Upper Tribunal for Scotland

2025UT50

Ref: UTS/AP/25/0041

DECISION OF

Sheriff C Dunipace

ON AN APPLICATION FOR PERMISSION TO APPEAL

(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND)

IN THE CASE OF

Indigo Square Property Limited

Appellants

- and –

Miss Nicola Wilson

Respondent

FTS case reference FTS/HPC/PF/23/3112

7 July 2025

Decision

The Upper Tribunal refuses leave to appeal.

Introduction

1. Indigo Square Limited (hereinafter "the Appellants"), who are a firm of Property Factors, have submitted an application seeking leave to appeal a decision of the First-tier Tribunal (hereinafter referred as "the Tribunal") dated 14 January 2025. Ms Nicola Wilson (hereinafter referred to as "the Respondent ") is the owner of the property at 38 Davie Sneddon Way, Kilmarnock, KA1 1AD, which is a flat situated in a development of 22 flats, and which is factored by the Appellants. In their decision of 14 January 2025, the Tribunal determined that it proposed to make a Property Factor Enforcement Order (hereinafter referred to as a "PFEO") to the effect that the Appellants should pay the Respondent the sum of £1500 within 21 days of the final PFEO being served upon them. Full written reasons for that decision were provided by the Tribunal on that date. This determination also intimated in terms of section 19(2) of the Housing (Scotland) Act 2011 that, in light of this decision that parties had an opportunity to make representations in respect of this proposal.

2. A formal notice in terms of section 19(2)(b) of the aforementioned Act was sent to the Appellants on 14 January 2025 advising them that any such representations should be submitted to the Tribunal within 21 days of the decision being intimated to them. No such representations were received by the Tribunal and accordingly the final determination of the Tribunal was issued on 5 February 2025, intimating that the Tribunal had made a PFEO requiring the Appellants to pay the sum of £1500 to the Respondent within 30 days of service upon them of the decision.

3. The Appellants thereafter sought permission to appeal this decision on a number of grounds, namely:

- That it had been impractical to have required them to review the submissions of the Respondent which had amounted to 628 pages;
- That the Respondent had not abbreviated her submissions as required to do by the Tribunal; and
- The inability of the Respondent's Director to attend the Hearing on 20 November 2025.

4. The Appellants were refused Permission to Appeal by the Tribunal on 7 March 2025 on the basis that it was considered that none of the aforementioned matters raised disclosed

arguable grounds of appeal. Reference is made in this regard to the terms of the Statement of Decisions issued by the Tribunal dated 7 March 2025.

5. The Appellants have now lodged an appeal against this refusal on the following grounds:

- That during the Case Management Discussion of 29 September 2023 that the Respondent was informed that no issues after 6 September 2023 could be considered and that the Respondent was to reduce the size of her submission, which at that time amounted to 464 pages. The Appellants had expected these to be reduced, however a further 164 pages were subsequently submitted by the Respondent taking her submission to 628 pages. The Appellants stated that as by the time of the hearing the Respondent had not reduced her submissions as ordered that she was in breach of a Tribunal directive. By not insisting that the Respondent reduce her submissions in terms of the previous directive the Tribunal was said to have erred in law;
- That a director of the Appellants had not been able to attend the Hearing as he was cited for jury duty and as such the Tribunal erred in law by not discharging that Hearing and assigning a new Hearing when he could attend:
- That in fixing the award at £1500 that the Tribunal had accepted that they could not arithmetically calculate the losses of the Respondent , and as such no material loss was assessed. The Tribunal therefore erred in law by selecting the figure of £1500 when there was no justification for that figure being selected.

Discussion

6. This appeal is brought by the Appellant under the provisions of section 46 of the Tribunals (Scotland) Act 2014 ("the 2014 Act") and the procedural rules contained within The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 ("the 2016 Regulations"). It is also submitted in terms of rule 3(6) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016, where the First-tier Tribunal has refused permission to appeal, the Upper Tribunal may give permission to appeal if "the Upper Tribunal is satisfied that there are arguable grounds of appeal. The phrase "arguable grounds for the appeal" is not defined within the statute.

