Upper Tribunal for Scotland

[2021] UT 9
UTS/AP/19/0007

DECISION ON THE APPELLANT'S APPLICATION FOR PERMISSION TO APPEAL TO THE UPPER TRIBUNAL No 2

in the case of

Emrys Jones, 30 Drumsmittal Road, North Kessock, Inverness, IV1 3JU

Appellant

and

Allied Souter & Jaffrey, Lyle House, Fairways Business Park, Castle Heather, Inverness, IV2 6AA

Respondent

FTT Case Reference FTS/HPC/PF/17/0108

Decision

The Upper Tribunal, not being satisfied that there are arguable grounds for appeal, refuses permission to appeal to the Upper Tribunal.

Reasons for Decision

Introduction

[1] This is an application by the appellant for the Upper Tribunal (hereinafter referred to as "UT") to give permission to appeal a decision on the First-tier Tribunal (hereinafter referred to as "FTT"), dated 18 December 2018. This is the appellant's second attempt to appeal to the UT. The first decision of the FTT was dated 30 May 2017 and considered the

appellant's application under section 17 of the Property Factors (Scotland) Act 2011 (hereinafter referred to as "the 2011 Act"). The appellant's first application to the FTT sought a determination that the factor had, first, failed to comply with section 1, 3, 4.4, 4.6 and 4.7 of the Code of Conduct for Property Factors (hereinafter referred to as "the code") and, second, failed to carry out the property factor's duties appropriately. The FTT determined that the factor had failed to comply with sections 1 and 4.4 of the code, proposed to make a Property Factor Enforcement Order (hereinafter referred to as a "PFEO") requiring the factor to remedy the non-compliance with those sections of the code and awarded the appellant £100 in respect of the strain and anxiety caused by the lack of compliance with those sections of the code.

[2] The appellant sought permission to appeal the FTT decision of 30 May 2017 on two points of law. The FTT refused him permission to appeal to the UT. However, the UT, by decision dated 13 November 2017, granted limited permission to appeal on the following grounds:

1. Whether the FTT applied the appropriate test in considering whether the factor provided clarity and transparency in some or all accounting procedures (which is a requirement of section 3 of the code); and
2. Whether the FTT erred in law by failing to make sufficient findings in fact and in failing to give adequate reasons for its decision that there was not any breach of the requirement in section 3 of the code to have clarity and transparency in some or all accounting procedures .

The UT, in the same decision, refused permission to appeal on the following point of law:

1. "Whether a homeowner is entitled to be informed about: (a) the number of homeowners in arrears to a factor; and (b) the amount of the arrears due by each homeowner."

The appellant accepted to both the FTT and UT that he had been provided with the above information. The FTT held, at para 19 of their decision of 30 May 2017, that there had been no breach of section 4.6 of the code because information in relation to debts had been made available to the appellant and that there had been no specific debt recovery problems with implications for the other homeowners. At para 12 of the UT decision of 13 November 2017, the UT refused permission to appeal on the above point on the basis that: (1) the approach taken by the FTT did not disclose any arguable error of law; and (2) given the information had already been provided to the appellant (which the appellant had expressly acknowledged) the point was academic.

[3] The UT subsequently heard the appeal on the limited grounds set out in para 2 above and, by decision of 11 June 2018: (1) allowed the appeal: (2) quashed the FTT decision of 30 May 2017 in relation to the question of whether there had been a breach of section 3 of the code; (3) remitted the case to the FTT to reconsider the question of whether there has been a breach of section 3 of the code; and (4) directed that the case be reconsidered by members of the FTT not involved in the FTT decision of 30 May 2017. The UT decision of 11 June 2018 is set out in written judgement running to 23 pages. That judgement sets out in full section 14 and 17 to 19 of the 2011 Act together with the relevant sections of the code, including, in particular, section 3 and 4 of the code. The reasons that the UT allowed the appeal were, in short: (1) that it was not clear what test the FTT had applied when considering whether the factor had complied with section 3 of the code; (2) that the proper construction of section 17(1) of the 2011 Act required the FTT to make an objective assessment of whether the factor

has failed to carry out their duties to a reasonable standard or failed to ensure compliance with the code; (3) that the findings in fact and reasons given by the FTT for concluding that the factor had not breached section 3 of the code were inadequate and had resulted in it not being possible to determine whether or not the FTT had made an error of law; and (4) that what the FTT ought to have done was: (i) made findings in fact (which need not have been lengthy) identifying the information that was provided to homeowners; (ii) identified that they were applying an objective test in considering whether the homeowners had been provided with clarity and transparency in all accounting procedures (which section 3 of the code requires); and (iii) set out their reasons, in sufficient detail, so as to leave the informed reader in no real or substantial doubt as to what their reasons were for finding that there was not a breach of section 3 of the code and the material considerations it had taken into account when reaching that decision.

