Upper Tribunal for Scotland

[2020] UT 34
UTS/AP/19/0048

DECISION NOTICE OF SHERIFF MILLER

ON AN APPLICATION FOR PERMISSION TO APPEAL – RECONSIDERATION
(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND)

in the case of

MR JOHN GARRETT, 553 Mosspark Drive, Mosspark, Glasgow, G52 1QP

Appellant

and

YOUR PLACE PROPERTY MANAGEMENT LIMITED, Wheatley House,
25 Cochrane Street, Glasgow, G1 1HL

Respondent

FTT Case Reference FTS/HPC/PF/19/0680

24 June 2020

Decision

The Upper Tribunal for Scotland, having considered the reasons why the appellant failed to attend the convened hearing assigned to 28 February 2020, Finds that the appellant's failure to attend was wilful and deliberate, Determines under and in terms of rule 10 (2)(b) of The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 that he has failed to co-operate with the Upper Tribunal by failing to attend the hearing but that notwithstanding that lack of co-operation the Upper Tribunal can deal with his application fairly: Invokes rule 28 of the 2016 Regulations and Considers the appellant's application for permission to

appeal against the decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) dated 28 August 2019 in respect that it is in the interests of justice to do that without appointing a further hearing, and having done that Determines that the appellant has been unable to identify a point of law as required by section 46(2)(b) of the Tribunals (Scotland) Act 2014; therefore Refuses to grant him permission to appeal to the Upper Tribunal and Dismisses his application.

NOTE

Introduction

[1] By application made timeously and accepted as such by the Upper Tribunal for Scotland (UT) the appellant requests the UT to reconsider its decision dated 15 January 2020 (the UT decision) to refuse him permission to appeal against the decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (FtT) dated 28 August 2019 (the FtT decision), the FtT having also refused to grant him leave to appeal against it by its decision dated 8 October 2019 (the FtT refusal).

[2] The UT administration assigned a hearing at which the appellant could make oral submissions in support of his application. It was appointed to 28 February 2020 at 10.00 am in the Glasgow Tribunals Centre, York Street, Glasgow. The UT administration intimated that hearing to the appellant early in February 2020. On 27 February 2020 he gave notice to the UT that he would not attend the hearing. He was not in attendance when the hearing was called at its appointed time and he did not attend later in the morning.

[3] As a consequence of his failure to attend the hearing the UT has to consider what to do with his application. One available option is to invoke the provisions of rule 10 of The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 (the 2016 Regulations)

which makes provision for dismissing a party's case on the occurrence of any of the situations narrated in the rule. The most apposite provision that bears upon his failure to attend the hearing is the one contained in rule 10(2)(b) that the appellant has failed to co-operate with the UT to such an extent that the UT cannot deal with the proceedings fairly. Another option is to invoke rule 28 which permits the UT to proceed with a hearing in the absence of a party. Both provisions involve the UT exercising its discretion.

[4] In compliance with the mandatory requirement of rule 10(3) the UT issued a Decision dated 28 February 2020 giving the appellant an opportunity to explain why he failed to attend the hearing and make representations in relation to the proposed dismissal. Only once he has been given that opportunity can the UT proceed to exercise that discretion in light of whatever the appellant chooses to say by way of answer. He responded to that opportunity in four e-mails; the first dated 6 March, two dated 11 March and the last dated 13 March.

The issues for the UT

[5] This particular set of circumstances means that the UT has to deal with four issues:

1. Whether the UT is satisfied on the basis of the facts before it that the appellant has failed to co-operate with the UT to such an extent that the UT cannot deal with the proceedings fairly.
2. If the answer to the first issue is yes whether the UT should exercise its discretion and dismiss the application.
3. If the answer to the first issue is no, whether the UT should invoke the provisions of rule 28 and proceed with the hearing in the absence of the appellant.

4. If the answer to the third issue is yes, whether the information presented by the appellant in support of his application justify the UT in granting permission to appeal the FtT decision to the UT.

The first three issues relate to the preliminary matter of what to do with the application. Only the fourth involves making an assessment of the merits of the appeal. I deal with each issue in turn.

The first issue

[6] On 28 February 2020 the appellant failed to attend a duly convened hearing of which he had been given reasonable notice. That prompted the UT to issue its Decision dated 28 February 2020. The appellant responded to it in the four e-mails dated 6 March, two on 11 March and the last on 13 March. The e-mail of 6 March intimated, inter alia, that he was "recovering from influenza". He went on to make comments about the UT decision to require his attendance at the hearing and the Decision of 28 February and indicated that he would provide further clarity on establishing a point of law for his appeal. He returned to that last matter in his e-mail dated 11 March 2020 which stated "Reasons why case should not be dismissed". Attached to it was a document headed "Appeal a Decision of the Upper Tribunal" and described by him in the e-mail as a work in progress. He followed that up with a second e-mail dated 11 March 2020 enclosing correspondence to and about the fact of the respondents being registered property factors and then with the one dated 13 March 2020 to which he attached a later and revised version of the document which he now described as being "the final draft of the Permission to appeal a decision of the UtT". I understand this document to be his final statement of his appeal against the UT decision, and by reason of its highly detailed terms, of the FtT decision as well. I therefore treat it as his intended Note of Appeal.

[7] The power of dismissal of a party's case is granted by rule 10. Sub-paragraph (2)(b) of the rule has two features, both of which must be satisfied in order to exercise the discretion given: (i) that the appellant has failed to co-operate with the UT; and (ii) that as a consequence of that lack of co-operation the UT cannot deal with the proceedings fairly.

[8] The facts and circumstances that are relevant to deciding the first feature are found in paragraphs (6) to (11) inclusive of the UT Decision of 28 February 2020 and in the preceding and subsequent e-mail correspondence between the appellant and the UT administration. Paragraphs (6) to (11) are in the following terms:

> (6) Within an email dated 20/02/2020 and sent to the Upper Tribunal administration the appellant mentioned the prospect of postponing the oral hearing. He progressed that to a formal request for postponement in his emails to the Upper Tribunal administration dated 24/02/2020 and 25/02/2020.
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> (7) The Upper Tribunal administration sent copies of these emails to me on 26/02/2020 as the member of the Upper Tribunal allocated to preside over the oral hearing. I considered them and the reasons he expressed to support his request.
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> (8) I concluded that I wanted him to attend the hearing and give him the chance to submit reasons for requesting the adjournment, and that if I refused the adjournment I would require him to proceed with the merits of the oral hearing.
>
> (9) The Upper Tribunal administration conveyed my thinking to the appellant by emails dated 26/02/2020 and 27/02/2020. The email of 26/02/2020 stated *inter alia*, "The member has advised that if you wish to seek an adjournment of the hearing on the day then you may submit reasons for this at the hearing. The email of 27/02/2020 stated *inter alia*, "Any question in relation to the postponement can be addressed at tomorrow's hearing."
>
> (10) By email dated 27/02/2020 and timed at 11:39 the appellant intimated that he would not attend the oral hearing.
>
> (11) The appellant has not attended the Glasgow Tribunal Centre for the oral hearing, neither at the time appointed for the hearing nor later in the morning.