7. In essence, therefore, the task of the Upper Tribunal is to ascertain, having regard to the material submitted, whether the appellant has identified an error of law that is capable of being stated or argued before the Upper Tribunal at a hearing. As indicated, that is a relatively low threshold.

8. In terms of the relevant law, Section 46 of the Tribunals (Scotland) Act 2014 (hereinafter referred to as "the 2014 Act") provides:

> *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.*

9. Accordingly, it is apparent that the Appellants may only Appeal to the Upper Tribunal on a point of law (section 46(2)(b)).

10. The grounds of this Appeal are as stated above at paragraph 5.

The Hearing

11. The Hearing in respect of this appeal took place on 5 June 2025 by WebEx. The Appellants were represented by Mr Gilmour, one of their directors, and the Respondent represented herself. I have taken cognisance of all of the submissions received in this case.

12. Mr Gilmour adopted the terms of the Appellants' written submissions. He stated that the Tribunal had not adhered to its own directions as issued at the Case Management Discussion on 20 December 2023 to the effect that as the Respondent 's submissions were "too long" that she was directed to truncate these. Notwithstanding this direction the Respondent had submitted more representations, however her failure to comply with the previous direction was not taken into account at the Hearing. Mr Gilmour indicated that by the time of the Hearing that they had still been awaiting the reduced submissions.

13. In relation to the Hearing itself, Mr Gilmour indicated that there had been a mix-up in the company's diary, and at the relevant time he had been cited for jury service. He stated that he had attended Court to answer his citation and was excused. He had returned home to do "admin" while awaiting a call from the Sheriff Clerk to confirm whether he was needed. He had phoned the Sheriff Clerk the night before and been told to call back the next day after 12.00. He had told his staff that he was on jury duty that week and the person who took the call at the office did not contact him and tell him that the Tribunal had been in touch about the Hearing. He had only become aware that he had missed the Tribunal Hearing when he returned to his office the next day. He believed that the Hearing should have been re-scheduled

14. Mr Gilmour also stated that the law of delict meant that as the Tribunal could not arithmetically work out the damages suffered by the Respondent that no award should have been made, given the Tribunal's role was to put the Respondent in the same position that she had been before.

15. The Respondent replied by stating that it was factually incorrect to assert that the first Case Management Discussion had asked her to reduce her documents. This had not happened. The Case Management Discussion had been brief, and simply determined that as the issues were complex, that the case would have to go to a full Hearing. There were discussions about procedures, and numbers of witnesses etc but there was no direction about reducing her submissions, although it may have been suggested that she might summarise these. She stated that many of her productions were not actually lengthy, with for example approximately 100 pages of these simply being electricity accounts.

16. The Respondent was present at the previous Hearing on 4 April 2024 which could not proceed as Mr Gilmour did not attend. The Tribunal clerk had contacted him and was advised that he was ill. A further date was fixed for 22 July 2024 when Mr Gilmour had been present. At that hearing the Respondent gave evidence, although Mr Gilmour stated at that time that he had expected her to have submitted additional evidence, and that he understood that this was a preliminary hearing. Upon being advised that this was a full Hearing, he accepted his error, saying that if he had been aware of this, that he would have led evidence, given he had 100 pages of evidence. The Tribunal adjourned the Hearing to give him a chance to lodge this evidence. Parties were asked to confirm a suitable date and agreed on 20 November 2024.

17. The Respondent recalled that the Tribunal directed her to lodge written submissions by October 2024 confirming which aspects of the Code she maintained had not been complied with, and that she had lodged these submissions six weeks prior to the Hearing on 20 November 2024. The Respondent considered that this gave the Appellants ample opportunity to make their own submissions.

