



DECISION OF

Tony Kelly

**ON AN APPEAL
IN THE CASE OF**

James Gibb Property Management Limited t/a James Gibb Residential Factors, Bellahouston
Business Centre, 423 Paisley Road West, Glasgow, G51 1PZ
per BTO Solicitors LLP,
48 St Vincent Street, Glasgow, G2 5HS

Appellant

- and -

Mr John Blair, Flat 3/2, 87 Dunlop Street, Glasgow, G1 4ET

Respondent

FtT Case Reference: FTS/HPC/PF/22/1597

Glasgow, 22 March 2023

Decision

The Upper Tribunal refuses the appeal and upholds the decision of the First Tier Tribunal.

Introduction

1. On 21 September 2022 the First Tier Tribunal (“FtT”) issued a decision and made a Property Factor Enforcement Order (“PFEO”). It narrated procedurally what had occurred until a case



management discussion had concluded. Written representations had been lodged on behalf of each party and the Tribunal, without objection, proceeded to issue a decision without a further hearing.

2. Subsequently, the FtT on 20 October 2022 issued a further order correcting an error in the notification of its decision.

3. Both the home owner and the property factor appealed against the decision. The FtT by decision dated 2 November 2022 granted permission to both parties to appeal the decision. This decision deals solely with the property factor's appeal.

Grounds of appeal

4. The FtT permitted the property factor to appeal on the following ground:

“The Tribunal erred in law because (a) the owners are personally barred from relying on any breach by the Factor as a result of their instructions to the Factor to depart from the prescribed apportionment; (b) the Factor cannot breach its duties when authorised by the owners to act in the way complained of.”

5. In granting its permission to appeal to the Upper Tribunal (“UT”), the FtT noted that no submissions were made to it regarding personal bar (see paragraph 3(i)).

Hearing: 7 February 2023

6. Mr Kane, solicitor, represented the property factor and the home owner, Mr Blair was personally present.

7. At the outset of the appeal hearing clarification was sought about the matters raised in the appeal by the property factor and whether these had been canvassed before the FtT. Mr Kane submitted that this was contained in an outline written submission submitted to the FtT dated 26 July 2022.



Appellant

8. Mr Kane confirmed for the avoidance of doubt that no amendments were sought to be made to the findings in fact made by the FtT.

9. As to the conduct to be relied upon by the home owner, said to amount to that which barred him from proceeding with his application to the FtT, the UT was taken to an email exchange of 2 and 3 October 2020 between the home owner, Mr Blair and the property factor. On 23 September 2020 the home owner had proposed an interim apportionment of insurance costs with reference to a spreadsheet. This did not conform to the Deed of Conditions. The property factor responded by email of 2 October 2020 rejecting that proposed apportionment and explaining why it would continue to use the apportionment that it had applied up until that point in time. Mr Blair responded on 3 October 2020:

“Fine...”

10. Thereafter invoices submitted to the home owner by the property factor had been paid. It was this conduct, coupled with a period of inactivity or failure to take forward a challenge that was founded upon by Mr Kane and said to amount to conduct which was capable of barring Mr Blair from proceeding with the application before the FtT.

11. Mr Kane developed his submissions with reference to Gloag & Henderson, *The Law of Scotland*, 15th Ed. at para. 3.05. He submitted that each of the factors mentioned there required to be present for a plea of personal bar to succeed and that they existed here.

12. In connection with the other aspect – unfairness - the examples listed in Gloag & Henderson



at para. 3.07 were not prescriptive but were merely illustrative. In looking to the unfairness of the home owner's conduct, Mr Kane came to accept that there was little that he could found upon in the conduct of the home owner which could be said to be blameworthy. He repeated much of the inconsistency in the home owner's conduct.

13. In connection with the prejudice caused to the property factor, Mr Kane relied solely upon the economic consequence of the home owner being allowed to proceed with the application.

14. Mr Kane referred to *Maclaine v Gatty* [1921] 1 AC 376 for the statement of personal bar:

“...the rule of estoppel or bar, as I have always understood it, is capable of extremely simple statement. Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time.” per Lord Birkenhead L.C. at p.386

15. Mr Kane referred to the case of *Advocate General for Scotland v Murray Group Holdings Ltd* 2016 S.C. 201 and in particular paragraphs 42 *et seq.* He characterised the error of law arrived at by the FtT as one involving the misapplication of law to the facts found by it. In his submission, the FtT was wrong to hold that the property factor was in breach of its duties in terms of the Deed of Conditions and the Code of Practice because the home owner was personally barred from proceeding with this application of the FtT.

16. Mr Kane came to accept that there was no express mention of, nor submissions upon, the issue of personal bar before the FtT. The closest that this was given expression was in the representations submitted to the FtT on 26 July 2022 (referred to at the outset of the hearing before the UT). On page 3 it states:

“Mr Blair then questioned this approach and we responded to confirm the position and Mr Blair appeared to accept this response.”



17. Notwithstanding that the FtT was not given the benefit of detailed submissions upon the law, it had evidence before it from which it could conclude that Mr Blair was personally barred. In failing to apply that to the evidence before it the FtT erred.

Respondent

18. Mr Blair sought to place the email of 3 October 2020 in context. He had responded “fine” among other things. The communication was about his challenge to the method of apportionment between the property owners.

19. In connection with payment of the invoices, Mr Blair sought to again place this in context. Invoices were issued quarterly. They include items for building, maintenance and insurance. It was always his practice to pay it and then to seek to challenge it. If he did not pay he was charged £30. This he described as his “general approach to billing”.