By e-mail dated 27 February 2020 the appellant wrote the UT administration stating, inter alia:

> "The Homeowner [namely, the appellant] sends his apologies for he will not be at hearing scheduled for 27 (sic) February 2020 as advised previously for legitimate reasons. I await an alternative date."

He sent that e-mail in response to the two sent to him by the UT administration the previous day and earlier on 27 February. The UT administration conveyed to him the thinking of the UT in the e-mail of 26 February 2020 and followed that up with the e-mail of 27/02/2020.

[9] I am satisfied that the statement of the appellant that he would not attend the hearing and that he awaited an alternative date amounts in the whole circumstances to a failure to co-operate with the UT. The terms of his e-mail of 27 February 2020 justify the conclusion made on the balance of probabilities that his failure to attend was wilful and deliberate. He had requested a hearing. The UT administration had to organise the date weeks in advance. Having done that they intimated the date, time and place of the hearing to him early in February. That gave him due and reasonable notice of the hearing. He was under an obligation to attend the hearing. By the time that he came to write his e-mail of 27 February he was aware of the e-mails sent to him by the UT administration conveying that any question of postponing the hearing would be addressed at the hearing. The e-mail of 26 February 2020 stated inter alia, "The member has advised that if you wish to seek an adjournment of the hearing on the day then you may submit reasons for this at the hearing. The e-mail of 27 February 2020 stated inter alia, "Any question in relation to the postponement can be addressed at tomorrow's hearing." In his e-mail of 27 February 2020 he set out what he describes as "Factors supporting the granting of a postponement". He lists seven. The first is that the consequences of the hearing are serious. This is not a reason that supports postponement but rather supports the hearing going ahead on the date

appointed for it. The second refers to him being prejudiced if the request were not granted but does not explain the nature of the prejudice or why it is of such import as to support a postponement. The third refers to providing evidence to the FtT about postponement of the hearing but the FtT has no role to play in the present proceedings. The fourth asserts that the UT was not unaware of that evidence which is a matter that he could and should have clarified at the hearing and even if substantiated does not on the fact of it justify a postponement. The fifth refers to disclosure issues without any further specification and I can find no help on that in the rest of the e-mail which makes it impossible to work out what he means by it. The sixth refers to personal issues neither of which is confirmed or even supported by any document from a medically qualified person and neither of which is said to prevent him from attending the hearing. He returned to that in his e-mail of 6 March 2020 in which he said that he was recovering from influenza. He did not provide with it any medical confirmation of that and he did not state that it had prevented him from attending the hearing. The seventh refers to settlement issues without explaining what that means in the context of his decision not to attend the hearing. The e-mail that he sent to the UT administration on 11 March 2020 indicated "Reasons why the case should not be dismissed" and referred to its accompanying document. That was the document headed "Appeal a Decision of the Upper Tribunal". It concentrates on the merits of his appeal, says nothing about why he failed to attend the hearing and therefore does not add to his explanation in his e-mails dated 27 February and 6 March 2020. The same observations apply to his Note of Appeal. On the balance of probabilities I am not satisfied that the seven factors when considered either individually or cumulatively and taking into account when and how he has presented them support the conclusion that they prevented him from attending the hearing or justify his failure to attend it.

[10] The second feature is concerned with the consequence for the UT of that lack of co-operation. The direction that it requires a conclusion that the UT cannot deal with the proceedings fairly sets a high standard and that has to be applied from the point of view of the court and not that of the appellant. The rules are silent on what is meant by being unable to deal fairly with the proceedings and each case will inevitably have to be decided on its own particular facts and circumstances.

[11] The appellant's failure to attend the hearing without good or valid reason amounts to a wilful and deliberate flouting of the requirement that he attend, which requirement was reinforced by the e-mails to him dated 26 and 27 February 2020 sent by the UT administration. Serious and concerning as that is I consider that on its particular facts it falls short of preventing the UT from dealing with his application fairly. Accordingly I answer no to the first issue in dispute.

The second issue

[12] As a result of my answer to the first issue I do not need to answer the second issue.

The third issue

[13] Having made those decisions I move on to how to respond to the failure to attend. My response is to resort to Rule 28 which sets out what the UT may do if a party fails to attend a hearing. The rule states that the UT may proceed with the hearing if the UT (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and (b) considers that it is in the interests of justice to proceed with the hearing.

[14] The first requirement is satisfied because the appellant was not only notified of the hearing he actively requested its postponement.

[15] The second is also satisfied in the circumstances of the application. The appellant seeks a reconsideration of the refusal to grant him permission to appeal to the UT. That is a matter of importance for him as his correspondence with the UT administration discloses. He made his request for a reconsideration about the middle of January 2020 and is entitled to a decision as promptly as is practicable. Because of the coronavirus pandemic and the multifarious ways in which it is being addressed nationally this case was sisted for almost three months, from 24 March 2020 to 16 June 2020, and the appellant was notified of both its placing and recall. One further consequence of the pandemic is the need to comply with social distancing requirements. This has resulted in a move away from face to face hearings such as an oral hearing to replacing them with presentation by way of written submissions and, only if needed, additional oral submissions by telephone conference call. Even if there had been no pandemic the UT administration would have been unable to schedule an alternative hearing at short notice. As for what the appellant wants to say at the hearing it seems to me that the UT has received all that he wishes the UT to be aware of and take into account. It is contained in the Note of Appeal which he sent to the UT administration with his email dated 13 March 2020. This document runs to 16 pages and contains 27 distinct paragraphs the majority of which have one or more subparagraphs. It appears to set out the appellant's position in great detail. I understand from that document and from its accompanying e-mail that it contains what he wants the hearing to take into account and a decision on the issues he raises can be achieved without an oral hearing which would be by telephone conference call and without impairing his ability to state his case. On that basis I do not see that there is any need to request the UT administration to arrange a future oral

hearing. For these reasons I answer yes to this third issue and proceed to deal with his application on its merits.

The fourth issue

Discussion

[16] In determining the merits of the appellant's application for a reconsideration of the refusal to grant him permission to appeal I have had regard to the Note of Appeal, the FtT decision, the FtT refusal, the UT decision, the text of the submissions that he made to the FtT that are contained in his Opening Statement and his Written Representations dated 26 July 2019, his oral submissions so far as recorded in the FtT decision and his productions so far as referred to in these documents. I have also been made aware of the succession of e-mails that the appellant has sent to the UT administration since he received the UT decision.

