Upper Tribunal for Scotland

2025UT83
Ref: UTS/AP/25/0031

DECISION OF

Sheriff S. Reid

IN THE APPEAL
(AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL FOR SCOTLAND)
IN THE CASE OF

Mr Stephen McDougall

APPELLANT

- against –

Hacking & Paterson Management Services

RESPONDENT

FTS Case Reference: FTS/HPC/PF/24/1381

GLASGOW, 17th October 2025

Decision

The Upper Tribunal for Scotland:

1. Refuses the Appellant's appeal against the decision of the First-tier Tribunal for Scotland ("FTS") dated 3 February 2025 (issued on 4 February 2025).

Sheriff S. Reid
Member of the Upper Tribunal for Scotland

NOTE:

1. At a Hearing of this Appeal (by WebEx video conference call) on 17 October 2025, having heard and considered parties' written and supplementary oral submissions, I refused the Appellant's appeal. I gave an *ex tempore* decision, briefly explaining the basis of the decision.

2. For the assistance of the parties, I append this more detailed Note of my reasons.

Procedural Summary

3. The Appellant applied to the FTS for orders *inter alia* that the Respondent, a property factor, had breached the Property Factors Code of Conduct in multiple respects.

4. On any view, the Appellant's application was lengthy, dense, repetitive, confused, and confusing.

5. Nevertheless, the application was processed and, on 25 April 2024, the Respondent received formal notice of it.

6. The FTS ordered that any written representations by the Respondent should be submitted no later than 16 May 2024, in advance of a Case Management Discussion that had been assigned for 8 July 2024. On 13 May 2024, the Respondent duly submitted written representations to the FTS. They were brief, fairly general in nature, but timeously submitted.

7. On 17 December 2024, the FTS ordered that the Respondent lodge further representations in relation to two specific issues: (i) the basis of their authority to act as property factor of

the development of which the Appellant's property formed part; and (ii) the basis of their authority to charge an administrative fee for amending their terms of service, in preparation for the 2021 Code of Conduct coming into force. On 8 January 2025, the Respondent replied by duly submitting written representations to the FTS. They were slightly lengthier than the Respondent's earlier submission, somewhat rambling and generic in nature, but timeously submitted, and can plausibly be said to have engaged (albeit to a minimum tolerable extent) with the FTS Order.

8. It is also worth noting that, in the intervening period, the FTS issued two separate Directions to the Appellant (the first on 10 September 2024, the second on 22 October 2024) *inter alia* ordering the Appellant to lodge with the FTS "a simple table" showing (i) each paragraph of the Code that was allegedly breached by the Respondent, with a corresponding explanation of how and when the breach allegedly occurred, and a cross-reference to the evidence in support of that breach; and (ii) a separate "simple table" showing each of the factor's duties allegedly breached by the Respondent, with a corresponding explanation of how and when the breach allegedly occurred, and a cross-reference to the supporting evidence. The FTS was clearly struggling to understand the Appellant's application.

9. In the event, the Appellant refused to comply with both Directions.

10. Instead:

    a. On 22 October 2024, the Appellant lodged five separate requests for directions from the FTS seeking *inter alia* to have the FTS compel the Respondent to lodge evidence to prove their compliance with the Code and to appear personally before the FTS;

b. On 6 November 2024, the Appellant sought to lodge with the FTS productions extending to almost 2,000 pages;
c. On 20 November 2024, the Appellant lodged a further eight requests for Directions from the FTS; and
d. On 27 November 2024, the Appellant lodged written submissions extending to 132 pages, much of it repetitive, rambling and confused in content.

The two "simple tables" ordered by the FTS were never produced.

11. On 10 December 2024, the application called at a Hearing before the FTS. The Appellant was in attendance. The Respondent, which had received notification of the Hearing, declined to attend. The FTS proceeded to consider the merits of the application on all the material before it, including the Appellant's evidence and submissions, and the written representations from the Respondent.

12. By a decision dated 3 February 2025 (issued to the parties on 4 February 2025), the FTS concluded that the Respondent had failed to comply with the Property Factors Code of Conduct 2021 (namely, with paragraph 1.5A thereof) in certain relatively minor respects, in breach of section 14 of the Property Factors (Scotland) Act 2011. None of the other (multiple) breaches of the Code alleged by the Appellant was upheld by the FTS.

13. Having determined that the Respondent had failed to comply with the Code, the FTS decided to make a Property Factor Enforcement Order ("PFEO"). In compliance with section 19 of the 2021 Act, the FTS gave notice to the parties of the proposed PFEO and invited representations thereon.

