Upper Tribunal for Scotland

[2019] UT 6
Ref: UTS/AP/17/0006

DECISION OF SHERIFF CHRISTOPHER DICKSON

in the case of

MR EMRYS JONES, 30 Drumsmittal Road, North Kessock, Inverness, 1V1 3JU

Appellant

and

ALLIED SOUTER & JAFFREY, Lyle House, Fairways Business Park, Castle Heather, Inverness, IV2 6AA

Respondent

FTT Case Reference FTS/HPC/PF/17/0108

DECISION

The Upper Tribunal, in terms of section 47 of the Tribunals (Scotland) Act 2014:

1. quashes the decision of the First-tier Tribunal, dated 30 May 2017, in relation to the question of whether there had been a breach of section 3 of the Code of Conduct for Property Factors; and

2. remits the case to the First-tier Tribunal to reconsider the question of whether there has been a breach of section 3 of the Code of Conduct for Property Factors; and

3. directs: (i) that the case be reconsidered by members of the First-tier Tribunal not involved in the First-tier Tribunal decision, dated 30 May 2017; and (ii) that the First-tier Tribunal proceed as accords.

REASONS FOR DECISION

Introduction

[1] This is an appeal by Mr Jones, the appellant, against a decision of the First-tier Tribunal (hereinafter referred to as "FTT"), dated 30 May 2017.

[2] The decision of the FTT, dated 30 May 2017, considered the appellant's application under section 17 of the Property Factors (Scotland) Act 2011 (hereinafter referred to as "the 2011 Act") . The appellant's application to the FTT sought a determination that the factor had, first, failed to comply with section 1, 3, 4.4, 4.6 and 4.7 of the Code of Conduct for Property Factors and, second, failed to carry out the property factor's duties appropriately. The FTT determined that the factor had failed to comply with sections 1 and 4.4 of the Code of Conduct for Property Factors, proposed to make a Property Factor Enforcement Order requiring the factor to remedy the non-compliance with those sections of the code and awarded the appellant £ 100 in respect of the strain and anxiety caused by the lack of compliance with those sections.

[3] The appellant considered that the FTT had erred in two aspects of its decision. The appellant initially sought permission from the FTT to appeal to the Upper Tribunal (hereinafter referred to as the "UT"). However, the FTT, by decision dated 16 August 2017, refused to give the appellant permission to appeal. The appellant then applied to the UT for permission to appeal to the UT. By decision of 13 November 2017 I gave the appellant permission to appeal on the following limited grounds :

1. Whether the FTT applied the appropriate test in considering whether the factor provided clarity and transparency in some or all accounting procedures.
2. Whether the FTT erred in law by failing to make sufficient findings in fact and in failing to give adequate reasons for its decision that there was not any breach

of the requirement, in section 3 of the Code of Conduct for Property Factors, to have clarity and transparency in some or all accounting procedures.

[4] After sundry procedure the appeal was heard at a public hearing in Inverness on 15 May 2018. The appellant appeared in his own right. Mr Swarbrick, solicitor advocate, appeared on behalf of the respondent.

The relevant law

[5] Section 46 and 47 of the Tribunals (Scotland) Act 2014 (hereinafter referred to as "the 2014 Act") provide:

"**46 Appeal from the Tribunal**

(1) A decision of the First-tier Tribunal in any matter in a case before the Tribunal may be appealed to the Upper Tribunal.

(2) An appeal under this section is to be made
(a) by a party in the case,
(b) on a point of law only.

(3) An appeal under this section requires the permission of-
(a) the First-tier Tribunal, or
(b) if the First-tier Tribunal refuses its permission, the Upper Tribunal.

(4) Such permission may be given in relation to an appeal under this section only if the First-tier Tribunal or (as the case may be) the Upper Tribunal is satisfied that there are arguable grounds for the appeal.

(5) This section-
(a) is subject to sections 43(4) and 55(2),
(b) does not apply in relation to an excluded decision.

47 Disposal 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.

(4) In remitting the case, the Upper Tribunal may give directions for the First-tier Tribunal's reconsideration of the case.

(5) Such directions may relate to -

(a) issues of law or fact (including the Upper Tribunal's opinion on any relevant point),

(b) procedural issues (including as to the members to be chosen to reconsider the case)."

[6] The relevant provisions of the 2011 Act are as follows :

"**14 Code of conduct**

(1) The Scottish Ministers must from time to time prepare a code of conduct setting out minimum standards of practice for registered property factors (a "property factor code of conduct").

