



2023UT34

Ref: UTS/AP/23/0025 &

UTS/AP/23/0026

DECISION OF

SHERIFF GEORGE JAMIESON

ON AN APPEAL

**(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND HOUSING AND PROPERTY
CHAMBER)**

IN THE CASES OF

Mrs Lesley Ross, West Whitelee Farm, Old Glasgow Road, Stewarton, KA3 5JU

and

Mr Duncan Munro, Dr Jane Munro, Flat 2/2 192 Wilton Street, Glasgow, G20 6BW

Appellants

- and -

Largiemore Estate Limited, Largiemore Farmhouse, Otter Ferry, Tighnabruaich, PA21 2DH

Respondent

FTS Case References: FTS/HPC/PF/22/3578 & FTS/HPC/PF/22/3579

Paisley 9 October 2023

Decision

The Upper Tribunal for Scotland:

1. Allows the Appellants' conjoined appeals against the decision of the First-tier Tribunal for Scotland ("FTS") dated 25 May 2023 postponing its case management discussion in respect of conjoined applications FTS/HPC/PF/22/3578 & FTS/HPC/PF/22/3579 to the FTS on grounds of appeal 1, 3 and 4.



2. Refuses the appeal on ground of appeal 2.
3. Quashes the foresaid Decision of the FTS.
4. Remits the cases to the FTS for further consideration.
5. Directs the FTS to fix a case management discussion before the same or a differently constituted FTS as urgently as possible and, thereafter, to proceed to determine the applications as required by section 19(1) of the Property Factors (Scotland) Act 2011.

Representation

The Appellants were represented in the appeals by NM Legal, Cumbernauld.

The Respondent was represented in the appeals by Turcan Connell, Solicitors, Edinburgh.

Reasons for Quashing the FTS Decision to Postpone the Case Management Discussion

Introduction

[1] I conjoined these appeals by Order No. 1 dated 3 August 2023.

[2] The Appellants in both appeals are chalet owners at Largiemore Estate, Otter Ferry, PA21 2DH.

[3] On 22 October 2022, they applied to the First-tier Tribunal for Scotland Housing and Property Chamber (the “FTS”) for a determination under section 17(1) of the Property Factors (Scotland) Act 2011 that the Respondent had failed to carry out its property factor duties.

[4] By decision made on 25 May 2023, the FTS postponed its case management discussion (“CMD”) in the Appellants’ applications fixed for 30 May 2023 without setting a date for a further CMD at that time.



Permission to Appeal

[5] The Appellants appeal to the Upper Tribunal for Scotland (the “UTS”) against the foregoing decision of the FTS with permission of the FTS on ground of appeal 3 and by permission of the UTS on grounds of appeal 1, 2 and 4.

Appeal Determined Without a Hearing

[6] Both parties’ solicitors consented to this appeal being determined by the UTS without a hearing in accordance with rule 24 of the Upper Tribunal for Scotland Rules of Procedure 2016.

[7] The Respondents decided not to submit a formal Reply to the Appeal.

[8] The Appellants lodged a detailed Response expanding on their grounds of appeal.

Decision Appealed Against

[9] The FTS made its order dated 25 May 2023 to postpone the CMD on 30 May 2023 pending the possibility of criminal proceedings against the respondent under section 12 of the 2011 Act for operating as an unregistered property factor without reasonable excuse. It did so in response to an email from the Respondent’s solicitor dated 17 May 2023 advising the FTS that the defence agent acting on behalf of the Respondents had been in touch again with the procurator fiscal’s office who advised that matters were with the relevant fiscal but no indication as to whether or not a criminal complaint would be issued had yet been provided. They submitted that in those circumstances it would be appropriate for the continued CMD scheduled for 30 May 2023 to be “discharged and the application (*sic*) paused until a decision has been made by the Fiscal”.

[10] The Appellants’ solicitor replied to this request by email dated 25 May 2023:



“On behalf of the Applicants, I strongly oppose postponing or pausing the CMD fixed for 30 May 2023 at 10.00.

As stated by me at the first CMD, the Procurator Fiscal's jurisdiction and consideration of the matter are both quite different to that of the Tribunal. The Applicants' joint position is set out in the Statements which form part of the Applications.

