



DECISION NOTICE OF SHERIFF ANTHONY DEUTSCH

in the case of

IAN McNAUGHT, 1 Milcroft Road, Cumbernauld Glasgow, G67 2QE

Applicant

and

APEX PROPERTY FACTOR LTD, 46 Eastside, Kirkintilloch, East Dunbartonshire, G66 1QH

Respondents

FTT Case Reference: FTS/HPC/PF/17/0023

The upper tribunal refuses the respondents permission to appeal.

Note

[1] The respondents in their application for leave to appeal contend that, because the first tier tribunal determined that the respondents were not properly appointed as factor, it follows that there was no jurisdiction for the tribunal to make the order which the respondents now seek to appeal. It is argued that if the respondents are not the property factor for the applicant's block of flats then they cannot be said to have failed to carry out their duties. It is further argued that the first tier tribunal only has jurisdiction to deal with applications from "homeowners" as defined within the Property Factors (Scotland) Act 2011 ("the 2011 Act"). It is suggested that another corollary of the determination that the

respondents were not validly appointed is that the applicant thereby falls out-with the statutory definition of homeowner.

[2] The first tier tribunal's jurisdiction is conferred by sections 17 and 19 of the 2011 Act. That jurisdiction in the first instance is to determine one or other or both of two things; whether (a) the property factor has failed to carry out its duties or (b) failed to comply with the section 14 duty i.e. the obligation upon a registered property factor to ensure compliance with the property factors code of conduct.

[3] By virtue of sections 31 (the interpretation section) and section 17 (5) of the 2011 Act the property factor's duties in relation to a homeowner relate principally to the management of the common parts pertaining to the homeowner's property. It is a moot point whether a property factor can have duties of management in circumstances where the factor has no valid appointment. That is one of the issues raised in the application for leave to appeal, however, it is not one which for present purposes it is necessary to determine. Unnecessary because the decision of the first tier tribunal to make an enforcement order arises out of its determination that there have been breaches of the separate section 14 duty.

[4] The terms of section 14 (5) of the 2011 Act make it clear that the obligation to comply with the section 14 duty applies regardless of whether the factor is properly appointed or otherwise.

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

When the various breaches of the code identified are considered it is apparent that no other interpretation would make sense. A registered property factor whatever the status of his appointment must not communicate with homeowners in any way which is abusive or intimidating, or threatens them. Similarly he must respond promptly to enquiries and

complaints. He must not take legal action without taking reasonable steps to resolve matters or without notice. Where he has arranged insurance, regardless of whether he was entitled to do so, he must give information about that insurance. These duties are all aimed at setting minimum standards of practice for registered property factors generally (section 14 (1)).

[5] It is only a homeowner who may make an application to the first tier tribunal in terms of section 17 (1). A homeowner is defined by section 10 (5) as follows:

- (5) In this Act, "*homeowner*" means—
 - (a) an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor, or
 - (b) an owner of residential property adjoining or neighbouring land which is—
 - (i) managed or maintained by a property factor, and
 - (ii) available for use by the owner.

[6] It is a necessary component of this definition that the homeowner's property be managed by a property factor. The provision contains no express requirement that the property factor who carries out that management should be validly appointed; to imply that condition would not be consistent with the legislative intention of setting minimum standards of practice for all registered property factors (section 14 (1)). All that is required is that the property factor who is the subject of complaint did in fact manage or maintain common property pertinent to the homeowner's property.

[7] For the foregoing reasons I consider that no arguable point of law is advanced by the respondents. I have accordingly refused leave to appeal.