(2) After preparing a property factor code of conduct, the Scottish Ministers-

(a) must -

(i) publish a draft of the code,

(ii) consult with such bodies as they consider appropriate and also with the general public about the draft, and

(iii) consider any representations about the draft made to them as a result of such consultation, and

(b) may amend the draft accordingly.

(3) After complying with subsection (2), the Scottish Ministers must, in the following order-

(a) lay the property factor code of conduct before the Scottish Parliament,

(b) publish the code, and

(c) bring the code into force on such day as they may by order appoint.

(4) An order under subsection (3)(c) is not to be made unless a draft of the statutory instrument containing the order has been laid before, and approved by resolution of, the Scottish Parliament.

(5) A registered property factor must ensure compliance with the property factor code of conduct for the time being in force.

[...]

17 Application to the First-tier Tribunal

(1) A homeowner may apply to the First-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.

18 Referral to the First-tier Tribunal

(1) The Chamber President must decide whether to-

(a) refer an application under section 17(1) to the First-tier Tribunal, or

(b) reject the application.

(2) The Chamber President may reject an application only if the Chamber President considers-

(a) that it is vexatious or frivolous,

(b) that the homeowner has not afforded the property factor a reasonable opportunity to resolve the dispute,

(c) where the homeowner has previously made an identical or substantially similar application in relation to the same property, that a reasonable period of time has not elapsed between the applications, or

(d) that the dispute to which the application relates has been resolved.

(3) The Chamber President must make a decision under subsection (1)-

(a) within 14 days of the First-tier Tribunal's receipt of the application concerned, or

(b) where the Chamber President considers-

(i) that the decision cannot be made without further information, or

(ii) that there is a reasonable prospect of the dispute being resolved by the parties,

by such later date as the Chamber President considers reasonable.

(4) The Chamber President must, as soon as practicable after rejecting an application, give notice of the rejection-

(a) to the homeowner, and

(b) where the Chamber President is aware of the name and address of a person who acts for the homeowner in relation to the application, to that person.

(5) Such a notice must-

(a) set out the reasons for the rejection, and

(b) explain the procedure for appealing against it.

(6) In this Act, "Chamber President" means Chamber President of the First-tier Tribunal for Scotland Housing and Property Chamber .

[...]

19 Determination by the First-tier Tribunal

(1) The First-tier Tribunal 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 First-tier Tribunal 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 First-tier Tribunal 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 First-tier Tribunal must make a property factor enforcement order.

(4) Subject to section 22, no matter adjudicated on by the First-tier Tribunal may be adjudicated on by another court or tribunal."

[7] "The Property Factors (Scotland) Act: property factor code of conduct", (hereinafter referred to as "the code") came into force on 1 October 2012 (Property Factors (Code of Conduct) (Scotland) Order 2012/217). The relevant sections of the code are as follows:

"**INTRODUCTION**

This Code of Conduct ("the Code") sets out minimum standards of practice for registered property factors and has been prepared in terms of section 14 of the Property Factors (Scotland) Act 2011 ("the Act"). Registered property factors (as defined in section 2 of the Act) are legally required to ensure compliance with the Code in terms of section 14(5) of the Act.

This Code is one of three main elements to the Act. The other two elements are:

1. A register of all property factors operating in Scotland (a property factor operating in Scotland without registration is committing a criminal offence in terms of section 12 of the Act);
2. A dispute resolution mechanism - the homeowner housing panel.

[...]

SECTION 2: COMMUNICATION AND CONSULTATION

Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:

2.1 You must not provide information which is misleading or false.

2.2 You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action).

2.3 You must provide homeowners with your contact details, including telephone number. If it is part of the service agreed with homeowners, you must also provide details of arrangements for dealing with out-of-hours emergencies including how to contact out-of-hours contractors.

2.4 You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the

group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).

2.5 You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers).

SECTION 3: FINANCIAL OBLIGATIONS

While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.

The overriding objectives of this section are:

- Protection of homeowners' funds
- Clarity and transparency in all accounting procedures
- Ability to make a clear distinction between homeowners' funds and a property factor's funds

3.1 If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

3.2 Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor.

3.3 You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.

3.4 You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property).

If you are a private sector property factor:

3.5a Homeowners' floating funds must be held in a separate account from your own funds. This can either be one account for all your homeowner clients or separate accounts for each homeowner or group of homeowners.

3.6a In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest-bearing account must be opened in the name of each separate group of homeowners.