14. Before the procedure for ingathering representations on the PFEO was completed, the Appellant applied for a review of the FTS decision dated 3 February 2025. By a decision

dated 24 February 2025, the FTS refused the review application on the ground that it was totally without merit.

15. The Appellant then sought permission from the FTS to appeal the decision dated 3 February 2025. By a further decision dated 2 April 2025, the FTS refused the Appellant's application for permission to appeal, on the ground that the multiple proposed grounds of appeal did not raise arguable points of law.

16. The Appellant then sought permission from the UTS to appeal against the decision dated 3 February 2025.

17. By a decision dated 7 August 2025, the UTS granted the Appellant permission to appeal on one single ground only (namely, Ground 1, set out below). *Quoad ultra* the Appellant was refused permission to appeal because the remaining grounds of appeal did not raise an arguable point of law.

The single Ground of Appeal

18. The single ground of appeal in respect of which permission to appeal was granted was as follows:

> "The Appellant submits that the FTS erred in law by entering upon an inquiry into, and adjudicating upon, the evidential, legal and substantive merits of the application, notwithstanding that the application was undefended ("Ground 1")."

19. According to this ground of appeal, the Appellant submitted that, since the Respondent had chosen not to appear or be represented at the procedural or substantive Hearings, the FTS should have accepted the Appellant's claim in its entirety and should have found the breaches of the Code alleged by the Appellant to be established. According to the

Appellant's ground of appeal, there was no need for any further inquiry to be carried out by the FTS into the evidential merits of the application.

20. Arguable support for this ground of appeal was found in the decision of the UTS in *Woro v Brown* 2022 SLT (Tr) 97 (per Sheriff P. di Emidio). In *Woro*, there was said to be no duty (or power) on the part of the FTS to take it upon itself to adjudicate upon the legal relevancy (or, in this case, by extension, the evidential merits) of an *undefended* claim.

21. Subsumed within the Appellant's ground of appeal were two related arguments. The first argument was that, under statute, the onus lay on the Respondent to prove its compliance with the Code. Standing its failure to participate in the proceedings, the Appellant submitted that the Respondent had thereby failed to prove compliance with the Code; and that, for that reason, the Appellant ought to have succeeded. The second related argument was that the FTS had inverted the proper onus; it had imposed upon the Appellant a duty to prove the Respondent's non-compliance with the Code; it had unreasonably failed to accept the unchallenged evidence produced by the Appellant in support of his assertion (that the Respondent had breached the Code in multiple respects); and that it had thereby wrongly concluded that the Appellant had failed to prove his allegations.

The Appeal Hearing

22. On 17 October 2025, the Appeal called before me at an oral hearing (by WebEx video conference call). The Appellant appeared personally, representing himself. The Respondent was represented by a solicitor (Mr Neilly, Mitchells Roberton, Glasgow). Both parties adopted the written representations lodged by them in advance of the Hearing and made supplementary oral submissions.

Submissions for the Appellant

23. The Appellant's submissions at the appeal hearing tended to stray into areas covered by the grounds of appeal in respect of which permission to appeal had previously been refused.

24. Nevertheless, with some clarification from the Bench as to the restricted issue for consideration, the Appellant reiterated his principal submission that, since the Respondent had chosen not to appear or be represented at the FTS evidential Hearing, the FTS should have accepted the Appellant's claim in its entirety and granted the orders sought by him. There was no need for any further inquiry to be carried out by the FTS. In a similar vein, he also submitted that, under statute, the onus lay on the Respondent to prove its compliance with the Code. Standing its failure to participate in the proceedings, it followed that the Respondent had failed to prove compliance with the Code, the FTS should have accepted the unchallenged evidence produced by the Appellant in support of his assertions, and therefore the Appellant ought to have succeeded in whole before the FTS.

Submissions for the Respondent

25. For the Respondent, it was submitted that the FTS had not fallen into error. The simple answer to the single Ground of Appeal was this: the application was not "undefended"; it was defended. It was defended because the Respondent had timeously lodged "written representations" with the FTS following upon intimation of the application. Since the application was technically defended, the FTS was entitled to adopt and promulgate any form of procedure it considered appropriate.

26. In the event, the FTS chose to assign an evidential hearing; it chose to consider the whole material before it (including the Respondent's written representations); it rejected the Appellant's evidence and arguments (in large part); and it was entitled to do so.

Reasons for the UTS decision

27. In my judgment, the appeal fails for the following reasons.

Is the application defended?