[17] The FtT made its decision after hearing submissions presented by the appellant in the course of which he provided the FtT with facts which were treated as his evidence: see the FtT decision passim. The respondent (hereinafter the factor) was neither present nor represented at the hearing which took place on 19 August 2019. The appellant's case was rooted in his dissatisfaction with ways that he said the factor had acted towards him and his property which he asserted amounted to a failure to comply with a large number of duties set out in the Code of Conduct for Property Factors (the Code) which has been effective since 1 October 2012. He described "[t]he nub of the complaint" that he has with the factor in paragraph 21 of his Written Representations as being:

> "that whilst structural damp is an unfortunate occurrence which will normally involve some level of disruption and expense, those inevitable consequences were made much worse by the failure on the part of the Property Factor (PF) to comply with its obligations under the duties as well as the Code."

This was essentially a restatement of how he had characterised his dissatisfaction with the factor in his Opening Statement to the FtT:

> "Arising from a series of management failings to deliver over several years, the ***judgement*** of the PF [the factor] to scope, cost and programme work for the repair, maintenance or renewal of the Common Parts towards completion has been brought into question and the Homeowner [the appellant] has lost confidence in the PF to such an extent that he considers that the PF has forfeited his authority to act by his own incompetence."

Having taken time for consideration the FtT issued the FtT decision nine days after the hearing. The decision was that the factor had failed to carry out its factor's duty by failing to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 (the 2011 Act) in that it did not comply with section 6.1 and 6.9 of the Code. The FtT did not uphold the appellant's claim that the factor had failed to comply with sections 1A, 1B, 2.1, 2.2, 2.4, 2.5, 3.3, 4.1, 4.2, 4.4, 4.9, 5.4, 5.6, 5.7, 6.3, 6.4 and 7.1 of the Code. The FtT made a Property Factor Enforcement Order (the PFEO) which included an order for payment to the appellant in the sum of £1,000 sterling to reflect what the FtT stated was the serious nature of the breaches of the Code and the duties of the factor.

[18] The appellant was dissatisfied with the FtT decision. The subsequent history of proceedings is that he applied to the FtT for permission to appeal both the decision anent the factor and the sum awarded. The FtT refused him leave to appeal in its FtT refusal. He then lodged a notice of appeal with the UT, which considered it and in the UT decision refused him permission to appeal. He then asked for a reconsideration of that refusal. His final statement of his position on the appeal is contained in the Note of Appeal.

The legislative ground of the appeal

[19] An appeal of the present kind is to be made (a) by a party to the case, (b) on a point of law only: section 46(2) of the Tribunals (Scotland) Act 2014 (the 2014 Act). The appellant satisfies (a). For (b) the fundamental legal requirement of the appellant's application is that it must identify, state and support a point or points of law that he asserts would justify the grant of leave to appeal. It is then for the UT to decide whether what he contends satisfies the requirement that there are arguable grounds for the proposed appeal: section 46(4). These statutory requirements are replicated in their essentials in rule 3 of the 2016 Regulations. It is concerned with the requirements of a notice of appeal against a decision of the FtT. Sub-paragraph (2) of the rule states that a party lodging a notice of appeal against such a decision must in it: (a) identify the decision of the FtT to which it relates; and (b) identify the alleged error or errors of law in the decision.

The legal test to apply to what is meant by a point of law

[20] What for present purposes is meant by a point of law? The 2014 Act does not say and neither do the 2016 Regulations. For help one has to turn in the first instance to decided cases. In the case of *Melon* v *Hector Powe Ltd*. 1981 S.L.T. 74 the Inner House of the Court of Session considered the phrase "a question of law" in the context of deciding whether the employment appeal tribunal had been right in law to reverse the decision of an industrial tribunal which arose out of claims by the three appellants that they had been dismissed by reason of redundancy as a result of a change in the ownership of the business by which they had been employed. In such a case an appeal from the employment appeal tribunal to the Court of Session could be made only upon a question of law. The Lord President, Lord Emslie, delivering the opinion of the court said of "the extent to which…this court is

entitled to interfere with a decision of first instance, and to substitute their own decision for that arrived at by the industrial tribunal" that:

> "The law is clear that where it cannot be shown that the tribunal of original jurisdiction has either misdirected itself in law, entertained the wrong issue, or proceeded upon a misapprehension or misconstruction of the evidence, or taken into account matters which were irrelevant to its decision, or has reached a decision so extravagant that no reasonable tribunal properly directing itself on the law could have arrived at, then its decision is not open to successful attack. It is of no consequence that the appellate tribunal or court would itself have reached a different conclusion on the evidence. If there is evidence to support the decision of the tribunal of first instance then in the absence of misdirection in law – which includes the tribunal's selection of the wrong question to answer – that is an end of the matter." (at page 76)

When the case went on further appeal to the House of Lords, Lord Fraser of Tullybelton, in delivering the decision of the House expressly endorsed the substance of what Lord Emslie had said (at page 79). Lord Emslie refined certain aspects of the same test in delivering the judgement of the First Division of the Inner House in the slightly later case of *Wordie Property Co. Ltd*. v *Secretary of State for Scotland* 1984 SLT 345 at 347-8. There he said of an error of law that it had to be a material error of law going to the root of the question for determination and added that a ground of appeal could be where the decision under appeal was one for which a factual basis was required and there was no factual basis to support it. It seems to me that for present purposes I can and should treat the phrases "a question of law" and "a point of law" as synonyms and therefore should adopt Lord Emslie's test as being in point for the present application and follow it as the authoritative test in its composite terms derived from both cases.

[21] What that means for the appellant is that he must identify, state and support a point or points of law that indicate that the FtT decision falls foul of one or more of the following six criteria:

(i) the FtT decision contains a material error of law going to the root of the question for determination;

(ii) the FtT entertained the wrong issue;

(iii) the FtT took into account irrelevant considerations;

(iv) the FtT failed to take into account relevant and material considerations which it ought to have taken into account;

(v) the FtT decision was made where there was no proper basis in fact to support it and it is one for which a factual basis is required; and

(vi) the FtT decision is so unreasonable that no reasonable tribunal, aware of the law and the whole facts and circumstances of the case before it and acting reasonably thereon could have reached or imposed it.

[22] In articulating these criteria Lord Emslie included a note of caution and qualification. It is not every failure to comply with any of the criteria that will amount to a point of law that can serve as a ground of appeal: it has to be of a nature that if sustained by the appeal court, in this case the UT, would alter the decision of the tribunal of first instance, in this case the FtT, and result in a different disposal of the matter covered by that ground of appeal. This requirement that there be a limitation on what can be a ground of appeal that raises a point of law is reinforced by the use of the word "arguable" in section 46(4) of the 2014 Act. Parliament has left to the courts to indicate what that word means for these purposes.

[23] Three Scottish cases have given guidance on the formulation of the appropriate test for arguability where a party is seeking leave to appeal. The judicial member of the UT mentioned them at paragraph 4 of the UT decision. All are decisions of the Inner House of the Court of Session: *Campbell* v *Dunoon & Cowall Housing Association 1992* SLT 1136; *Hoseini*

v *Secretary of State for the Home Department* 2005 SLT 550; and *Czerwinski* v *HM Advocate* 2015 SLT 610. The earlier two were concerned with an appeal from a tribunal decision to the Court of Session, *Campbell* being from the employment appeal tribunal and *Hoseini* from the immigration appeal tribunal while *Czerwinski* was an appeal from the sheriff in an extradition case. The decisions in *Campbell* and *Hoseini* reveal differing expressions of how the test should be expressed. *Campbell* proposed:

> "that applicants for leave to appeal must generally show something of the nature of probabilis causa in relation to a genuine point of law which is of some practical consequence."