If you are a Registered Social Landlord or local authority property factor:

3.5b Homeowners' floating funds must be accounted for separately from your own funds, whether through coding arrangements or through one or more separate bank accounts.

3.6b In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest-bearing account or accounting structure must be used for each separate group of homeowners.

SECTION 4: DEBT RECOVERY

Non-payment by some homeowners can sometimes affect provision of services to the others, or can result in the other homeowners being liable to meet the non-paying homeowner's debts (if they are jointly liable for the debts of others in the group). For this reason it is important that homeowners are aware of the implications of late payment and property factors have clear procedures to deal with this situation and take action as early as possible to prevent non-payment from developing into a problem.

It is a requirement of Section 1 (Written statement of services) that you inform homeowners of any late payment charges and that you have a debt recovery procedure which is available on request.

4.1 You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts.

4.2 If a case relating to a disputed debt is accepted for investigation by the homeowner housing panel and referred to a homeowner housing committee, you must not apply any interest or late payment charges in respect of the disputed items during the period that the committee is considering the case.

4.3 Any charges that you impose relating to late payment must not be unreasonable or excessive.

4.4 You must provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations.

4.5 You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding.

4.6 You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation).

4.7 You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs.

4.8 You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention.

4.9 When contacting debtors you, or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position."

[8] At the time of the FTT's decision of 30 May 2017 (hereinafter referred to as the "FTT decision"), the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2016 were in force (hereinafter referred to as the "2016 Rules"). The 2016 Rules have since been replaced by First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017. Rule 31 of the 2016 Rules provided:

"**31.- Decisions on section 14 duty and compliance with property factor enforcement orders etc.**

(1) This rule applies to any decision of the First-tier Tribunal under section 19(1) , 21(1) or 23(1) of the Act.

(2) Any decision of the First-tier Tribunal-

(a) must be reached by the majority but, where the First-tier Tribunal is constituted by two members, the chairing member has the decisive vote; and

(b) must be recorded in writing in a document which-

(i) contains a full statement of the facts found by the First-tier Tribunal and the reasons for its decision;
(ii) refers to the right of appeal to the Upper Tribunal under section 46(1) of the 2014 Act; and
(iii) is signed by the chairing member (or, in the event of absence or incapacity of the chairing member, by another member of the First-tier Tribunal).

(3) The First-tier Tribunal must, as soon as reasonably practicable, make a decision by giving notice of the decision to the parties.

(4) Such a notice must be accompanied by-
(a) the document mentioned in paragraph (2)(b);
(b) the property factor enforcement order or proposed property factor enforcement order, if any; and
(c) any report which the First-tier Tribunal considered before making the decision.

(5) The decision of the First-tier Tribunal and a statement of reasons are to be made publicly available."

Rule 31(1) of the 2016 Rules is referring to sections of the 2011 Act (Rule 12(2) of the 2016 Rules).

The FTT decision

[9] The FTT were undoubtedly faced with a difficult task in this case given the number of breaches that were alleged to have occurred in respect of both the code and the factor's duties. The FTT made the following limited findings in fact:

"(i) The homeowner has been the proprietor at the property at 30 Drumsmittal Road, North Kessock, Inverness since 2001
(ii) The Factor was appointed as property manager of the development of 78 houses at Drumsmittal Road, North Kessock, Inverness, by the developer, Taylor Woodrow Homes Limited. [sic] in 2000.
(iii) Each property is subject to the terms of a Deed of Conditions executed by Taylor Woodrow Homes Limited dated Fourth January and recorded in the Division of the General Register of Sasines on Fourteenth April, 1989.
(iv) The Factor is a registered Property Factor with registration number PF000470
(v) The date of registration of the Property Factors [sic] was 24 September 2013
(v) [sic]The Association was set up with the objects of protecting and maintaining the amenity of the development and to uphold and renew and maintain in a neat and tidy condition, amenity ground, open spaces and off-street parking areas.

> (vi) The Association holds an Annual General Meeting in January of each year, despite the terms of its constitution providing that such meeting should be held in October.
> (vii) The Constitution of the Association gives the Council of the Association power to appoint a Managing Agent or Factor to administer the objects of the Association. The Factor, Allied Souter & Jaffrey, has, accordingly, been appointed by the Association each year since 2000.
> (viii) An annual levy is collected from each homeowner by the Factor. An annual Certificate of Income and Expenditure is prepared by the Factor for the AGM of the Association, and circulated to each homeowner prior to the AGM.
> (v) [*sic*] The Homeowner has raised various issues with the Factor concerning debt and accounting procedures, scheduling and documents of the AGM, and breaches of title conditions."

