



DECISION BY

Sheriff P. Di Emidio

IN THE APPEAL

(DECISION OF THE FIRST-TIER TRIBUNAL FOR SCOTLAND)

IN THE CASE OF

Mr Anthony Halifax

Appellant

and

Hacking and Paterson

Respondent

FTS Case Reference - FTS/HPC/PF/22/2528

Appellant: unrepresented

Respondent: Mitchells Robertson, Solicitors, Glasgow

20 December 2024

Decision

Ground 1

The Tribunal Allows the appeal in part and Quashes that part of the decision of the First-tier Tribunal for Scotland dated 27 July 2023 in which it rejected the appellant's complaint (Complaint Two) that the respondent breached section 1.5A of the Property Factors Code of Conduct 2021.

Remakes the decision by Deleting Findings in fact C and D and Substituting new Findings in fact C and D1 to D3 as follows:

"C. The development of which the appellant's property forms part is subject to the detailed burdens set out in the Deed of Conditions by John Dickie Limited registered 19 February 2002.



“D1. Clause 3.3 provides for the appointment of a factor and contains a declaration that John Dickie Limited shall have the right to appoint the first factor.

“D2. Clause 3.3 sets out the powers and authority of the factor in detail and also the basis on which it may be remunerated.

“D3. The [respondent] was appointed as the first factor and has acted as factor for the development ever since.”

Finds the respondent failed to comply with section 1.5A of the 2021 Code and as a result to be in breach of section 14(5) of the Property Factors (Scotland) Act 2011.

Proposes a draft Property Factor Enforcement Order in the following terms:

- a. *The Tribunal orders the respondent within 30 days of the making of this Property Factor Enforcement Order to issue a fresh Written Statement of Service to the appellant which deletes the reference to custom and practice as the source of its authority to act and states the correct basis of that authority as being derived from the Deed of Conditions by John Dickie Limited registered 19 February 2002;*
- b. *The Tribunal orders the respondent within 30 days of the making of this Property Factor Enforcement Order to make payment of the sum of £500.00 as compensation for its persistent failure to comply with its duty to state the correct basis of its authority to act as property factor.*

Allows the parties a period of 30 days from the date of issue of this Decision to comment in writing on the proposed draft Property Factor Enforcement Order.

Ground 2

The Tribunal Refuses the appeal, in so far as it relates to the alleged breach of section 2.4 of the 2021 Code and upholds the decision of the FTS in this respect.

Reasons for Decision

[1] The dispute relates to the source of the respondent’s authority to act as factor for the development of which the appellant’s property forms a part. The respondent has stated that its authority arises by virtue of custom and practice. When challenged by the appellant it asserted that it was sufficient that it had stated this as the source of its authority in its Written Statement



of Services (“WSS”). The question that now arises is whether that assertion is sufficient in the face of the appellant’s challenge. Permission to appeal was granted on two closely related grounds. The question to be determined is whether the FTS erred in law when it concluded that the respondent property factor did not breach sections 1.5A (Ground 1) and 2.4 (Ground 2) of the Property Factors Code of Conduct (“the 2021 Code”).

[2] The appellant was successful on a number of points before the FTS. This Tribunal granted permission to appeal after a hearing on two points that essentially overlap. Having considered the response to the grant of permission to appeal and the appellant’s reply, I agreed with both parties that the appeal could be determined without the need for a hearing. The written submissions of the parties are addressed in the reasons for decision.

[3] In July 2021, the Scottish Government published the new code of conduct for property factors. This replaced the original code on 16 August 2021. The 2021 Code sets out the minimum standards of practice that registered property factors must adhere to in the provision of their services and encourages transparency in the way that they conduct their business. The 2021 Code also aims to improve clarity and flexibility for property factors in Scotland. All registered property factors require by law to ensure compliance with the 2021 Code in terms of section 14(5) of the 2011 Act.

[4] The 2021 Code contains a number of provisions and definitions that are significant for the determination of this appeal. It is convenient to set them out at the outset.

The final sentence of section 1.1 of the 2021 Code states that:

“If a homeowner makes an application under section 17 of the 2011 Act to the [FTS] for a determination, the [FTS] will expect the property factor to be able to demonstrate how their actions compare with their Written Statement of Service as part of their compliance with the requirements of this Code.”