For ease of reference, the salient parts are:

1. The Respondent is a Property Factor as defined by Section 2 of the Property Factors (Scotland) Act 2011 (“the Act”);
2. The Applicants are homeowners in terms of Section 10(5) of the Act;
3. Their Applications in terms of Section 17 of the Act were accepted by the Tribunal Chamber in terms of Section 18 of the Act and that acceptance was not appealed;
4. In terms of Section 19 of the Act, the Tribunal must make a decision on the Applications;
5. There has been no formal challenge to the Tribunal's jurisdiction in respect of the Applications and no legal argument has been put forward in that regard and the cases referred to at the CMD have not been lodged on behalf of the Respondent;
6. The offence under the Act for which the Respondent has been charged and is under consideration by the Fiscal is set out at Section 12 (1) of the Act which states "a person who operates as a property factor while unregistered is guilty of an offence." Section 12(4) of the Act states "It is a defence for a person charged with an offence under subsection (1) to show that there was a reasonable excuse for acting in the



way charged." The Fiscal's consideration is not "is the Respondent acting as an unregistered property factor" but "is the Respondent acting in that manner **without reasonable excuse**". The Fiscal may take the view that a "reasonable excuse" is following legal advice, albeit erroneous legal advice. The Fiscal is also required to take into account other criteria such as public interest and alternatives to prosecution. Therefore, the Fiscal may decide not to proceed with a prosecution for reasons other than that the Respondent is not an unregistered property factor;

7. Accordingly, it is my strong view that the decision of the Fiscal is not relevant to the Tribunal's consideration of the facts of the Applications which facts are direct application of the wording of the Act to the activities carried out by the Respondent.

Further, I am aware that Simple Procedure debt actions have been raised against the Applicants by the Respondents for payment of factoring or service charges. These actions have been raised in the Sheriff Courts relative to each Applicant's residence. Each of these actions has been paused for the Tribunal to determine the Applications because, as I understand it, it was the view of the various Sheriffs that jurisdiction on the disputes rests with the Tribunal and the Sheriffs are awaiting the outcome of the Applications.

My view is that a further postponement of consideration of the Applications is not in the interests of justice and my motion on Tuesday will be to fix a hearing on evidence to allow the Tribunal to make a fully informed determination in terms of Section 19 of the Act."



[11] The FTS had held an earlier case management discussion on 23 February 2023 which it adjourned to 30 May 2023 for confirmation the procurator fiscal did not intend to prosecute the Respondent under section 12 of the Property Factors (Scotland) Act 2011.

[12] The FTS's note of that discussion records its intention that the proceedings before the FTS should "not proceed further at this time lest this prejudiced or otherwise interfered with any criminal proceedings the procurator fiscal might choose to bring against the Respondent." The determination of the applications would have to await the outcome of any prosecution.

[13] This was predicated on the FTS's belief that the Appellants' applications before the FTS involved "the same arguments and legal position as advanced in defence of these applications".

[14] The FTS gave very brief reasons to the Appellants' solicitor – by email dated 5 June 2023 - for its decision to accede to the Respondent's application to postpone the CMD on 30 May 2023. These were that the FTS had further postponed the CMD "for the reasons previously set out and explained on page 2" of its CMD Discussion Note from 23 February 2023. Those reasons made no reference to the Appellant's solicitor's email dated 25 May 2023 strenuously objecting to the Respondent's application to adjourn the CMD.

Relevant Rules of Procedure

[15] The grounds of appeal engage with rules 1(2), 2(1), 2(2) (e), 17(4) and 28(1) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 forming the schedule to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (SSI 2017/328):

Application and interpretation



1.—(2) In these Rules:...“adjourn” means, in relation to a hearing, a decision by the First-tier Tribunal to suspend after it has begun and continue on a later date;...“postpone” means, in relation to a hearing, a decision by the First-tier Tribunal to defer to a date later than that originally set by the First-tier Tribunal.

The overriding objective

2.—(1) The overriding objective of the First-tier Tribunal is to deal with the proceedings justly.

(2) Dealing with the proceedings justly includes: (e) avoiding delay, so far as compatible with the proper consideration of the issues.

Effect of the overriding objective

3.—(1) The ...First-tier Tribunal must seek to give effect to the overriding objective when: (a) exercising any power under these Rules; and (b) interpreting any rule.

Case management discussion

17.—(4) The First-tier Tribunal may do anything at a case management discussion which it may do at a hearing, including making a decision.

(2) Before making a decision under paragraph (1), the First-tier Tribunal must consider any written representations submitted by the parties.

Adjournment or postponement of a hearing

28.—(1) The First-tier Tribunal at its discretion may, on its own initiative or on an application by a party, at any time, adjourn or postpone a hearing.



(3) The First-tier Tribunal may only adjourn or postpone a hearing at the request of a party on cause shown.

No Power to Sist Proceedings in the Rules of Procedure

[16] There is no rule in the Procedure Rules whereby the FTS is authorised to sist or postpone proceedings before it on an indefinite basis, namely without fixing a further CMD to review the progress of the application before it.

Grounds of appeal

[17] Ground of appeal 1 is that in making its decision the FTS did not have regard to the written submissions made by the appellants' solicitors and thus acted contrary to the overriding objective set out in rules 2(1) and 3 of the Procedure Rules for the FTS to deal with the proceedings justly. This ground of appeal was advanced on the basis that the FTS's reasons for its Decision issued on 5 June 2023 made no reference to the email from the Appellants' solicitor dated 25 May 2023 opposing the postponement of the CMD.