Page 3 of the FTT decision makes clear that the Association referred to in the findings in fact is the Drumsmittal Road Owners Association.

[10] Para 17 of the FTT decision sets out the FTT's reasons for holding that the factor did not breach section 3 of the code. Para 17 of the FTT's decision is in the following terms:

> "17. With regard to the alleged breach of Section 3 of the Code the Tribunal did not find that the Factor had breached the Code in terms of a lack of clarity and transparency in all accounting procedures. The Factor has provided a Statement of Income and Expenditure each year to the satisfaction of the Association. Details relating to debt have been disclosed and discussed at the AGM of the Association. However, the Tribunal members observed that. [sic] had the Homeowner alleged a failure in terms of Section 2.5 of the Code, the Tribunal might have been minded to make a finding of non-compliance with the Code by the Factor. Although most of the Homeowner's letters and emails were answered, there was a failure to answer a letter and email in August and September 2016. Furthermore, although the Tribunal accepted that there was information that could not properly be passed to Mr Jones, the Homeowner, had the Factor supplied more information in relation to some of the Homeowner's concerns, the Application before the Tribunal might have been avoided."

[11] In addition, the FTT, when refusing permission to appeal, stated:

> "The Tribunal does not accept that the wrong test was used in determining whether the Factor breached section 3 of the Code. The test used by the Tribunal in reaching a decision was not the satisfaction of the Homeowners Association, as the decision makes clear. The Tribunal was satisfied at the hearing, and on the evidence before it, that the Factor had complied with the requirement of the Code to have clarity and transparency in all accounting procedures. The Tribunal used the correct test to determine this."

The FTT did not, however, make clear what test they did in fact apply.

Submissions

Submissions for the appellant

[12] The appellant highlighted: that the code set out the minimum standards of practice for registered property factors; that one of the overriding objectives of section 3 of the code was for the factor to provide clarity and transparency in a// accounting procedures (therefore partial compliance was not enough); and that section 3.3 of the code made clear that the factor must provide to homeowners, in writing at least once a year, a detailed financial breakdown of charges made and a description of the activities and works carried out which were charged for. The appellant explained that his main argument before the FTT was that the certificate of income and expenditure (hereinafter referred to as "the ClE") produced by the factor (which is document A 16 of the appendix) was misleading and did not comply with section 3 of the code. In particular, the CIE: (1) was not in the form of a balance sheet and did not detail the position with debtors and creditors at a year-end date (and did not detail debtors and creditors at all); (2) did not explain why there was a shortfall between the service charges collected and the number of homeowners (in the present case the annual service charge for each homeowner was £102.32 with there being 78 home owners, therefore the service charges collected ought to have been £7,980.96 (£102.32 x 78 = £7980.60); the actual service charges collected figure shown in the CIE was £7,609.86 and therefore the shortfall of £371.10 (£7,980.96 - £7,609.86) ought to have been explained); (3) did not explain what the charges for debt recovery were for (i.e. was it for court actions or demand letters or something else); and (4) did not detail how many homeowners were not paying their service charge nor did it explain how long any such

debts had been outstanding for. The appellant explained that he also argued before the FTT that the requirement under section 3 of the code required clarity and transparency in all accounting procedures to be provided to all homeowners and not just the Association. The appellant explained that the FTT had, at para 8 of their decision, summarised his arguments but had then failed to give any consideration to them when reaching their decision at para 17 of their decision.

[13] The appellant submitted that the FTT had determined whether the factor had provided clarity and transparency in all accounting procedures by applying a test of whether or not the Association was satisfied with the information provided. The appellant submitted that that was the wrong test. The appellant put forward a number of suggestions about what the appropriate considerations for the FTT ought to be. He suggested that: (1) consideration ought to be given to whether a balance sheet, prepared in accordance with standard accounting practice, ought to be produced; (2) consideration ought to be given to whether a shortfall in the anticipated service charge collection figure ought to be explained; (3) consideration ought to be given to requiring an explanation of what the debt recovery charges were for; and (4) consideration ought to be given to showing the number of homeowners in debt and the amount of such accumulated debt. In the end, the appellant's submission came to be: (1) that the FTT ought to apply an objective test in considering whether a factor had complied with section 3 of the code; (2) that in applying that objective test the FTT ought to have considered his arguments and given reasons for accepting or rejecting them; and (3) that the findings in fact made and the reason given by the FTT were inadequate. Finally the appellant noted that the FTT had rejected all his arguments and had tried to refuse him permission to appeal to the UT. The appellant submitted that if the case

was to be remitted, it ought in the circumstances, as a matter of fairness, be remitted to the FTT made up of different members to those who made the FTT decision.