18. In relation to Mr Gilmour's failure to appear at the Hearing on 20 November 2024, the Respondent recalled that when the Tribunal Clerk had contacted Indigo Square that they spoke to his colleague Mr Sinclair, who stated that he did not know where he was but would make inquiries. When the clerk contacted him later, Mr Sinclair had said he could not contact him, although he had checked his diary and noted a reference to jury duty. Mr Gilmour appeared not to have given his staff any prior notice that he was on jury duty. Further Mr Gilmour had provided no evidence that he was on jury duty. The Respondent believed Mr Gilmour had been aware of the imminence of the Hearing, given he had contacted her on 14 November 2024, making an offer of £350 in settlement, which she had rejected. In relation to the amount awarded by the Tribunal, she considered that this had been a matter for the discretion of the Tribunal, and they had addressed this fully.

Discussion

19. This appeal is brought by the Appellant under the provisions of section 46 of the Tribunals (Scotland) Act 2014 ("the 2014 Act") and the procedural rules contained within The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 ("the 2016 Regulations"). It is also submitted in terms of rule 3(6) of the Upper Tribunal for Scotland (Rules of

Procedure) Regulations 2016, that where the First-tier Tribunal has refused permission to appeal, the Upper Tribunal may give permission to appeal if "the Upper Tribunal is satisfied that there are arguable grounds of appeal. The phrase "arguable grounds for the appeal" is not defined within the statute.

20. Case law in other situations is of assistance. For example, in Czerwinski v HM Advocate 2015 SLT 610, the court was formulating the appropriate test for the grant of leave to appeal in an extradition case in the absence of statutory guidance. It settled on adopting the test applicable to criminal appeals: "do the documents disclose arguable grounds of appeal?" in terms of section 107 of the Criminal Procedure (Scotland) Act 1995.

21. In Wightman v Advocate General 2018 SC 388 Lord President Carloway (at paragraph 9) observed that arguability and stateability were synonyms. This was said to be a lower threshold than "a real prospect of success", the test applicable in deciding whether to grant permission for an application to the supervisory jurisdiction to proceed, in terms of section 27D(3) of the Court of Session Act 1988, as amended. The threshold of "arguability" is therefore relatively low.

22. Advocate General for Scotland v Murray Group Holdings Ltd [2015] CSIH 77; 2016 SC 201 (affirmed by UKSC in [2017] UKSC 45; 2018 SC (UKSC) 15) concerned an appeal from the Tax & Chancery Chamber of the First Tier Tribunal under section 13 of the Tribunals, Courts & Enforcement Act 2007. An appeal to the Upper Tribunal was available "on any point of law arising from the decision made by the First Tier Tribunal." The appeal thereafter to the Court of Session was "on any point of law arising from a decision made by the Upper Tribunal," and it was in that context that the Inner House examined what was meant by "a point of law." It identified four distinct categories that an appeal on a point of law covers:

> (i) General Law, being the content of rules and the interpretation of statutory and other provisions;
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> (ii) The application of law to the facts as found by the First Tier Tribunal;
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> (iii) A finding, where there was no evidence, or was inconsistent with the evidence; and

(iv) An error of approach by the First Tier Tribunal, illustrated by the Inner House with examples: "such as asking the wrong question, or by taking account of manifestly irrelevant considerations or by arriving at a decision that no reasonable tax tribunal could properly reach." ([41]-[43])

23. Accordingly, from an application of the foregoing Section 46 of the 2014 Act, it is apparent that the Appellant may only Appeal to the Upper Tribunal on a point of law (section 46(2)(b) that is arguable.