[4] A differently constituted FTT subsequently dealt with the remit from the UT. At the same time that FTT also required to deal with further matters raised by the appellant. The first was a letter by the appellant to the FTT dated 6 December 2017 complaining that the PFEO issued by the FTT on 28 September 2017 (following upon their decision of 30 May 2017 - this PFEO was not affected by the subsequent UT decision to allow the appellant's appeal as regards section 3 of the code) had not been complied with by the factor. The second was a further application by the appellant, made in August 2018, complaining that the factor had failed to comply with sections 3.2, 3.3 and 4.7 of the code. The FTT issued their decision in respect of all these matters on 18 December 2018. It is this decision (all references will be to this decision unless otherwise stated) that the appellant seeks permission from the UT to appeal against. The appellant initially sought permission from

the FTT to appeal to the UT. However, the FTT, by decision dated 19 February 2019, refused to give the appellant permission to appeal. The appellant has therefore applied to the UT for permission to appeal to the UT on what the appellant contends are "several points of law", which he has attempted to identify under a number of headings (these are set out at para 13 below).

The relevant law

[5] Section 46 of the Tribunals (Scotland) Act 2014 (hereinafter referred to as "the 2014 Act") provides:

> "46 **Appeal from the Tribunal**
>
> (1) A decision of the First-tier Tribunal in any matter in a case before the Tribunal may be appealed to the Upper Tribunal.
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> (2) An appeal under this section is to be made-
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> (a) by a party in the case,
> (b) on a point of law only.
>
> (3) An appeal under this section requires the permission of-
>
> (a) the First-tier Tribunal, or
> (b) if the First-tier Tribunal refuses its permission, the Upper Tribunal.
>
> (4) Such permission may be given i n relation to an appeal under this section only if the First-tier Tribunal or (as the case may be) the Upper Tribunal is satisfied that there are arguable grounds for the appeal.
>
> (5) This section-
>
> (a) is subject to sections 43(4) and 55(2),
> (b) does not apply in relation to an excluded decision."

[6] Rule 3 of The Upper Tribunal for Scotland Rules of Procedure 2016 (hereinafter referred to as "the 2016 Rules") provides:

"(6) The Upper Tribunal may, where the First-tier Tribunal has refused permission to appeal-

(a) refuse permission to appeal;
(b) give permission to appeal; or
(c) give permission to appeal on limited grounds or subject to conditions;

and must send a notice of its decision to each party and any interested party including reasons for any refusal of permission or limitations or conditions on any grant of permission.

(7) Where the Upper Tribunal, without a hearing-

(a) refuses permission to appeal; or
(b) gives permission to appeal on limited grounds or subject to conditions,

the appellant may make a written application (within 14 days after the day of receipt of notice of the decision) to the Upper Tribunal for the decision to be reconsidered at a hearing.

(8) An application under paragraph (7) must be heard and decided by a member or members of the Upper Tribunal different from the member or members who refused permission without a hearing.

(9) Where the First-tier Tribunal sends a notice of permission or refusal of permission to appeal to a person who has sought permission to appeal, that person, if intending to appeal, must provide a notice of appeal to the Upper Tribunal within 30 days after the day of receipt by that person of the notice of permission or refusal of permission to appeal."

[7] Section 46 of the 2014 Act makes clear that the appellant can only appeal to the UT on a point of law (section 46(2)(b) of the 2011 Act) and that permission to appeal to the UT can only be granted if the UT is satisfied that there are arguable grounds for appeal. Rule 3(6) of the 2016 Rules makes clear that the UT is entitled to: refuse permission to appeal; give permission to appeal on all grounds sought; or give permission to appeal on limited grounds. The question therefore, at this stage, is whether the UT is satisfied that the purported points of law, identified by the appellant, set out one or more arguable grounds for appeal.

[8] The appellant, at this stage, in order to satisfy the UT that there are arguable grounds for appeal, requires, in my view, to point to a material error of law, which could result in the decision of the FTT being quashed in terms of section 47(1) of the 2014 Act. An error of law would include: (i) an error of general law, such as the content of the law applied; (ii) an error in the application of the law to the facts; (iii) making findings for which there is no evidence or which is inconsistent with the evidence and contradictory of it; and (iv) a fundamental error in approach to the case: for example, by asking the wrong question, or by taking account of manifestly irrelevant considerations, or by arriving at a decision that no reasonable tribunal could properly reach (see Advocate General for Scotland v Murray Group Holdings 2016 SC 201 at paras 42 to 43).

[9] The FTT in refusing permission to appeal to the UT correctly pointed out that the function of the permission requirement is to filter out cases that are frivolous, unnecessary or unmeritorious by scrutinising the grounds of dissatisfaction to see if they have sufficient merit (see Jacobs, Tribunal Practice and Procedure , 4th Edition at para 4.155 and the cases referred to in footnotes to that para).

