discretion for the person who holds the mandatory (sic) to act on how he sees fit. It provides a wider discretion".

15. The appellant describes the forms produced, and notes that these refer to "mandatory", not proxy. He analyses this so as to accuse the respondent of lying.

16. This argument is completely misconceived. The DDC expressly allows mandate voting. A mandate is a much more powerful tool than a proxy, because it allows unrestricted voting. The appellant does not dispute that the respondent held these mandates. His criticism that they should properly be disregarded as proxies is contradicted by the oral evidence and the documentary evidence, and in any event makes no sense, because in holding a mandate the respondent held all the powers of a proxy and more. This point of law is completely illogical and unarguable.

17. The appellant then criticises the Tribunal's analysis of the DDC provisions, as discussed in para 78. "Any such person" may be appointed as mandatory. The Tribunal notes (and the appellant does not contradict) that the appellant accepts the property factor may be appointed as a mandatory. He argues that, in effect, if the property factor is appointed it must be present and, being a corporate body, could not be physically present, but only present through its officer, Ms Griffiths. This is augmented in the grounds of appeal in a manner not easy to understand. It rehearses the "proxy" argument (above). This ground is unarguable. A corporate body always acts through its office holders and employees. There is no reason in law the factor could not be appointed as a mandatory.

18. The appellant then goes on to criticise lack of evidence about what instructions the factor held. As noted above, there was evidence available to the Tribunal to support their findings.

19. He makes certain observations, circling round points already made (proxy voting, the factor as mandatory) and then raises questions of transparency and conflict of interest. Nowhere, however, before the Tribunal or in this appeal, does the appellant set out what he identifies to be a conflict of interest. The factor is charged with providing services to the development. It requires instructions in order to carry out anything but routine maintenance and other ongoing duties. If any of the proprietors is content to leave matters to the discretion of the factor, then there is no automatic conflict of interest. The factor remains accountable to the proprietors for all expenditure. The remaining proprietors are entitled to challenge or vote against the

factor. No doubt a scenario may arise within that relationship which throws the factor into a conflict of interest position, but that is not self-evident, and if the appellant wishes to found on such a scenario in order to appeal, it is the appellant's task to set out concisely and clearly what conflict of interest he has in mind. He has not done so. His submissions to the Tribunal, and the grounds of appeal, are vague on both fact and law, rely on findings in fact which the Tribunal did not make, and fail to explain why the factor has a conflict of interest in this specific context, namely in acting to instructions of proprietors, or voting according to mandates given to them. As such these grounds are not capable of supporting an appeal.

20. The appellant proceeds to rely on lack of reasonable standard. He does so, however, in order to make the same points in a different way. They remain unarguable.

21. There is no demonstrable error either in fact and law that would allow the appeal to succeed in relation to this head, or any other.

Ground: "Taking a wrong approach to the case by arriving at a decision that no reasonable Tribunal can properly reach".

22. The appellant uses this head to restate the same arguments. To succeed he would require to show that the Tribunal had acted irrationally on the material before it. As discussed above, he disputes that the Tribunal had evidence which they plainly did have. On reading the appeal, the Tribunal reasoning is both clear and rational. This ground of appeal proceeds largely on the appellant's own assumptions of what the evidence showed. That cannot be a legitimate use of an appeal process. This is not arguable.

Ground: "General points"

23. This summarises much of what has gone before. The appellant relies on natural justice. There is nothing unjust about proprietors deciding to entrust their votes to the factor, or the factor voting the mandates according to the powers thereby given. The appellant may not like his fellow residents doing so, but he cannot prevent them exercising their own voting rights as they see fit.

24. This appeal is entirely without merit, and must be refused.

Post-script

25. This appeal required to be heard because the Tribunal gave permission to appeal. On so doing, it removed any discretion on the Upper Tribunal to decide whether permission should be granted or to refuse to hear the appeal.

26. The function of the Tribunal in considering permission to appeal is a very important one. The Tribunal is the gatekeeper for further procedure. It is important that the Tribunal properly and carefully considers the proposed grounds of appeal, whether there is an arguable case, and whether as a result permission should be granted.

27. There appears to be a misconception that if the appeal raises questions of law then permission must automatically be granted. That is a misunderstanding, and represents a failure to apply the appropriate test. The test is whether the appeal is arguable. The test can be said to be "*that the appeal can properly be put forward on the professional responsibility of counsel*" (*Czerwinski* v *HMA* 2015 SLT 610).

28. The Tribunal in this case refused a review of its own decision on the basis that it "considers the application for review to be wholly without merit". It thereupon granted leave to appeal that same decision without any discussion of the merits, either in fact or in law. The incongruity of that approach should be obvious. The Tribunal did not properly apply its mind to the question. I would suggest that in this case the "professional responsibility of counsel" test is a long way from being met. This appeal has therefore required to be heard and written upon. The grounds of appeal are, in the words of the Tribunal, wholly without merit.

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.*