Hoseini took account of that formulation of the test and also of the specific terms of the procedural rule that governed applications for permission to appeal to the immigration appeal tribunal (rule 18(4) of the Immigration and Asylum Appeals (Procedure) Rules 2003) which provided that:

> "The Tribunal may grant permission to appeal only if it is satisfied that – (a) the appeal would have a real prospect of success; or (b) there is some other compelling reason why the appeal should be heard." (at 552D)

The court concluded that (a) was:

> "consistent with what was said by the court in Campbell. We propose to approach the present case in the same way. We accordingly will consider whether this appeal would have a real prospect of success." (at 552 F)

It did not need to consider (b) on the facts of that appeal but implicitly if it had it would have done so. In *Czerwinski* the court had regard to the test as formulated in both *Campbell* and *Hoseini* and added to them the test applied in applications for leave to appeal against conviction in criminal cases, that the appeal could properly be put forward on the professional responsibility of counsel and the test which to the court "appears to exist, at least in part, in England and Wales of 'reasonably arguable' " (para [9] at 612F). Having reviewed all four formulations the court decided that it would:

> "proceed on the basis that what is being looked for is an 'arguable' ground of appeal as that term is understood in the criminal appeal sifting process" (para [10] at 612I).

That requires that a point of law be stateable and that means that it must have sufficient inherent merit to indicate that it has at the least a prima facie prospect of success. That requirement is most obviously seen in Lord Emslie's characterisation of the first and sixth criteria, namely, what is required to substantiate an error of law and a decision that rests on an exercise of discretion and is challenged as to its reasonableness but it attaches to all of the other four as well. It is worth emphasising that the word "reasonable" is used in this context in a highly specific way as a term of legal art and the formulation of the sixth criterion imposes an exacting standard on the person who seeks to challenge an exercise of judicial discretion as unreasonable.

The grounds of appeal in the Note of Appeal

[24] In his Note of Appeal the appellant insists in his appeal against the FtT determination. In paragraphs 5 to 23 inclusive he sets out by reference to sections of the Code what he considers to be his reasons why the FtT were wrong in declining to uphold his stated position and submissions made before them. He does that in respect of all the sections on which he relied before the FtT with the exception of section 4.4 (paragraph 14) and section 6.1 (paragraph 19) which do not form part of his appeal. The remaining paragraphs deal with a variety of matters: what he describes as "Points of Issue" (para 1), criticisms of the UT decision about the activities of the factor as property factor (paras 2 and 3) and his contention that the FtT failed to take account of his opening statement (para 4); criticism of the FtT decision on property factor duties (para 24); criticism of the way in which the FtT calculated the compensation that it awarded to him (para 25); the

asserted failure of the FtT to rule on aspects of the law of agency (para 26); and a list of reasons why he should be granted permission to appeal (para 27).

[25] In paragraph 27 of the Note of Appeal he states four propositions which he expresses and treats as being the points of law on which he wishes to rely. They are: (i) making a mistake about the meaning of the legislation; (ii) overlooking the important evidence; (iii) making a decision for which there is no evidence or not enough evidence; and (iv) unfairness in the way matters have proceeded. They echo the first, fourth, fifth and sixth of Lord Emslie's criteria. Support for all four he says is to be found in the preceding paragraphs 1 to 26 of the Note of Appeal because he states that he "has provided sufficient clarity and explanation together with relevant examples to support the points of law he [the appellant] outlined previously."

[26] In paragraph 1 he narrates what he calls "[t]he issues to be determined by the Courts". There are eight. All of them concern or involve a determination of matters of fact.

[27] I have not found it altogether easy to follow his lines of argument throughout the Note of Appeal because a number of paragraphs and subparagraphs express his position across more than one of the legal criteria that I must apply and also because he recurrently uses assertion and commentary and statements that he does not link to what he presented to the FtT at the hearing. This manner of presentation has caused me some difficulty in aligning what he states with the demands of those legal criteria in light of what the FtT had to work with.

The nature of the appeal process

[28] The process of considering afresh the appellant's request for permission to appeal the FtT decision has to be conducted by reference to the FtT decision and in light of the

proposed grounds of appeal contained in his Note of Appeal. This process involves working with the information presented to the FtT on the basis of which it reached the FtT decision. It can only look at whether the FtT made an error of law in applying the law and whether the UT member overlooked any such error of law. It forms no part of this process to take into account material and information which was not before the FtT but which was made available after the FtT decision was issued and that includes the appellant's occasional criticisms of the FtT refusal and the UT decision throughout his Note of Appeal. This process reinforces the essential fact that this is an appeals process and not a review process. This is of particular importance for the present appeal because the majority of the appellant's criticisms are founded in his disagreement with the conclusions that the FtT made on matters of fact.

What the FtT were given to work with

[29] The FtT record in the FtT decision that at the hearing on 19 August 2019 it had before it the appellant's Opening Statement (paragraph 8 of the FtT decision), his Written Representations (paragraph 4) which he had lodged in advance of the hearing together with supporting documents (paragraph 62) and his oral submissions (paragraph 8). It was on the basis of that body of information that it reached its decision. It was a substantial body of facts and material. While his Opening Statement is a single page document his Written Representations extend to 25 pages and 225 paragraphs and he had lodged many productions as well.

The characterisation of the content of the Note of Appeal

[30] Translating the appellant's wide-ranging criticisms in his Note of Appeal into what appears to me to be the most appropriate legal criterion for each and doing that in particular by reference to the sections of the Code has not been entirely easy for the reasons that I have already stated. What I have concluded is that they may usefully and properly be analysed as follows:

- The first criterion: paragraphs 2 (Decision), 24 (Property Factor Duties) and 26 (law of agency).
- The second criterion: paragraphs 13 (section 4.2) and 18 (section 5.7).
- The sixth criterion: paragraphs 3 (Background), 5 to 12 inclusive (sections 1A to 4.1 inclusive), 15 (section 4.9), 16 (section 5.4), 17 (Section 5.6), 22 (section 6.9), 23 (section 7.1) and 25 (compensation).

[31] That leaves paragraphs 1, 4, 20 and 21. The statement of facts set out in paragraph 1 do not provide any propositions in law and do not relate any of the facts mentioned to any particular section of the Code on which the appellant relies in his appeal. For their role in the appeal I have had to look to other paragraphs. Paragraph 4 is a narrative of facts which he describes as his opening statement and which contains an overview of his criticisms of the factor and certain comments about the UT decision. Paragraph 20 (section 6.3) is a statement that the appellant "had asked the property factor for tender information in general and for insurance in particular". Paragraph 21 (section 6.4) consists of a comment on what the appellant believes to be shortcomings of the factor as property factor. None of these four paragraphs contains a ground of appeal or raises a point of law.