[18] Ground of appeal 2 is that the FTS exceeded its powers in terms of the Procedure Rules as there was no rule which allowed it to postpone the CMD in advance of that hearing. The proper course was for the FTS to have held the CMD and decided thereat whether or not to postpone the CMD in terms of rule 28(1).

[19] Ground of appeal 3 is that the FTS erred in law in postponing the CMD pending possible criminal proceedings as this contravened its duty under section 19(1) of the Property Factors (Scotland) Act 2011 to determine the applications.



[20] Ground of appeal 4 is that the FTS breached its duty in terms of rule 2(2) (e) of the Procedure Rules to avoid delay in determining the applications by postponing the CMD without fixing a further date for the CMD.

Discussion

[21] I refuse the appeal on ground of appeal 2 because, in my opinion, not every procedural decision of the FTS needs to be taken at a CMD. There may be good reason why the FTS requires to discharge a CMD in advance of the hearing, for example illness of a party or a party's solicitor, provided the FTS obtains representations from both parties before making that decision. While the FTS did not err in law in taking the approach it did in these cases, I think it would have been prudent for the FTS to have heard the application at the CMD on 30 May 2023. This is because the Appellants had strong objections to the Respondent's application and those objections raised significant points of law which would have merited discussion at the CMD.

[22] However, I allow the appeal on grounds of appeal 1, 3 and 4 because in my opinion:

1. *Ground of Appeal 1* Although I am satisfied the FTS did in fact have regard to the Appellant's solicitor's email to it dated 25 May 2023 in making its Decision to discharge the CMD on 30 May 2023, the FTS ought nonetheless to have specifically referred to this email in its reasons for its Decision issued on 5 June 2023.
2. This is because in order to have dealt deal justly with the Respondent's application to discharge the CMD and pause the proceedings, the FTS required to demonstrate in its reasons for its Decision that it had fairly taken into account both parties' written submissions before reaching that Decision.



3. *Ground of Appeal 3* The FTS had a duty under section 19(1) of the Property Factors (Scotland) Act 2011 to determine the applications. That sub-section states that the FTS “**must**”, in relation to a homeowner application made to the FTS, decide whether the property factor carried out its duties under the 2011 Act.
4. I therefore agree with the Appellant’s solicitor that the possibility of criminal proceedings against the Respondent in respect of a possible contravention of section 12(1) of the 2011 Act was not a relevant reason for the FTS to avoid complying with its duty under section 19(1) of the Act. Any similarity in the issues before the FTS and in any criminal prosecution would not have prevented the FTS from considering these applications. The FTS would be well equipped in terms of its case management powers to determine any preliminary issue such as whether the Respondent was a property factor as defined in section 2 of the 2011 Act. The FTS’s findings as to any breach of the Respondent’s duties would not have bound the sheriff in any criminal proceedings, which would have served a different purpose from these applications, and would not necessarily to be relevant to any question whether the Respondent had a reasonable excuse for operating as an unregistered property factor.
5. *Ground of Appeal 4* Firstly, the FTS did not have regard to the definition of “postpone” in regulation 1(2) of the Procedure Rules in deciding to discharge the CMD on 30 May 2023. “Postpone” is defined therein as a decision by the FTS to defer to a date later than that originally set by the FTS.
6. The FTS has no power in the Procedure Rules to sist or pause proceedings, which was effectively what it did by granting the Respondent’s application.



7. It did not postpone to a later date as required by rule 1(2) of the Procedure Rules as no date was fixed for the postponed CMD.
8. Secondly, the FTS misunderstood rule 2(2) (e) of the Procedure Rules whereby the overriding objective required it to “[avoid] delay, so far as compatible with the proper consideration of the issues”.
9. “Compatibility with the proper consideration of the issues” did not confer a discretion on the FTS to avoid its duty under section 19(1) of the Property Factors (Scotland) Act 2011 to determine the Appellants’ applications before the FTS.
10. This qualification simply acknowledged that a measure of delay may be inevitable in some applications to the FTS, indeed required, to allow the FTS to justly determine applications before it, for example where the case is complex and sufficient time is required by parties to gather evidence and prepare for a hearing.

Conclusion

[23] I have allowed the appeal and directed the FTS to proceed to determine these applications. This includes holding a further CMD as urgently as possible.

Further Appeal

[24] Any party aggrieved by this decision may seek permission from the UTS to appeal to the Court of Session on a point of law.

[25] Any such application must be made to the UTS within 30 days of the date on which this decision was sent to that party.



[26] The application 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) in terms of section 50(4) of the Tribunals (Scotland) Act 2014, state the important point of principle or practice that would be raised in the further appeal or any other compelling reason there is for allowing a further appeal to proceed.

George Jamieson
Sheriff of North Strathclyde
Judicial Member of the Upper Tribunal for Scotland