28. It is true that in certain court actions (in the Sheriff Court and the Court of Session) pursued under ordinary procedure, the Court Rules make express provision for the pursuer (the party pursuing the clam) to obtain a "decree in absence" against the defender (the party against whom the claim is directed) if the action is undefended. In such Court actions, subject to very limited exceptions, decree as craved is granted automatically against the absent party. There is no further enquiry by the Court into the underlying legal or evidential merits of the claim. The limited exceptions relate to issues which are said to be *pars judicis* (that is, issues of which the Court is under a duty to take cognisance). These issues are well-established and include such matters as (i) whether the court has jurisdiction; (ii) whether the action is competent; (iii) whether the remedy sought is competent; (iv) whether the right of action has *ex facie* prescribed.

29. Aside from these few fundamental issues, the scope for a Court to refuse to grant a decree in absence (in ordinary procedure) is very limited. However, any perceived injustice may be said to be mitigated by the fact that the Court Rules also make generous provision for the recall of such decrees in absence, if the absent party seeks belatedly to appear and to advance a *prima facie* defence.

30. That said, there are many other forms of Court applications (such as sheriff court summary applications, or petition processes in the Court of Session) where a claimant will not automatically be entitled to a "decree in absence" merely because an application is not opposed by any interested party. The court, in such processes, retains the power and discretion (indeed, duty) to refuse the orders sought in the application until it is satisfied on the legal and factual merits, after such procedure and inquiry as the court considers fit.

31. The conduct of applications (such as this) in the FTS is regulated the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017/328 ("the 2017 Rules"), enacted under the Tribunals (Scotland) Act 2014. There is no provision in the 2017 Rules for the automatic grant of a "decree in absence" against a party who fails to engage or to appear at a Hearing.

32. Nevertheless, the decision in *Woro, supra*, supports the conclusion that in (certain, at least) FTS applications that are properly characterised as "undefended", the scope for the FTS, in the proper exercise of its discretion, to undertake its own scrutiny of the legal relevancy of an undefended claim (and, by extension perhaps, into the evidential merits of such an undefended claim) may perhaps be more limited. To that extent, I take no issue with the attractive reasoning in *Woro*.

33. However, the simple answer to the present appeal is that, in contrast with the situation in *Woro*, the present application was not "undefended" at all.

34. Instead, in contrast with *Woro*, the Respondent in the present case had indeed, at the outset, submitted timeous written representations in response to the application, the content of which was tolerably sufficient to engage with and oppose ("defend") the grounds of the Appellant's application. Indeed, in response to a subsequent FTS Direction, the Respondent timeously lodged a further written reply, tolerably sufficient in content to constitute "representations" on that Direction also.

35. Therefore, the low threshold for engagement, sufficient to render the proceedings defended, was crossed by the Respondent in the present case.

36. Thereafter, the procedure to be followed in the FTS is different from procedure in ordinary actions in the Sheriff Court or Court of Session. The FTS has a wide discretion as to how it

shall conduct the case (paragraph 16A, 2017 Rules). It has a wide discretion to make "such inquiries" as it thinks fit (paragraph 20, 2017 Rules). Critically, those "inquiries" may include "consideration of any written representations made in good time…by or on behalf of the parties (paragraph 20(3), 2017 Rules). In this case, the FTS had the benefit of such "written representations" from the Respondent, which it was entitled to take into account.

37. The Rules appear to envisage that a Hearing (to be held in public) will be convened in most cases (paragraph 24, 2017 Rules). The FTS has a wide discretion to conduct that Hearing as it sees fit. Of course, the intensity of the examination may vary depending upon the nature of the claim, the supporting material available, and the extent to which the application is opposed.

38. That said, it is correct that the FTS also has a discretion to determine the application without a Hearing - but only where (i) having regard to such facts as are not disputed by the parties, the FTS is able to make "sufficient findings to determine the case"; and (ii) to do so will not be contrary to the interests of the parties (paragraph 18). Therefore, even this provision (to dispense with a Hearing) envisages some sort of consideration of the underlying merits of the application in order that the FTS can make "sufficient findings to determine the case".

39. In the present case, the FTS properly exercised its (wide) discretion as to the procedure to be followed to determine the merits of this opposed/defended application. No error is discernible in its decision to convene a Hearing, or to consider and assess the merits of the whole material before it, including the Appellant's evidence and submissions, and the "written representations" of the Respondent. For that reason, the appeal (on this single permitted ground of appeal) must fail.

40. With respect, it appears that the Appellant is labouring under the misapprehension that the FTS was bound to find in his favour, and to grant the remedies sought by him, merely

because the Respondent chose not to appear or to be represented at any of the FTS Hearings. Choosing not to attend (or be represented at) any of the Hearings was a commercial decision (and risk) that the Respondent was entitled to take, having submitted "written representations" to the FTS that were sufficient, at least, to constitute a defence.