Section 1.5 of the 2021 Code, so far as relevant, provides:



“The WSS must set out:

A. Authority to Act

- a. a statement of the basis of the authority the property factor has to act on behalf of all the homeowners in the group [Footnote 3]. Property factors operating under a custom and practice arrangement with no formal appointment should clearly indicate this arrangement to homeowners in the WSS.”

Footnote 3, so far as relevant, states:

“For example (not an exhaustive list): -

Named in the Title Deeds as the property factor for the first (x period of time). This time limit has/has not expired. –

Appointed by a decision of a majority of homeowners on x date. –

Operating as property factor by custom and practice – no formal appointment exists”

Section 2.4 of the 2021 Code provides:

“Where information or documents must be made available to a homeowner by the property factor under the Code on request, the property factor must consider the request and make the information available unless there is good reason not to.”

The Glossary appended to the 2021 Code defines “Authority to Act” as:

“[a]statement that makes clear the basis on which a property factor is acting on behalf of homeowners including any legal basis where applicable.”

The Glossary defines the expression “custom and practice” as:

“A course of action between a property factor and homeowners which has historically been undertaken in a particular way and is considered by both parties as the norm in the absence of any formal contract or arrangement between a property factor and homeowners.”

Ground 1: Alleged breach of section 1.5A of the 2021 Code

[5] At page 3 of its decision, the FTS made short Findings in Fact. The following are relevant to this appeal.

“C. The Factor has been factor of the development since the development was erected (2002).

“D. The source of the Factor’s authority is custom and practice.”



[6] The FTS stated at page 5 of its decision of 27 July 2023 (within an extended unnumbered part of paragraph 12.1) that section 1.5A of the 2021 Code had been complied with by the respondent detailing in the WSS that its authority to act as factor was through Custom and Practice. The FTS had before it a document issued by the respondent entitled “Terms of Service and Delivery Standards”, which bore a date of issue of 30 August 2021. Section 2.1 of that document stated:

“We act as property factor to all homeowners in the group, of which you form part, deriving delegated authority to do so through: Custom & Practice”

The parties’ submissions

[7] The appellant’s case is very simple. The respondent’s assertion that its authority derived from custom and practice, in the sense defined in the Glossary of the 2021 Code, is inaccurate and cannot be determinative. The FTS was not bound to accept that assertion and erred in law when it did so.

[8] In its Answers, the respondent submitted that it disagrees with the statement made by the FTS, at page 5 of its decision, that the respondent’s contract with the homeowners stems from the Code of Conduct, Deed of Conditions, Written Statement of Services and the Property Factor’s duties. However, its conclusion that there was no breach of section 1.5A of the 2021 Code was correct. The FTS may have clarified matters by distinguishing between the terms of the parties’ contract and the respondent’s authority to act.

Analysis

[9] The respondent produced a copy of the Land Certificate for the appellant’s property to the FTS by letter dated 19 December 2022. Both parties accept that this document contains the terms of the Deed of Conditions that apply to the development including the appellant’s property. This comprehensive document contains detailed provisions regulating the



responsibilities of the proprietors for the care maintenance and management of the common parts and the role of any property factor appointed to manage the development of which the appellant's property forms a part. In particular, clause 3.3 provides for the appointment of a factor and contains a declaration that the developer John Dickie Limited had the right to appoint the first factor. Clause 3.3 sets out the powers and authority of the factor in detail. It is not necessary for present purposes to rehearse these provisions at length. The whole powers exercisable by a majority vote of proprietors at a meeting are delegated to the factor. By virtue of clause 3.3(a)(viii) the factor is granted :

“full power and authority to instruct and have executed from time to time such works for the repair, maintenance or renewal of the common subjects as specified in clauses 2.1, 2.2 and 2.4 hereof or any part thereof, as [it] in [its] judgement shall consider necessary to render quarterly accounts...”,

[10] Since the Deed of Conditions came into effect, the 2011 Act and the 2021 Code have altered the relationship between the parties by imposing new obligations on the respondent and conferring certain rights on the appellant as a homeowner. That does not affect the continuing legal effect of the factor's source of authority to act. The respondent put no evidence before the FTS of any custom or practice of the kind described in footnote 3 of section 1.5A of the 2021 Code. There is no scope in this analysis for custom and practice as defined in the 2021 Code. Clause 3.3(a) of the 2002 Deed of Conditions contains the basis for the original appointment of the factor from around 2002 as accepted in the Answers. That original appointment enabled the respondent to contract with individual homeowners within the development to act as factor. The respondent's submission is misconceived.