[10] The decision to grant permission to appeal is discretionary. Permission may be refused if a mistake by the FTT did not affect the outcome. In R v Secretary of the State for Social Services ex p Connolly [1986] 1 WLR 421 the English Court of Appeal was concerned with a refusal of permission by a Commissioner . In that case Slade LJ stated at p432:

> "If an applicant presents... an arguable, even substantially arguable, point of law, it may still, in some circumstances, be open to the commissioner to refuse leave in the proper exercise of his discretion, for example, if he is satisfied that the point of law will have no effect on the final outcome of the case."

[11] In R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982, Brookes LJ made clear, at para 10, that:

> "Errors of law of which it can be said that they would have made no difference to the outcome do not matter ..."

Permission can also be refused if an application identifies a point of law but it has no merit or substance (R(I) 3161) or if further litigation would be disproportionate (Cook v Plummer [2008] 2 FLR 989 at para 13) or if the point has become academic (R (Begum) v Social Security Commissioners [2002] EWHC 401 (Admin) at para 22.

[12] In the very recent case of Wightman v Secretary of State for Exiting the European Union 2019 SC 111, the Inner House of the Court of Session made clear that a court should not be asked to determine hypothetical or academic questions; that is those that will have no practical effect (see Lord President (Carloway) at para 22). However, the Inner House of the Court of Session can consider an academic appeal but will only do so if there is a wider public interest to be served in giving authoritative guidance on an important point of law (Eurocopy Rentals Ltd v Tayside Health Board 1996 SC41O at 413; Sloan v B 1991 SC 412 at 431). The Upper Tribunal may also be able to consider an academic appeal on the same grounds.

The purported points of law raised by the appellant

[13] The appellant's application for permission to appeal to the UT was accompanied by a lengthy letter, dated 16 March 2019 (it is clear from the decision of the FTT in refusing permission to appeal that they were faced with a similar lengthy letter, dated 3 February 2019). The appellant's letter of 16 March 2019 ran to 13 pages and contained 86 paragraphs. It set out the numerous points raised by the appellant, with the appellant using the following headings:

1. Assignation of the respondent's factoring account;

2. Application FTS/HPC/PF/17/108 - compliance with section 3 of the code;

3. Compliance with the PFEO;

4. Application FTS/HPC/PF/18/2228 - compliance with section 3.2 of the code;

5. Application FTS/HPC/PF/18/2228 - compliance with section 4.7 of the code; and

6. Application FTS/HPC/PF/18/2228 - compliance with section 3.3 of the code.

[14] It was not always clear from what was written by the appellant , in relation to each heading, the specific point of law which he wished to raise.However, I have carefully considered what the appellant has set out under each heading and have sought to identify the points of law which he wished to put in issue. The FTT in refusing permission to appeal have used the above headings to focus their decision and it is therefore convenient for me to follow the approach of both the appellant and the FTT and utilise the above headings in this decision. Headings 1 and 4 are related and I will therefore deal with them together . However, before doing so, it is first important to identify that there has been a change of factor . The respondents in this case are Allied, Souter & Jaffray. They were the factors to the Drumsmittal Road Resident's Association (hereinafter referred to as "the Association") until the end of October 2017. Since 1 November 2017 Newton Property Management has been the factor. In the circumstances I will refer to the respondents as "ASJ" and Newton Property Management as "Newton". Newton is not a party in this case.

Heading 1 and 4 - Assignation of the respondent's factoring account; Application FTSIHPCIPF/18/2228 - compliance with section 3.2 of the code

[15] The points raised under these headings are focused in the appellant's letter of 16 March 2019 at paras 11 to 18 (heading 1) and 43 to 50 (heading 4). The appellant contends that the FIT erred in law by finding that ASJ's factoring contract with the Association had been assigned to Newton. The appellant makes clear, at para 16 and 45, of his letter that he did not dispute that there had been a 'change' of factor but disputed that there had been an assignation. The appellant claims that the distinction was an important one because it has affected the FTT's decision as regards his complaint in respect of a breach of section 3.2 of the code. Section 3.2 of the code provides:

> 3.2 Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor" .

The appellant contends the FTT have misinterpreted section 3.2 of the code. What section 3.2 of the code required, according to the appellant, was that any funds due to the homeowner must be returned to the homeowner when the property factor changed. Therefore ASJ should have returned all funds due to the homeowners when the factor changed to Newton. The FTT found that this was not necessary because there had been an assignation , however, the FTT were, according to the appellant, wrong about the assignation and that had then led them into error in their approach to section 3.2 of the code.