[32] I turn now to analyse the FtT decision in light of the other paragraphs of the Note of Appeal by reference to the six legal criteria.

[33] In doing that I proceed on the basis, as stated by the FtT at paragraph 62 of the FtT decision, that it had "carefully considered all of the oral submissions made at the hearing by the Homeowner [the appellant] and the lengthy written submissions and documents lodged in support of his application". That must be held to include his opening statement, the comprehensive written representations he relied upon and the oral submissions all with their attendant documents he made under and in respect of the 2011 Act and in particular those made regarding any breach of duties that he considered fell within the scope of the definition given in section 17(5) and his submissions contained in what he said and wrote regarding the application of the law of agency to his case.

Criterion 1: Paragraphs 2, 24 and 26

[34] In paragraph 2 the appellant criticises the FtT decision because it "made no mention whatsoever of any breaches of duties under section 17(5) of the Property Factors (Scotland) Act 2011 or The Law of Agency". In paragraph 24 he repeats that and adds a failure to mention the factors failures in duty under section 17(1) of the 2011 Act and asserts that the FTT "made its own definition of the term '*duties*', express or implied, as being aligned to or sub servant of (sic) '*the Code*', contrary to the clear and distinct definition already provided in the 2011 Act". He then goes on to list at subparagraph f) what he describes as the "failings of the FtT in their duty to act includes but is not limited to fundamental issues" and lists 11. In paragraph 26 he states that the FtT "did not consider or rule upon the aspects of the Law of Agency referred to in the original submission of [the appellant] and refers to his written submissions dated 27 July 2019."

[35] Section 17 is concerned with the right of a homeowner to apply to the FtT for determination of certain alleged failings on the part of a property factor. Section 17(1) confers on a homeowner the legal right to apply to the FtT for determination of whether a

property factor has failed (a) to carry out the property factor's duties and (b) to ensure compliance with the property factor's code of conduct as required by section 14(5) which is described as the "section 14 duty". Section 17(5) is the subsection that defines "property factor's duties" for the purposes of sec 17. It defines those duties as meaning 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.

[36] The structure of section 17 indicates that subsection (5) does no more than provide a definition of the property factor's duties and any established failure in any of them would be expressed as a determination under section 17(1) indicating which section 14 duty or duties the factor had failed to carry out or comply with. That is what the FtT did. Its decision, stated at page one of the FtT decision, adopts the language of section 17(1) by saying that the factor had failed to carry out its property factor's duties and had failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with sections 6.1 and 6.9 of the Code. Those sections are concerned with duties which have the appearance of falling under section 14(1)(b). The FtT has expressed its determination in its decision in the form and with the content that section 17 enjoins. It takes account of the provisions of both that section and section 14 so far as relevant to its decision. Furthermore and in any event, the appellant's criticism in paragraph 2 does not identify the nature of the error in law that flows from the way in which the FtT dealt with the statutory provisions or indicate how it is that it is of such materiality as would entitle the UT to consider altering the FtT decision. The criticism of the appellant expressed in paragraphs 2 and 24 of the Note of Appeal on the use made by the FtT of these statutory provision raises no point of law.

[37] Separately, and in any event, what he narrates in subparagraphs d) and e) of paragraph 24 are comments about the UT decision and as such do not raise a matter that is part of this reconsideration of permission to appeal against the FtT decision. Moreover, subparagraphs 24 f) and g) are concerned with matters of fact. In so far as presented to the FtT, and the appellant does not say if they were all so presented, all of them fall within the discretion of the FtT on how to deal with them. What he says does not provide reasons why the FtT decision is unreasonable. None of these four subparagraphs raises a point of law.

[38] As for the criticism in paragraph 26 of the FtT's handling of the law of agency, the appellant's submission is that the FtT decision failed "to consider or rule upon the aspects of the Law of Agency referred to in the original submission of [the appellant]" that being his written submissions dated 27 July 2019. He does not indicate where within that lengthy and detailed document he raises the issue of agency. So far as I can see the only direct references to it are in its paragraphs 129 and 219. Paragraph 129 states that:

> "The PF [the factor] (Tom Cuthill) has Duties under the Law of Agency, which means in a client-facing role he cannot afford to intimidate, be abusive or frustrate the interests of any Homeowner."

Mr Cuthill is mentioned extensively throughout the written submissions and described at paragraph 139 as a "Common Repairs team manager" in the employment of the factor. Paragraph 219 states that the factor "is bound by the Law of Agency" and then lists six duties that he says are owed to him by the factor. He also lists them in paragraph 61. He then refers to problems that he experienced with "serious flooding within the Solum" of his property and says that Mr Cuthill left him "in the lurch" on that matter which he says is a "dereliction of duty".

[39] The appellant's criticism is not borne out by the FtT decision. Paragraph 129 is contained within the part of his written submissions that discusses section 2.2 of the Code

and paragraph 219 with section 6.9. The FtT dealt with his submissions in the FtT decision, for section 2.2 at paragraph 46 with the feature of intimidation also mentioned under section 4.9 at paragraph 53 and for section 6.9 at paragraph 59. The FtT also list five of the six averred duties at paragraph 28 indicating that it was well aware of them. For both sections 2.2 and 4.9 the FtT concluded that the factor was not in breach of the sections and for section 6.9 that the factor had by "apparently" leaving the appellant "to identify the problem with the leaking drain himself". Accordingly the FtT has both considered and ruled upon the submissions made to them. The FtT has done that as a matter of fact and it was entitled to take the view that it did on the facts presented to them. There is nothing to suggest that in exercising its discretion the FtT conclusion amounted to an error in law. The appellant's challenge in paragraph 26 is made as a matter of law but that is not its correct characterisation in the circumstances. The challenge raises no point of law.

Criterion 2: Paragraphs 13 and 18

[40] For both paragraphs 13, dealing with section 4.2 of the Code, and 18, dealing with section 5.7, the appellant disputes the FtT's account of the factual situation as presented at the hearing. For paragraph 13 the FtT state that the appellant "was no longer insisting in his complaint in respect of this section of the Code" and for paragraph 18 that he "confirmed that he had not asked the Factor for any tender documents". The appellant's response on paragraph 13 is that: "[t]he case relating to disputed debt was accepted for investigation by the chair" and on paragraph 18 that he "DID ask the factor for tender information."

[41] The FtT conclusion on both matters must be held to have been based upon the words of the appellant and that those words amounted to concessions on his part. Nothing said in either of his responses supports the conclusion that the FtT entertained the wrong issue,

namely that for paragraph 13 he was insisting in his complaint and for paragraph 18 that the FtT did "accept for investigation" submissions he made about disputed debts. Furthermore and in any event the appellant gives no indication that even if the FtT were mistaken in their statement of the facts that if the FtT had acted upon his indicated position for each that it would have led to any different result either in fact or in law. For the foregoing reasons I conclude that paragraphs 13 and 18 do not raise a point or points of law.