Submissions for the respondent

[14] The solicitor advocate for the respondent made clear from the outset that he was not supporting the FTT decision. Under reference to MS YZ v Secretary of State for the Home Department [2017] CSIH 41 at para 44 he conceded that the reasons given by the FTT were inadequate. The solicitor advocate for the respondent accepted that the FTT had failed to specify the test that they had applied in considering whether or not the factor had breached section 3 of the code and submitted that they ought to have applied an objective test. The solicitor advocate for the respondent made clear that he did not accept that the ultimate decision of the FTT, on the question of whether or not there had been a breach of section 3 of the code, was wrong, but accepted that that part of the FTT decision ought to be quashed for the reasons he had given. The solicitor advocate for the respondent submitted that the appropriate disposal was for the case to be remitted, under section 47(2), (4) and (5) of the 2014 Act, to the FTT for reconsideration under appropriate directions from the UT. The solicitor advocate for the respondent explained that the factor operated a computer programme called "RENT". This programme was used to prepare the CIE and was used widely by factors in a very high number of factoring arrangements. The factor's position was that the RENT computer programme produced information that was in compliance with section 3 of the code. In the circumstances the decision in this case could have an impact on a very high number of factoring arrangements and therefore it was of significant importance in this case, and more generally, for the factor to lead to evidence to demonstrate why the information produced by the RENT computer programme complied with section 3

of the code. The solicitor advocate for the respondent submitted: (1) that the UT were not in a position to hear evidence as they were proceeding by submission only; (2) that the UT, due to inadequacy of the FTT's findings in fact and reasons, did not have sufficient information, as it stood, to make a decision; and (3) in any event, it was appropriate for that evidence to be considered by the specialist FTT who would not only have an experienced legal member but would also have an ordinary member who was likely to have significant experience in factoring arrangements. The solicitor advocate for the respondent submitted that the FTT hearing the remit ought, as a matter of fairness and for justice to be seen to be done, to be differently constituted. In all the circumstances the solicitor advocate for the respondent submitted that the FTT decision in relation to the alleged breach of section 3 of the code should be quashed and the case remitted to a differently constituted FTT for reconsideration.

Discussion

[15] There appear to be three issues in this appeal, namely:

1. The scope of the appeal;
2. Whether the FTT applied the appropriate test in considering whether the factor provided clarity and transparency in all accounting procedures.
3. Whether the FTT erred in law by failing to make sufficient findings in fact and in failing to give adequate reasons for its decision that there was not any breach of the requirement in section 3 of the code to have clarity and transparency in all accounting procedures.

Issue 1- The scope of the appeal

[16] In my opinion, it is of critical importance to recognise that an appeal from a decision of the FTT to the UT is restricted to a point of law only (section 46(2)(b) of the 2014 Act). In MS YZ Lord Glennie explained the limited nature of such an appeal:

> "42 Mr Webster accepted before us that the UT was only entitled to interfere with findings in fact made by the FTT if those findings were infected by some error of law or where the FTT made an error of law in reaching those findings in fact. He was correct to make this concession. An appeal from the FTT to the UT lies on a point of law: section 11(1) of the 2007 Act. There is no appeal against the FTT's findings in fact. It is important to understand this point. Of course, it may not always be possible to identify where the line is to be drawn between findings of "pure" fact, where the appellate body cannot usually intervene, and findings which are in truth findings of mixed fact and law or are what is sometimes called "evaluative" findings, where the approach to the fact finding task is determined by the legal framework within which factual assessments have to be made. Thus, there will be cases where, before making its findings in fact, the FTT has first to identify the legal test it is seeking to apply. It may, for example, be required to make a finding as to whether certain conduct is reasonable or proportionate, a question which may depend on the context in which or the purposes for which such an assessment is relevant or necessary; and in approaching these questions it may have to identify what, as a matter of law, requires to be taken into account. In such cases an error of law in identifying what factors are or are not relevant may open up the whole of its decision for reconsideration, including what appear to be findings of "pure" fact, though it will not always do so. If the FTT has erred in law by failing to take relevant matters into account in reaching its decision on the facts, or in taking into account irrelevant matters, or has reached a decision which no reasonable tribunal presented with the evidence and correctly applying the law could have arrived at, that too may entitle the UT to interfere. Another situation, perhaps closer to this case, is where the FTT has erred in law, and the UT takes it upon itself to re-make the decision, as it is entitled to do under section 12(2)(b)(ii) of the 2007 Act. It may in so doing "make such findings of fact as it considers appropriate": section 12(4)(b) . But while in that situation the UT has the power to make additional supplementary findings, it does not have the power to overturn findings of "pure" fact made by the FTT which are not undermined or otherwise infected by that or any other error of law. Nothing in the cases cited to us, in particular Kizhakudan and EK , suggests otherwise. Our conclusion on this point is, in our opinion, consistent with the remarks of Lord Carnwath in HMRC v Pendragon pie [2015] 1 WLR 2838 at paragraphs 49-51."