20. It was not correct to say that he had surrendered this challenge in the meantime to the method of apportionment. Mr Blair explained that he had endeavoured to assist the property factor with the provision of information from and after their appointment. If anyone was likely to be prejudiced by the apportionment conform to the Deed of Conditions it was he, Mr Blair. It was likely in light of the relative size of his property that he would pay a greater sum than if the cost was subject to flat rate apportionment. He had continued to complain about the rate of apportionment used culminating in his application to the FtT.

Decision

21. The issues which fell to be decided by the FtT were (i) the failure to provide an annual statement conform to section 5.3 of the 2021 Code of Conduct for Property Factors; and (ii) the



apportionment of the insurance premium between the home owners.

22. In respect of issue (i), the failure to provide the necessary information was the subject of a decision by the FtT and not ultimately challenged in this appeal by the property factor (see paragraph 9, finding in fact 7 and the PFEO part 1).

23. In relation to issue (ii), apportionment of the insurance premium across the various property owners, the FtT noted that the written submission of 26 July 2022 accepted that this was not carried out in compliance with the Deed of Conditions. A number of issues were said to explain that failure, including the lack of instructions from the Owners' Committee and lack of sufficient information to enable the property factors to comply with the Deed of Conditions. The FtT rejected these defences or explanations and held that there had been a breach of the property factor's duties in respect of apportionment of insurance costs. The property factor's written statement of services said that it would apportion insurance costs in accordance with the Deed of Conditions. The apportionment had not occurred in this manner.

24. The FtT made a PFEO ordaining the factor to calculate the insurance costs in accordance with the Deed of Conditions over two separate periods from November 2020 to November 2021 and November 2021 to November 2022. Any overpayment would require to be refunded to the home owner or underpayment invoiced to the home owner.

25. In connection with the ground of appeal the FtT had granted permission to argue, it cannot be said that this issue was before the FtT. In its decision granting permission to appeal, the FtT notes that no submission was made to it in this regard. Mr Kane referred to the material submitted to the FtT on 26 July 2022. This does not bear the construction Mr Kane sought to accord to it. It



does not make any reference either expressly or by implication of the question of personal bar. The FtT had no basis upon which it could have decided the issue of personal bar against the home owner.

26. The property factor seeks to characterise the failure of the FtT to consider this issue as a misapplication of the law to the facts as found by it. The property factor did not invoke personal bar as a defence to the original application or in proceedings before the FtT. Instead, it placed before the FtT the administrative or other obstacles which it claimed were a defence to the claimed failure to comply with the Deed of Conditions. This was clearly focused in the final paragraph of the representations of 26 July 2022:

“We agree with Mr Blair that the insurance should be charged based on the property value. However we do not have an accepted valuation and the MOC, representing the home owners, I am not instructed as to obtain a new valuation. Without this detail we believe we cannot charge the cost based on property value. Due to the need to have funds in place we have had to charge as an equal share in the meantime. To date we have had no instruction from the MOC to obtain a valuation.”

27. This was repeated in submission before the UT. The property factors were alert to the difficulties in seeking to implement the terms of the Deed of Conditions. Further valuation(s) was/were required. This would incur further expenditure. This had not been authorised. The property factors were acting as agents for the proprietors.

28. It is clear from matters recorded in paragraph 10 of the FtT decision of 21 September 2022 that these were the factors that the FtT directed itself to and ultimately rejected. Finding in fact 11 records that:

“Insurance costs have not been apportioned in accordance with the Deed of Conditions but in respect of apartments each home owner has been charged a 1/94th share.”



29. Before the UT no challenge was made to this or the other findings in fact. No exception was taken in the context of the appeal mounted by the property factor to the reasoning contained in paragraph 10 of the FtT decision.

30. Rather, the property factor seeks to mount a challenge not canvassed before the FtT. Whilst this is not entirely incompetent standing the grant by the FtT of permission to appeal, the manner in which the property factor sought to invoke this challenge is problematic. In endeavouring to characterise the decision of the FtT and its failure to uphold or to make a finding of personal bar, the property factor says that the FtT fell into error. The basis of that error is said to be the submissions made to the UT on the law of personal bar and the application of those various factors to the documentary and other productions available to the FtT. The FtT dealt with the issue presented to it namely whether the property factor's failure to apportion in terms of the Deed of Conditions was explicable and whether that ultimately provided a defence to the home owner's application - by finding against the property factor and making a PFEO.

31. It is not now open to the UT to carry out its own review and come to its own view on evidential matters. No challenge was made to the findings in fact made by the FtT. There is no criticism of its fact finding. That is unsurprising given that an appeal from the FtT lies on a point of law alone. Fact finding is the exclusive province of the FtT.

32. True it is, as was pointed out by Mr Kane, the powers of the UT are relatively untrammelled. However, it is not a fact finding jurisdiction (Cf. rule 18, Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016). In looking to assess whether the plea of personal bar is capable of being upheld, the UT is required to rely upon the unchallenged findings made by



the FtT.

33. Mr Kane sought to persuade the UT that it was a relatively straightforward matter to assess the inconsistency of the home owner's conduct as focused in para. 3.05 of Gloag & Henderson. The home owner and respondent, Mr Blair, sought to place a quite different complexion upon the exchange of email, the communication between parties and even the question of payment of invoices. The matter is further complicated when one looks at the assessment of unfairness tied up with the parties' whole conduct. This evaluative and discretionary exercise – as it was described by Mr Kane – is one supremely for the FtT.

34. It is difficult to see how that exercise would inevitably meet with success on the part of the property factor. Indeed, it is far from certain that it would. It is sufficient to state that in failing to address this issue the FtT did not err. It did not address this issue because it was not asked to do so. It asked and answered the issue that it was directed to, namely whether the aspects invoked by the property factor provided a sufficient defence to the application made by Mr Blair. There is no error of law in failing to apply the law to the facts found by the FtT.

Conclusion

35. The appeal is refused. The decision of the FtT is upheld.

*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.*