Criterion 6: Paragraphs 3, 5 to 12, 15 to 17, 22, 23 and 25

[42] Paragraphs 3, 5 to 12, 15 to 17, 22, 23 and 25 all express criticisms that essentially arise out of the FtT's interpretation of the facts that were presented to them at the hearing and the appellant's disagreement with how the FtT dealt with the various facts and circumstances in the FtT decision. I agree with the judicial member of the UT who gave the UT decision when he said at para 3:

> "It is important to emphasise that the process which the Upper Tribunal undertakes is not a re-hearing of the evidence. The First-tier Tribunal which heard the case is an expert tribunal. It made findings in fact which are contained within paragraphs 29 to 42 of its written decision. The First-tier Tribunal had the benefit of hearing the evidence and submissions and an appeal can only be considered on a point of law."

It is also worth recalling that the demands of this criterion are determined by the legal meaning of unreasonable and that meaning imposes an exacting standard on the appellant to identify, state and support a ground of appeal that could amount to a point of law.

<u>Paragraph 3 – Background</u>

[43] In this paragraph the appellant makes several assertions about what he sees as defects in the way that the FtT dealt with certain facts. The FtT state at paragraph 62 of the FtT decision that it "carefully considered all of the oral submissions made at the hearing by

the [appellant] and the lengthy written submissions and documents lodged in support of his application".

[44] Subparagraph a) says that the FtT failed to take account of what he says was misleading or false information given to him by the factor by letter dated 12 July 2012. On the assumption that the piece of information on which he founds was placed before the FtT it must be held to have considered it and taken such account of it as it thought right. The fact that it is not referred to expressly in its decision does not mean that it failed to take account of it. Absence of evidence is not necessarily evidence of absence. In any event he does not indicate what effect the FtT's position would have on the determination that it made.

[45] Subparagraph b) similarly raises a matter of fact about the question of the change of name of the factor. The FtT concluded that there had only been a change of name and not the Factor and that is implicit in the finding in fact stated at paragraph 32 of the FtT decision. The appellant made the FtT aware of the incorporation of the factor during March 2003 at paragraph 10 of his written submissions and they refer to that date in paragraph 43 of the FtT decision. On the assumption that he also told them at the hearing of the date when the factor became a registered property factor the FtT were entitled to make of these facts what they wished. Their conclusion is not one that is so unreasonable as to reach the legal standard of unreasonableness.

[46] The thread of subparagraph c) is difficult to follow but it seems to be raising a matter over which registration number to use for the factor. If so then that is for the FtT to be concerned with rather than the appellant and it raises no point of law that the appellant can advance.

[47] Subparagraph d) returns to the matter of "how and why any Factor came to be appointed for a wholly owned building". The FtT dealt with that in paragraph 43 of the FtT decision. The appellant gives no reason that could found a ground of appeal as to why that decision on the facts is so erroneous as to warrant being challenged on appeal and if successful with what effect on the FtT decision.

[48] Subparagraph e) is in a similar position to subparagraph d).

[49] None of the five subparagraphs raises a point of law.

Paragraph 5 - Section 1A

[50] Before the FtT the discussion on section 1A centred upon the appellant's criticism of the basis on which the respondent was authorised to act and continued to act as factor. The FtT gave its reasons for its decision on that matter at paragraph 43 of the FtT decision. The FtT concluded that the factor's authority to act as constituted by the Deed of Conditions (the Deed) which burdened the appellant's property continued until such time as a majority of the owners determine that it should not. It did so from its reading of the terms of the Deed. The appellant raises two matters of fact those being the date when he moved into the property and the date from which the respondents assumed the responsibility of factors.

[51] The FtT decision was based upon its interpretation of the terms of the Deed and in light of the facts before it. The appellant has not demonstrated that its decision on the facts on respect of either matter reaches the legal test of unreasonableness and furthermore has not indicated what the effect would be on the conclusion on authority of the factor to act and continue to act even if the facts were revisited to the extent that he seeks. His criticisms of the FtT decision on section 1A discloses no point of law.

Paragraph 6 - Section 1B

[52] The appellant's ground of criticism for section 1B is that the Written Statement of Services fails to provide explicit details of the services that the factor would provide. The FtT decided that the information supplied in that document was sufficient to satisfy the terms of the Code in respect of response times and the core services available. The appellant's response to that founds on the Statement and what he sees as its binding contractual nature. He then criticises the factor's response to a leak that affected his property and concludes of it that he "was left in the lurch". He then goes on to state that he had a "legitimate expectation" that he "would have received what he was entitled to receive, because the policy and procedure in the offer of services was operated to deliver such services (so [he] expects that it will continue to be operated in that way)."

[53] It is not clear from the FtT decision to what extent any of these arguments were presented to the FtT for their consideration. Proceeding on the basis that they were, what the appellant has submitted does not address the ground on which the FtT reached its decision, which was that on its analysis of the Statement it provided sufficient detail to satisfy the terms of the Code in respect of response times and the core services available. That decision involves the exercise of the discretion conferred on the FtT on a matter of fact. As the judicial member of the UT stated in the UT decision: "As an expert tribunal in the exercise of its discretion and having seen and read the written statement it considered no breach had taken place." I agree with that statement. The appellant's criticisms do not contain any reason why that exercise of discretion was so unreasonable as to reach the legal test of unreasonableness.

[54] The appellant refers to having a legitimate expectation arising out of the contractual provisions. There is no clear indication that this argument was made before the FtT. There

is nothing said to indicate that it was a feature that the law obliged its incorporation into the contract. I can find no support for it being said to be an implied condition of the contract in question. In any event, it is of questionable relevance in the context of the contract on which he founds, that being the Statement. As presented his criticisms of the FtT decision on section 1B discloses no point of law.

Paragraph 7 - Section 2.1

[55] Under section 2.1 the appellant revisits his complaint that the factor had provided misleading or false information and gives examples. The FtT expressed its decision at paragraph 45 of the FtT decision that on the facts placed before it at the hearing, being the examples which the appellant provided, did not amount to the provision of misleading or false information by the factor.

[56] That decision is a matter of fact reached in the exercise of the FtT's discretion. The appellant has not presented material that supports at least prima facie the proposition that the decision was so unreasonable as to reach the legal test for unreasonableness. His criticisms of the FtT decision on section 2.1 discloses no point of law.

Paragraph 8 – Section 2.2

[57] The appellant's criticism of the FtT decision is that it refused to uphold his allegations of conduct on the part of Mr Cuthill on behalf of the factor in correspondence and on the telephone that he describes as being "designed to intimidate, belittle and disrespect" him. This covers similar factual material and criticism about the conduct of Mr Cuthill towards him as he used in support of one aspect of his argument concerning the law of agency which is narrated at paragraph [38] above. The FtT concluded in

paragraph 46 of the FtT decision that the correspondence and telephone call were not abusive, intimidating or threatening having arrived at that decision after adjudging the facts that the appellant put before it as disclosed in paragraph 12 of the FtT decision.