In my opinion, the above quoted paragraph is equally applicable in this case and accurately sets out the scope of the appeal in this case.

Issue 2 - Whether the FTT applied the appropriate test in considering whether the factor provided clarity and transparency in all accounting procedures

[17] In my opinion, para 17 of the FTT's decision (when read in light of the decision as a whole but without the benefit of the FTT's clarification when refusing permission to appeal) does suggest that the test applied by the FTT, in considering whether the factor fulfilled the requirement of clarity and transparency in all accounting procedures, was whether the information provided was to the satisfaction of the Homeowners Association. However, the FTT have then, when refusing permission to appeal, clearly stated that they did not apply such a test and have gone on to state they "used the correct test" to determine whether the factor complied with the requirement to have clarity and transparency in all accounting procedures. However, the FTT did not then go on and expressly state what test they did in fact apply. It is therefore unclear what test they did in fact apply.

[18] In Sheilds and Blackley v FTT, unreported, 2017, the UT considered the correct approach to the interpretation of "homeowner" in section 17 of the 2011 Act. At para 2 and 3 the UT stated:

> "2 Section 17 of the 2011 Act must be construed purposively in such a way as to give effect to the objectives and policy that underlie the provision (Great Stuart Trustees v McDonald 2015 SC 379 at 386, paragraph [20]). Those objectives and policy are not to be found, as would ordinarily be the case, in any report of the Scottish Law Commission or explanatory memorandum officially issued in connection with the bill, because the 2011 Act had its genesis as a private members bill, which the government eventually came to support. Be that as it may the purpose of the legislation and section 17 in particular is readily discernible through consideration of the pre-act law and the terms of the 2011 Act itself.
>
> 3 Before the 2011 Act was passed property factors in Scotland were not subject to regulation, they were not subject to any minimum standards of practice and disputes between property factors and homeowners could only be resolved by litigation conducted in the courts. In introducing such measures it is plain that the legislature saw the existing free-for-all as a mischief which required to be remedied. The preamble to the 2011 Act makes plain that the provision for resolution of

> disputes between homeowners and property factors represents one of its main purposes."

I agree with that analysis and consider that a clear purpose of the 2011 Act is to ensure that factors comply with their duties (as defined in section 17(5) of the 2011 Act) and the minimum standards of practice set out in the code. Indeed, section 14(5) of the 2011 expressly states that a "registered property must ensure compliance with the property factor code of conduct for the time being in force" and section 17(1) of the 2011 Act entitles a homeowner to apply to the FTT for determination of whether the property factor has failed to carry out the property factor's duties to a reasonable standard or failed to ensure compliance with the code. Both section 14(1) of the 2011 Act and the introduction to the code makes clear that it is setting out minimum standards of practice for factors and therefore the overriding objective in section 3 of the code, requiring "[c]larity and transparency in all accounting procedures" is a minimum standard that the factor must ensure compliance with. In my opinion that minimum standard applies to all the homeowners who are part of the factoring arrangement. Therefore a factor will require to be careful to ensure that the factor provides clarity and transparency in all accounting procedures to all homeowners and not just to a Homeowners Association or to those homeowners who attend an AGM held by a Homeowners Association.

[19] In my opinion, the proper construction of section 17(1) of the 2011 Act requires the FTT to make an objective assessment of whether the factor has failed to carry out their duties to a reasonable standard or failed to ensure compliance with the code. In the present case, in my opinion, the FTT ought to have assessed the information that was provided to the homeowners, made appropriate findings in fact in that regard and then considered,

objectively, whether the homeowners had been provided with clarity and transparency in all accounting procedures.