Conclusion

24. Dealing with the first issue raised by the Appellants, this appears to hinge on what took place at the Case Management Discussion referred to by the Appellants, and here there may be some confusion as to which Hearing the Appellants are actually referring to. There was a Case Management Discussion on 20 December 2023, which took place by teleconference at which time the matter was continued to a full Hearing on 4 April 2024. Regrettably, there appears to be no minute of this Discussion available, although the Respondent confirmed that this was a relatively short Hearing at which time the Tribunal, acknowledging that the issues involved were complex and that there appeared to be no possibility of the matter settling, elected therefore to fix a full Hearing for 4 April 2024. There is in the determination of 14 January 2025 (paragraph 2) reference to this Discussion and to the fact that the Respondent 's application of 5 September 2023 was accompanied by a number of documents. There is no further specification in relation to these documents and given that there is no suggestion of any indication that the number of these documents should be reduced or their contents otherwise "truncated", I am satisfied therefore that no such direction was provided at the Case Management Discussion to this effect. As regards the suggestion that the Tribunal also stated that no other matters other than those which had occurred before 6 September 2023 could be considered, again I have seen no indication that this Direction was in fact issued at that time, and in any event I have seen no evidence to suggest that any post-6 September 2023 matters were actually considered.

25. The Appellants may however be referring to the events as they transpired at the full Hearing of 22 July 2024 at which both parties were present. At the conclusion of that Hearing the matter was adjourned to enable the Respondent to provide specific details, by reference to particular paragraphs of the Property Factor Code as to which provisions had been breached, to enable parties an opportunity to make further written representations and to lodge any further productions if they wished to do so. Following this Hearing the Tribunal issued a Direction in terms of Rule 16 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017, requiring the Respondent to provide a written submission detailing the particular paragraphs of the Code which she considered to have not been complied with, and to detail the evidence she intended to rely on in support of her submissions, requiring that she lodge these submissions together with any additional productions before 7 October 2024 (paragraph 31). This appears to be the only Direction issued by the Tribunal in relation to productions, and this falls some way short of the position as stated in the Appellants' representations to the effect that the Respondent had been ordered to reduce the number and to truncate the content of her productions. In fact the Direction specifically envisages that further productions might be lodged. I do not find therefore that any Direction was issued to the effect that the Respondent must reduce her submissions given that the only Direction made anticipated further submissions. The Respondent subsequently fully complied with the terms of this Direction. In these circumstances therefore the Appellants have not identified a point of law which is in any way arguable and permission to appeal on this ground is refused.

26. The Appellants also assert that that one of their Directors, Mr Gilmour was unable to attend at the Hearing of 20 November 2024 due to his having been cited for Jury Duty at Glasgow Sheriff Court. In this regard it is noted that the original Hearing of 22 July 2024 was adjourned on the basis that the Appellants had indicated that they wished to lodge further productions and representations. The proposed date for the adjourned Hearing was canvassed with both parties at that time when they were personally present, both indicating that they would be able to attend. Despite indicating that they wished to lodge productions and representations, no such documents were ever lodged by the Appellants. It is a matter of agreement that Mr Gilmour was not present when the matter called on 20 November 2024, and when the Tribunal Clerk contacted his office, they were advised that they did not know

where he was, but that his diary was marked "Jury Duty". The position of Mr Gilmour was that he was not in attendance for two reasons, one being an IT Diary error, and the other being his requirement to attend for Jury Duty. Mr Gilmour did not contact the Sheriff Court seeking his excusal as a juror given his outstanding Tribunal commitment, nor did he contact the Tribunal seeking an adjournment due to his Jury Duty commitment. Mr Gilmour accepted that he had been told that he was not required to attend Court as a potential juror on 20 November 2024 although he was required to check by telephone after 12 noon to ascertain if he would be required later. It would appear he was not required that day and decided to stay at home and "do admin". The person contacted by the Tribunal had not seen fit to contact him that day to advise him that they had been in contact, and he had only learned about the Hearing the following day when he had attended at his office.

27. The Tribunal confirmed that on 20 November 2024, and having ascertained that no-one was present to represent the Appellants they had taken steps to contact their office, and spoke to a named individual who knew nothing of the whereabouts of Mr Gilmour, although looking at his diary they noted an entry which said, "jury duty". The Respondent had opposed any further adjournment given that it had previously been adjourned on the motion of the Appellants and that she was requiring to take time off work to attend. The Tribunal noted that when the date had been assigned on 22 July 2024 that Mr Gilmour had indicated that it was a suitable date, and he had not contacted the Tribunal thereafter to advise of any further difficulties in attending. He also had not responded to the representations submitted by the Respondent and had lodged no productions or submissions on his own behalf despite indicating on 22 July 2024 that he intended to do so. The Tribunal determined therefore to proceed with the Hearing in the absence of Mr Gilmour.