[58] That decision is on a matter of fact and involves an exercise of discretion. The FtT were entitled to reach that decision in the exercise of it. In any event the appellant does not indicate what alteration there would be in the FtT decision on this section if his objection were sustained. What he does say in support of his criticism under this section does not disclose a point of law.

Paragraph 9 – section 2.4

[59] The appellant disputes the FtT decision at paragraph 47 that although the factor failed to convene a meeting of owners, its acknowledgement of that error at the stage 2 complaint meant that it would not be appropriate for the FtT to make a finding against the factor for that failure. His submission is twofold: that "there appeared to be a real possibility of bias to a fair-minded impartial observer" and that the factor has failed to meet what he describes as "four key conditions of proper and fair consultation".

[60] The FtT were deciding a matter of fact and in doing that exercised its discretion on how to interpret the facts under consideration. The decision is one that it was entitled to make. The appellant's first criticism is entirely unsupported by any facts that could justify it as a valid conclusion. The second appears to present facts that were not placed before the FtT at the hearing for there is no indication in the FtT decision at paragraph 13 that they were put before it at all let alone in those terms and I can find no such unequivocal statement of it in the material that he did put before it. Even if "the four key conditions"

were, what he says does not raise any material that could form a valid ground of appeal against the discretionary decision made by the FtT. This criticism raises no point of law.

Paragraph 10 – section 2.5

[61] The appellant disputes the FtT decision expressed in its paragraph 48 that the factor did not breach this section of the Code in respect of its response to the incidence of pools of water in the solum of the appellant's property. He submits that the FtT decision "was irrational because it did not take into account the circumstances and context of the case, which involves human rights."

[62] The FtT, in order to reach its decision, had regard to the facts and circumstances placed before it at the hearing as it narrates at paragraph 14 of the FtT decision. The FtT concluded that on the matters put before them they "did not find" that the factor was in breach of section 2.5 of the Code. That was a decision that it was entitled to reach in the exercise of its discretion. The facts on which the appellant seeks to ground his appeal do not support even prima facie the conclusion that the decision was so unreasonable as to reach the legal standard required for a challenge to it. This challenge does not raise a point of law.

Paragraph 11 – section 3.3

[63] The appellant disputes the FtT decision expressed in its paragraph 49 that the factor had not breached this section of the Code. He does so on the ground that "it was reasonable to provide him with detailed information on the costs of proposed works".

[64] This criticism is without foundation in the section. Its express terms make it clear that it is not concerned with proposed works but with works carried out. The obligation it places on the factor is to "provide to homeowners … a detailed financial breakdown of

charges made and a description of the activities and works carried out which are charged for." This challenge does not raise a point of law.

Paragraph 12 – section 4.1

[65] The appellant disputes the FtT's way of dealing with his concern over debt recovery procedures. The FtT said at paragraph 50 of the FtT decision that it was satisfied that the factor did have a written procedure for debt recovery and that it was irrelevant that the appellant was disputing an alleged debt which the factor had taken no steps to recover and found that the factor was not in breach of this section. The appellant states that in his opinion it "is mandatory for the debt recovery procedure to set out how the Factor will deal with disputed debt", that the factor is in breach of this requirement and that he "was the victim of improper payment requests for unnecessary repairs". The sum involved is recorded at paragraph 16 of the FtT decision as being £233.73. He goes on to assert that he had "a legitimate expectation" the factor would resolve these matters "in a timely manner".

[66] The FtT decision was made on the basis of the facts placed before it by the appellant. The decision to which they came was on matters of fact. In the course of making it the FtT stated, at paragraph 49, that "[t]he documents provided by [the appellant] and his oral evidence tended to support the position that the Factor did provide a detailed financial breakdown of the charges made and a description of the activities carried out." The matter of how the factor deals with disputed debts is also a matter of fact which was before the FtT for consideration. The appellant refers to having a legitimate expectation. There is no indication that he presented this argument before the FtT. In the basis that he did, section 4.1 of the Code sets out the measure of what the appellant is entitled to expect of the factor under it. The FtT had regard to it in reaching its decision. The decision of the FtT on

the facts presented for their consideration was one that it was entitled to make. The appellant's criticisms do not support even prima facie the FtT having exercised its discretion so unreasonably that it reaches the legal standard of unreasonableness. They accordingly do not disclose a point of law.

Paragraph 15 – section 4.9

[67] The appellant's criticism of the factor, so far as it relates to what was before the FtT, proceeds on a similar concern as he used for section 4.1 that of the duty on the factor to have a debt recovery procedure in place. It is that the factor was in breach of that requirement and had "misrepresented his authority or the correct legal position" and that the FtT had "attached wholly disproportional weight to the Factor *"not taking steps to recover the alleged debt since the [appellant] had applied to the FtF"*.

[68] This criticism raises a question of fact. The FtT decision on those facts is contained in paragraph 53 of the FtT decision. For the reason given in paragraph [57] above I am satisfied that the FtT dealt with that matter of fact and I apply that reasoning here. In particular the weight to place upon facts is a matter for the FtT. I am not persuaded that what the appellant adduces in support of his criticism amounts to a ground of law that the decision on the facts is unreasonable. The same conclusion applies to his assertion that the factor had misrepresented the correct legal position. I can find nothing in what he says to support this. His criticism of the FtT decision on this section of the Code does not raise a point of law.

Paragraph 16 – section 5.4

[69] The appellant's disagreement with the FtT decision on this section arises out of what the Deed of Conditions requires of the factor with regard to insurance of inter alia his property. The particular incident that has led him to found upon the requirement of the Deed is his discovery during June 2016 of the cause of a leak which had resulted in damage to his kitchen for which he made a subsequent insurance claim in respect of the damage caused. He submitted before the FtT that the Deed required the factor to have in place a comprehensive policy of insurance for the full reinstatement value: see paragraph 20. The FtT concluded at paragraph 54 that the factor was not in breach of the section because the appellant had

> "confused the requirement in the Deed of Conditions for a comprehensive insurance policy to cover the cost of the full reinstatement of the property with the need for the policy to cover the full cost of damage from water ingress".

The appellant in his Note of Appeal advances two reasons in support of a ground of appeal: (i) that "[w]here policy wording is open to interpretation. Likely to engender confusion, or is silent on the matter - the default position is the tenement management scheme" and refers to the scheme stating that "a list of risks which are to be insured against is to be prescribed by Scottish Ministers; and (ii) that he "had a legitimate expectation that the policy of insurance was fit for purpose and that expectation depends on a number of factors that includes adequate cover, consultation and reasonableness".