Issue 3 - Whether the FTT erred in law by failing to make sufficient findings in fact and in failing to give adequate reasons for its decision

[20] Rule 31(2) of the 2016 Rules require a decision of the FTT to be recorded in writing in a document, which, amongst other things, contains a full statement of the facts found by the FTT and the reasons for its decision. In the case of MS YZ Lord Glennie also, helpfully, summarised what I consider to be the appropriate test to be applied when considering the issue of whether reasons given were adequate. At para 43 and 44 Lord Glennie stated:

> "43 ...It is, of course, trite that a tribunal must give reasons for its decision. But the nature of the reasons may vary according to the type of issue. In Flannery at page 382 (in sub- paragraph (3) at the top of the page) the Court of Appeal made the obvious point that the extent of the duty to give reasons depended on the subject matter. Where there was a straightforward factual dispute whose resolution depended simply on which witness was telling the truth about events which he claimed to recall, it is likely to be enough for the judge to indicate simply that he believes X rather than Y. The same applies, in our opinion, when the question is about which witness is more reliable in his or her account. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed and explain why he prefers one case over the other. The court noted that that was likely to apply particularly in litigation where there was disputed expert evidence. In our opinion, although this case involves evidence which is classified as a matter of law as "expert evidence", it is in substance evidence about the existence or otherwise of a given state of affairs, namely the family planning policies in China and how they are enforced, and is therefore largely a question of deciding which account is to be preferred. It does not require detailed analysis.
>
> 44 We also have in mind an earlier passage in R (Iran) v Secretary of State for the Home Department (supra) where the court discussed the obligation placed upon adjudicators (as they then were) to give reasons for their decisions. While breach of that obligation might amount to an error of law, unjustified complaints of a failure to give reasons were seen "far too often". In this context reference was made to two cases as illustrating the relationship between an adjudicator and the Immigration Appeal Tribunal ("IAT") (respectively now the FTT and the UT). He adapted what Griffiths LJ said in Eagil Trust Co Ltd v Pigott-Brown [1985] 3 All ER 119 at 122 to

the relationship between an adjudicator and the IAT, and we adapt it further to match the relationship between the FTT and the UT in the current system:

> '[An FTT judge] should give his reasons in sufficient detail to show the [UT] the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on [an FTT judge], in giving his reasons, to deal with every argument presented by [an advocate] in support of his case. It is sufficient if what he says shows the parties and, if need be, the [UT], the basis on which he has acted, and if it be that the [FTT judge] has not dealt with some particular argument but it can be seen that there are grounds on which he would have been entitled to reject it, [the UT] should assume that he acted on those grounds unless the appellant can point to convincing reasons leading to a contrary conclusion.'

We would endorse this approach, which reflects the position in Scotland as much as in England. It has been stated repeatedly that reasons are directed towards the informed reader, who is aware of the evidence on both sides, the criticisms of that evidence and the arguments as to which should be preferred. What is required, and all that is required, is that the decision must "leave the informed reader and the court [or superior tribunal] in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it": Wordie Property Co Ltd v Secretary of State for Scotland 1984 SLT 345 at page 347 per Lord President Emslie. Adapting what Lord President Emslie said at pages 350-351 of Wordie, it is a fair inference that everything recited in her decision was regarded by the FTT judge as having a bearing, one way or another, on the reasons for her decision; she can be understood from the terms of her decision as telling the informed reader that certain witnesses or experts had given particular evidence which she regarded as material to the decision and the decision was reached in accordance with it. It is not necessary in every case for the decision maker to set out at length in a separate part of the decision submissions which have already been recorded earlier on."

[21] In Uprichard v Scottish Ministers 2013 SC (UKSC) 219, Lord Reed, at para 47 and 48, in the context of a Minister specifying reasons for a planning decision, considered the duty to give reasons. He indicated that, in considering the adequacy of reasons, it is necessary to take account of matters such as the nature of the decision in question, the context in which it has been made, the purpose for which the reasons are provided and the context in which they are given. Reasons must be "proper, adequate and intelligible, and must deal with the substantive points that have been raised". Nevertheless, "It is ... important to maintain a

sense of proportion when considering the duty to give reasons, and not to impose on decision-makers a burden which is unreasonable having regard to the purpose intended to be served". In JC v Gordonstoun Schools Limited 2016 SC 758 Lady Smith made clear that Lord Reed's observation in Uprichard could also be applied to a tribunal decision (in that case it was a decision of the Additional Support Needs Tribunal of Scotland) and I considered that they can also be applied in the present case.