28. In his Note of Appeal the Appellants state that the Tribunal erred in law by not adjourning the Hearing. However the decision as to whether or not to adjourn the Hearing was a matter entirely within the discretion of the Tribunal and would not constitute an error of law unless it could be demonstrated that the approach taken by the Tribunal was a decision which was so palpably wrong that no reasonable Tribunal would have adopted that approach, or that they came to a decision that no reasonable Tribunal could have reached. In the present appeal that cannot be said to be the case. The Appellants were made aware of the date in July

2024, when the matter had required to be adjourned due to their lack of preparedness and had indicated no difficulties with this date. It was notable also that the Appellants had not engaged further with the process by lodging those productions which they had indicated that they would require to lodge when making their previous motion to adjourn. Whilst Mr Gilmour may have received intimation of Jury Duty prior to the adjourned date, this intimation would have been received by him some time before the Jury Sitting to which he was cited. This would have given him adequate time to contact the Tribunal, advising them of his potential difficulty and seeking an adjournment at that time. This was not done, which appears to have been indicative of a somewhat cavalier approach being taken by the Appellants to these proceedings. Whilst Mr Gilmour referred to a firm diary error, this may have been rectified if he had been available to other staff members on 20 November 2024 when the Tribunal had tried to contact him to give him the opportunity to attended, albeit late. It is indeed a strange set of circumstances that Mr Gilmour was at home "doing admin" but was not contactable at all by his staff members. He had been personally present when the date had been fixed, and it was his responsibility to attend. By not adjourning the matter further in these circumstances and having regard to the previous history of the process it could not be said that the Tribunal had adopted the wrong approach or come to a manifestly unreasonable decision in deciding to proceed with the Hearing in the absence of Mr Gilmour, particularly having regard to the requirement to conclude proceedings expeditiously. No point of law has been identified and accordingly leave to appeal on this ground is refused.

29. The Appellants also assert that the Tribunal erred in not providing a basis for their calculation of the award in the present case. It was submitted that in delict, that the only basis for any award was to put the wronged party in the position that they would have been in had that wrong not taken place. Unfortunately, for them the Appellants are misguided in asserting that payments made in term of the Property Factors (Scotland) Act 2011 are delictual matters. The authority for making payments in terms of a Property Factor Enforcement Order is statutory and contained within section 20(1)(a) of the aforementioned Act. This section provides that a Property Factor Enforcement Order may require the property factor to "make such payment to the homeowner as the First-tier Tribunal considers reasonable." It is not a matter of delict. As pointed out by the Tribunal in paragraph 164 of their determination, the calculation of the amount as to what is appropriate is a matter of judicial discretion, and as

such an appellate body will not lightly interfere with such an award. In the present case the Tribunal has provided details reasons for selecting the sum they considered to be appropriate having regard to the circumstances of the case at paragraphs 165 to 169 of their judgment. These paragraphs confirm fully the reasons why they considered the sum awarded in the present case was appropriate. There is nothing within these paragraphs to suggest that the Tribunal fully did not consider matters properly, nor that they took irrelevant considerations into account or ignored relevant considerations. Rather they clearly gave due consideration to what was reasonable in the circumstances. Further the Appellants were given an opportunity to make representations on the PFEO made and the amount awarded between 14 January 2025 and 5 February 2025 but chose not to do so. Accordingly, there is no evidence whatsoever to suggest that the Tribunal has not exercised its discretion appropriately, and as such no point of law has been identified and permission to appeal is refused.

Decision

30. Accordingly, permission to appeal on each ground as identified is refused.

Sheriff Colin Dunipace

Sheriff Colin Dunipace

Member of the Upper Tribunal for Scotland