[70] The appellant challenges its interpretation of the Deed. There is no indication in paragraph 20 that he presented either reason to the FtT in the terms now advanced. Instead according to paragraph 14 of the FtT decision he made his submission in support of his contention that the factor required to have a comprehensive policy of insurance for the full reinstatement value by reference to a previous policy of insurance which "offered much

better cover and the Factor had not been interested in checking that the claim was dealt with properly." This submission is concerned with matters of fact and not the interpretation of the terms of the Deed of Conditions. I have to conclude that the reasons he now advances in the terms in which he does that were not before the FtT and therefore it had no opportunity to consider them. They cannot therefore constitute a ground of appeal.

[71] If I am wrong in that, then even if the FtT did have them before it, it is for the FtT to decide what to make of them. The question of what interpretation to place on a provision of the Deed of Conditions and also doing that under reference to the appellant's particular circumstances is a matter of fact for the FtT. On the basis that he did present similar reasons to the FtT he does not disclose any sufficient reason why its interpretation was not one that it was entitled to reach in the exercise of its discretion. The FtT was satisfied that the resolution of the appellant's submissions under this section of the Code lay in a matter of interpretation of its relevant terms. The reasons now advanced do not support even prima facie that the FtT interpretation is open to challenge. This challenge does not raise a point of law.

Paragraph 17 – section 5.6

[72] The appellant has disputed the FtT decision that his raising with the factor the question of why the factor had appointed the particular insurers (paragraph 21) did not disclose a breach of this section of the Code (paragraph 55). That decision was made on the ground that he "was unable to refer the FtT to any documentation or correspondence to show that he had requested information on how and why the insurers had been chosen". His response in his Note of Appeal refers to "terms implied in fact are ones which are *not*

expressly set out, but which the [appellant] intended to include in his emails [38] [40]" and that "[T]erms express or implied are admissible as evidence."

[73] The decision of the FtT on the facts presented for their consideration was one that it was entitled to make. I am not persuaded that these statements answer the ground on which the FtT made its decision in terms that indicate even prima facie that the decision was made in error on a question of fact. This challenge does not raise a point of law.

Paragraph 22 – section 6.9

[74] The FtT sustained the appellant's submissions in respect of this section but he wishes it to go beyond that and hold that a collateral warranty is appropriate. There is nothing in the FtT decision to say that this was a submission that he made before the FtT and for that reason alone this challenge has to be refused. Even if he had made that submission the decision on whether it was soundly based is a matter for the FtT. The appellant gives no indication in this paragraph of his Note of Appeal "why a collateral warranty is appropriate and necessary" but refers to paragraph xxii of the document headed "Permission to Appeal a Decision Application to Upper Tribunal" that accompanied his Form UTS-1. In that paragraph he asserts objections to the way in which he says he was treated by the FtT and concludes that it was unfair and unreasonable. What that paragraph does not do is provide any legal reason why "the factor should obtain a collateral warranty from his nominated contractor". This challenge does not raise a point of law.

Paragraph 23 – section 7.1

[75] This section concerns the factor's complaints procedure. The appellant submits that the FtT was wrong to reach the conclusion, expressed at paragraph 60, that the factor did

have a written complaints resolution procedure and that it was in satisfactory terms and therefore there was no breach of the section. He submits that the FtT "was aware the factor must pursue the contractor to remedy inadequate work including handling complaints against contractors in accordance with section 7.1".

[76] The FtT decision was made on the basis of the facts and material placed before it. Those are the facts and the material that the FtT had to work with. Its task involve dealing with a matter of fact on which it had to decide. The appellant says in his Note of Appeal at paragraph 23 a) that he "raised such matters at the hearing". I can find no reference to that in the FtT decision either at paragraph 27 or at paragraph 60. I note that the FtT refusal states that he did not. As the judicial member of the UT stated in his decision: "If a point is not made before the FTT it cannot found a basis for permission to appeal absent any explanation as to why it was not previously raised". I agree with that statement. What the appellant has said goes no further than a statement of fact: it does not amount to an explanation of the kind required. Absent that I must adhere to the FtT point of view and as a result conclude that the criticism of the FtT decision on this section raises no point of law.

Paragraph 25 – Compensation

[77] The appellant disputes both the way in which the FtT calculated the damages that it awarded and the sum awarded. He submits that the FtT failed to take account of a large miscellany of factors that he says they ought to have had regard to and "operate[d] in denial of the evidence". As a result it awarded a sum that was not "a proper level of compensation for substantial delay, inconvenience, expenses, nuisance and neglect suffered."

[78] The FtT decision awarded the sum that it did in the exercise of the discretion vested in the FtT and having taken into account what the appellant submitted at the hearing, as it

states at paragraph 62, and "the considerable amount of trouble, inconvenience and expense" to which he had been put, as stated at paragraph 63. That it gave thought to the process of assessing damages can be seen from what it says in paragraph 63 about the features of which it was aware and took into account. The appellant does not dispute that these were relevant features to take into account. His criticism appears to be that the FtT did not take into account the further matters that he mentions in subparagraphs e) to j) in the paragraph of his Note of Appeal in respect of this section.

[79] The purpose of an award of damages is to compensate an injured party for the loss or damage that he has suffered at the hands of the person who is held liable to make restitution. In theory the sum awarded should restore him to the position that he would have been in if the wrong that he has suffered and which caused him loss had not happened. The loss has to be measured in money however imperfectly that substitutional way of expressing that loss may on occasions seem to be. Any calculation of damages has to be grounded in the act or acts that resulted in the loss or damage, and assessed in respect of the consequences which the law allows to flow from that for the aggrieved party. That means that the task of assessing damages involves an exercise of discretion and often has to be undertaken by adopting a broad approach because finesse is beyond what can be expected or required in the particular circumstances. Given that, an appeal tribunal will interfere with an award of damages only if it is demonstrated that the award of the tribunal of first instance is so unreasonable that no reasonable tribunal in command of the facts and circumstances before it could have reached it if acting reasonably.

[80] The appellant's criticisms of the award do not supply material that supports a ground of appeal against the award. The award has to be held as being founded on the breaches that the FtT held established, namely under section 6.1 and 6.9. There is no

criticism of that basis of assessment. What is criticised is what they made of the damages that flow from those breaches. That is peculiarly a matter of fact for the FtT. The appellant does not give any reasons that could found a challenge on the basis that they erred so badly that their decision was so unreasonable as to reach the legal standard that could open the door to a ground of appeal. The challenge does not raise a point of law.

Conclusion

[81] For all the foregoing reasons I have concluded that the appellant has been unable to make out a point of law for any of his challenges to the FtT decision. That means that I have reached the same conclusion as the FtT in its FtT refusal and the UT in its UT decision but I have done that on the basis of the appellant's submissions contained in a document that was not before either, that being the appellant's Note of Appeal. I am satisfied that the judicial member of the UT did not overlook any error of law in the FtT decision. My conclusion necessarily means that I do not have to decide under section 46(4) of the 2014 Act whether his appeal is arguable because there is not a point of law on which to make that decision. It also necessarily means that I must answer the fourth issue with a no, determine that the appellant has been unable to identify a point of law, refuse to grant him permission to appeal to the UT and dismiss his application for permission to do that.