[11] The respondent's reliance on a factually incorrect statement as the basis of its authority does not sit well with the Overarching Standards of Practice set out in the 2021 Code which encourage property factors to be open and transparent in their dealing with homeowners. The respondent will also have understood the significance of that part of section 1.1 of the 2021 Code



quoted above. The respondent could not comply with the 2021 Code by stating something that was factually incorrect.

[12] The FTS's analysis of the legal basis of the respondent's authority in relation to the interests of the appellant as a proprietor in the development quoted above was essentially correct. It erred by accepting the submission that it was sufficient for the respondent to assert its authority arose from custom and practice. It failed to carry through the logic of its own analysis. It should have found that the respondent was in breach of section 1.5A. For these reasons, Ground 1 is successful.

Ground 2: Alleged breach of section 2.4 of the 2021 Code

[13] The respondent was obliged under section 2.4 to consider a request for the provision of information or documents on request and make the information available unless there was a good reason not to. In this case, the respondent provided a WSS. The appellant complained that section 2.1 dealing with the source of the factor's authority was inaccurate. For the reasons set out above the appellant's complaint was well founded and constituted a breach of section 1.5A of the 2021 Code. The appellant's complaint regarding the respondent's source of authority is most appropriately dealt with under section 1.5A. The inaccurate statement at section 2.1 of the respondent's "Terms of Service and Delivery Standards" document quoted above is not a breach of section 2.4. There was no failure to make information available on request. Ground 2 of the appeal fails.

Disposal of the Appeal as regards Ground 1

[14] Two statutory provisions require to be considered because of the conclusion reached on Ground 1. Section 47 of the Tribunals (Scotland) Act 2014 sets out the powers of this Tribunal when disposing of an appeal:

- (1) In an appeal under section 46, the Upper Tribunal may uphold or quash the decision on the point of law in question.



- (2) If the Upper Tribunal quashes the decision, it may—
 - (a) re-make the decision,
 - (b) remit the case to the First-tier Tribunal, or
 - (c) make such other order as the Upper Tribunal considers appropriate.
- (3) In re-making the decision, the Upper Tribunal may—
 - (a) do anything that the First-tier Tribunal could do if re-making the decision,
 - (b) reach such findings in fact as the Upper Tribunal considers appropriate.”

Section 19 of the 2011 Act, as amended, provides for the making of a Property Factor Enforcement Order (“PFEO”):

- “(1) The [FTS] must, in relation to a homeowner's application referred to it under section 18(1)(a), decide—
 - (a) whether 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) if so, whether to make a property factor enforcement order.
- (2) In any case where the [FTS] proposes to make a property factor enforcement order, [it] must before doing so—
 - (a) give notice of the proposal to the property factor, and
 - (b) allow the parties an opportunity to make representations to [it] .
- (3) If the [FTS] is satisfied, after taking account of any representations made under subsection (2)(b), 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, the [FTS] must make a property factor enforcement order.”

[15] I have decided to quash the decision of the FTS to reject the complaint that the respondent was in breach of section 1.5A of the 2021 Code. There is nothing to be gained by remitting to the FTS and so the decision will be remade. This Tribunal has enough undisputed information before it to allow it to supply the necessary findings in fact and to propose a draft PFEO that provides a remedy for the additional breaches now found to have occurred.

[16] Therefore, this Tribunal remakes the decision of the FTS in the way set out in the decision section above. The deletion of Findings In Fact C and D and the substitution of the new Findings in Fact C and D1 to D3 supports the conclusion that the FTS erred when it found that the



respondent had only to assert Custom & Practice in its WSoS. It follows that the respondent also failed to comply with section 14(5) of the 2011 Act in this respect.

[17] In consequence, this Tribunal requires for the purposes of section 19(2)(a) of the 2011 Act to propose a draft PFEO to deal with the additional breach of compliance with the 2021 Code and allow parties an opportunity to make representations under section 19(2)(b). The proposed PFEO is set out in the decision section above. The parties' written submissions did not deal with the question of what this Tribunal should do if it upheld the appeal. They will now have an opportunity to make representations on the draft PFEO as required by section 19(2)(b) of the 2011 Act.

Appeal provisions

[18] *A party to this case who is aggrieved by this decision to set aside the previous decision of the Tribunal and re-decide the appeal 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. It 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 2014 Act what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*

Sheriff P. Di Emidio
Judicial Member of the Upper Tribunal for Scotland