Onus of proof

41. As explained above, the Appellant's single Ground of Appeal has subsumed within it two related arguments. It is only fair that I address them also.

42. The first argument was that, under statute, the onus lay on the Respondent to prove its compliance with the Code. Standing its (alleged) failure to participate in the proceedings, the Appellant submitted that the Respondent had thereby failed to prove compliance with the Code; and that, for that reason, the Appellant ought to have succeeded. The second related argument was that the FTS had inverted the proper onus; it had imposed upon the Appellant a duty to prove the Respondent's non-compliance with the Code; it had unreasonably failed to accept the unchallenged evidence produced by the Appellant in support of his assertion (that the Respondent had breached the Code in multiple respects); and that it had thereby wrongly concluded that the Appellant had failed to prove his allegations.

43. These two arguments are founded upon similar misunderstandings of the nature of the FTS proceedings.

44. Firstly, FTS proceedings are adversarial in nature, not inquisitorial. By lodging an application with the FTS, the FTS is not then obliged to initiate some free-ranging inquiry to ingather evidence to support and establish, or to rebut, the claim. The FTS is impartial. It must remain so. It is for the applicant to do the running, to produce such evidence as may be necessary to support and vouch his claim. That said, in appropriate circumstances,

the applicant may request that the FTS exercise the powers available to it to, for example, compel the attendance of persons at a Hearing and to produce documents. But these are not obligations on the FTS; they are powers available to it; and the exercise of those powers is entirely discretionary.

45. Secondly, a party who submits an application to the FTS bears the legal onus of satisfying the FTS that his claim is well-founded, in fact and in law. Therefore, in this case, it was for the Appellant to discharge that legal onus by producing sufficient material (in oral or written form) to satisfy the FTS that the claim was well-founded.

46. This conclusion derives from the general legal principle that the onus lies upon the party who is making a claim, or asserting a fact, to prove it. It is often said that one way of determining who bears the burden of proof of any issue is to ask: who would lose if no evidence were offered? (*Abrath v North Eastern Railway Co* (1883) 11 QBD 440, 456). Hence the conclusion that a pursuer (in these FTS proceedings, the Appellant) will generally bear the initial legal burden of proof (*Dickinson v Minister of Pensions* [1953] 1QB 228, 232). This also accords with the principle that a party should not generally be required to prove a negative.

47. This conclusion (as to where the legal onus lies) is also consistent with section 19 of the Property Factors (Scotland) Act 2011. It expressly provides that an application by a homeowner to the FTS for a determination of whether a property factor has failed to carry out its duties (including the section 14 duty to comply with the Code) "*must… set out the homeowner's reasons* for considering that the property factor has failed to carry out [the duties]".

48. Therefore, the onus lies on the Appellant to set out his stall – and, by logical extension, to explain the alleged breaches and to prove it. He failed to do so.

48. Of course, in certain circumstances, the usual legal onus can be inverted by express or implied provision to the contrary. But no such provision exists in the present case. It is also well-recognised that, in the course of an evidential inquiry, the so-called tactical or provisional or evidential onus can shift, from time to time, depending upon the strength or weakness of the evidence adduced. That is largely a matter of common sense. But, again, that did not happen here. In any event, at the end of the day, the tribunal must still ask itself not whether the provisional burden is discharged but whether the legal burden on the applicant has been discharged (*Brown v Rolls Royce Ltd* 1960 SC (HL) 22, 28).

49. It is evident that the greater part of the Appellant's claim failed for two simple reasons.

50. First, his application was rambling and confused. He did not help himself by stubbornly failing to comply with two FTS Orders to present "a simple table" explaining which duties and Code provisions had allegedly been breached; how and when those breaches occurred; and what evidence supported his claims. His claim might have been more persuasive if he had done so. At times, with respect, his complaints are barely intelligible.

51. Second, the FTS, taking account of all the material before it, clearly concluded that the Appellant's evidential material was poor in quality and unpersuasive. It was for the FTS to assess the value and weight to be attached to the evidential material before it. That is its function. There is no basis to conclude that it erred in the performance of that function. In essence, the Appellant simply disagrees with the FTS's assessment of the value and weight to be attached to that material. By itself, that is not a meritorious ground of appeal. No legitimate basis is advanced to entitle the UTS, as the appellate tribunal, to interfere with the FTS's assessment of the quality of that evidence. It is not the function of the UTS to revisit the fact-finding of the FTS, absent a discernible error in law.

52. For these reasons, the UTS refuses the Appeal.

*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.*