[22] In the present case the only finding in fact that was of any relevance was finding in fact (viii), which was in the following terms:

> "(viii) An annual levy is collected from each homeowner by the Factor. An annual Certificate of Income and Expenditure is prepared by the Factor for the AGM of the Association, and circulated to each homeowner prior to the AGM"

That finding in fact simply identified that the CIE was provided to homeowners but does not identify what actual information was provided to homeowners. The reason why the FTT considered that the factor had not failed to ensure compliance with section 3 of code is set out in two sentences in para 17 of the FTT decision. The first sentence states that the factor has provided a statement of income and expenditure to the satisfaction of the Association. The second sentence states that details relating to debt were disclosed and discussed at the AGM of the Association (but it is not clear if that information was then passed to homeowners who were not able to attend the AGM). I consider that I can have regard the FTT's clarification in refusing permission to permission to appeal (see BP Oil (UK) Ltd v City of Edinburgh Licensing Board 2011 SLT 491 at para 65; and English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409 at para 25). However, neither para 17 of the FTT decision, nor the clarification given by the FTT when refusing permission to appeal, identifies what test the FTT have applied in considering whether the factor had ensured compliance with section 3 of the code. The FTT did clarify that they did not apply a test of whether or not the

Association were satisfied with the information provided by the factor but then did not go on to confirm what test they did apply. The remainder of para 17 then goes on to discuss a possible breach of section 2.5 of the code. Para 17 of the FTT decision does not consider the main points raised by the appellant.

[23] In my opinion the FTT's decision, as regards whether there had been a breach of section 3 of the code, does not make sufficient findings in fact, does not identify the test they were applying and does not leave the informed reader in no real or substantial doubt as to what the reasons for their decision were and what were the material considerations which were taken into account in reaching it. In the circumstances I consider that the findings in fact and the reasons given by the FTT at para 17 were inadequate and has resulted in it not being possible to determine whether or not the FTT made an error of law (see Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377, Henry LJ at 383). In such circumstances I consider that the inadequacy of both the findings in fact and reasons of the FTT amounts to an error of law (see Kelly v Shetland Health Board 2009 SC 248 at paras 15 to 18, where the Inner House of the Court of Session, under reference to the passage in Wordie Property referred to above and the speech of Lord Brown in South Bucks District Council v Porter [2004] 1 WLR 1953 at para 36, allowed an appeal on a point of law due to the inadequacy of the reasons given by the National Health Service Tribunal).In my opinion, the FTT decision ought to have: (1) contained findings in fact (which need not have been lengthy) identifying the information that was provided to homeowners; (2) identified that the FTT were applying an objective test in considering whether the homeowners had been provided with clarity and transparency in all accounting procedures; and (3) set out their reasons, in sufficient detail, so as to leave the informed reader in no real or substantial doubt as to what

its reasons were for finding that there was not a breach of section 3 of the code and the material considerations it had taken into account when reaching that decision.

[24] In the circumstances the FTT decision, as regards whether there has been a breach of section 3 of the code, will require to be quashed and the case remitted to the FTT for reconsideration . In such circumstances I agree with both parties that justice must not only be done but be seen to be done and that it is therefore appropriate for the remit to be dealt with by a differently constituted FTT. Neither party sought an award of expenses .

Disposal

[25] In all the circumstances, in terms of section 47 of the 2014 Act, I: (1) quash the FTT decision in relation to the question of whether there had been a breach of section 3 of the code; (2) remit the case to the FTT to reconsider the question of whether there has been a breach of section 3 of the code; and (3) direct: (i) that the case be reconsidered by members of the FTT not involved in the FTT decision; and (ii) that the FTT proceed as accords.

Right of Appeal

[26] Section 48 of the 2014 Act provides that a decision of UT may be appealed, by a party in the case, to the Court of Session on a point of law only. Such an appeal requires the permission of the UT or, if the UT refuses permission, the Court of Session (the test for giving permission is set out in section 48(4) and 50 of the 2014 Act). An application for permission to appeal must be received by the UT within 30 days from the date when the UT decision was sent to the party wishing to appeal (Regulation 2 of the Scottish Tribunal (Time Limits) Regulations 2016). Accordingly, either party, in the present case, has the right to appeal to the Court of Session on a point of law. If either party wishes to do so they will

require to send an application for permission to appeal to the UT so that it is received by the UT within 30 days from the date that this decision is sent to the parties.