[16] The FTT's decision deals with the change of factor at paras 11 to 20. It does not appear that the FTT saw any contractual documents as regards Newton's purchase of ASJ's factoring division (who were managing 67 estates). They did, however, hear from Mr Smith

(a Director of ASJ) who confirmed that with effect from 1 November 2017 the factoring division of ASJ had been purchased by Newton. Mr Smith also stated that ASJ had sought to ensure that all of their obligations in relation to the managed estates would be taken over by Newton. The FTT also had sight of a letter from Newton to the appellant, dated 20 November 2017, which indicated that the "factoring book of Allied, Souter & Jaffray" had been purchased by Newton. The FTT then, at para 20, felt able to find that the obligations of ASJ in respect of the development at Drumsmittal Road, had, with effect from 1 November 2017, been transferred to Newton. The FTT, at para 68 to 75, then considered the appellant's complaint as regards the alleged breach of section 3.2 of the code. The FTT at para 71 stated:

> "71. Essentially, the issue here is whether 3.2 applies in a case where the obligations of the factor are assigned to another factor, which takes up where the other factor left off. There was no "final bill" issued by Allied Souter & Jaffray, and therefore no "point of settlement" for that bill. The funds held in credit by Allied Souter & Jaffray were not retained by them ; they were transferred to Newton."

[17] The FTT then went on to hold at para 74 that:

> "... where there is an assignation by one factor to another, with the consequent transfer of funds held on behalf of the homeowners (as in this case), then in the view of the Tribunal there is no "final bill", and therefore no requirement to account to homeowners in the manner envisaged by section 3.2. It agrees ... that such an accounting would have the effect of requiring further time and trouble on the part of the outgoing and incoming factors, and the homeowners, which would be pointless. It would also not be necessary to meet the overriding objective of protecting the homeowners' funds."

The FTT when refusing permission to appeal noted at para 6 and 7 of that decision that even if there had not been an assignation (and there had been termination of ASJ's contract with the Association and a new contract entered into by the Association with Newton), their decision would have remained the same.

[18) In my view the FTT were entitled, on the evidence before them, to make the finding at para 20 of their decision and I consider that they have given clear reasons in relation to

their approach to their interpretation of section 3.2 of the code. The FTT decision is, as the appellant, points out, based on there being an assignation but the FTT have explained, when refusing permission to appeal, that they would have made the same decision even if a new contract had been entered into between Newton and the Association. Further, the appellant, whilst disputing that there was an assignation, clearly accepts that there was a change of factor on 1 November 2017. The appellant does not suggest that the funds held by ASJ (which amounted to £4,305.44 - see para 18 of the FTT decision) were not transferred to Newton in their entirety but rather considers that the exercise that the FTT considered would be pointless should have been conducted. Indeed at para 49 of his letter of 16 March 2019 the appellant stated:

> "My objective with regard to section 3.2 of the Code was not to dispute that funds had been handed over, nor was it to explain why such a transfer should prejudice homeowners. My objective was to demonstrate that AS&J's actions did not comply with the requirements of the Code."

In my view, whilst I do consider it to be arguable that section 3.2 does require the exercise, which the FTT considered would be pointless, to be done when there is a change of factor (whether by assignation or by way of termination of the old contract with the exiting factor and entering a new contract with a new factor), I am of the view that this point is now academic. It is now well over a year since the funds have been transferred to Newton in circumstances where there was no loss or inconvenience to the homeowners. ASJ no longer has any involvement with the Association. I would expect that Newton would have by now used the transferred funds in the course of their factoring duties. In my view, even if the appeal was successful it could only ever result in the FTT requiring a pointless paper exercise to be conducted which may cause considerable inconvenience to the other homeowners and I would doubt if any reasonable FTT, in such circumstances, would

exercise their discretion in terms of section 19(1)(b) of the 2011 Act and make a PFEO (section 19 of the 2011 Act is set out at para 33 below). In my view a successful appeal would not have any practical effect, would not affect the final outcome reached by the FTT in this case and I consider that it would also be disproportionate to litigate this point (in the absence of any other arguable grounds) any further.

[19] In the circumstances I am not satisfied that the following purported errors of law are arguable and I refuse to grant permission to appeal to the UT in respect of them:

(1) The FTT's purported error of law erred in law by finding that ASJ's factoring contract with the Association had been assigned to Newton; and

(2) The FTT's purported error of law in its interpretation of section 3.2 of the code resulting in it finding that there had been no breach of section 3.2 of the code.

Heading 2 - Application FTSIHPC/PF/17/108 - compliance with section 3 of the code

[20] This heading is in relation to the remit from the UT. The points raised under this heading are focused in the appellant's letter of 16 March 2019 at paras 19 to 36. The appellant contends that the FTT erred in law by: (1) failing to follow the decision of the UT; (2) failing to find that ASJ were in breach of section 3 of the code; and (3) finding that his complaint about the Certificate of Income and Expenditure (hereinafter referred to as "CIE") failing to include details about owners not paying their service charges fell within section 4.6 of the code. As regards the purported errors of law (1) and (2) the appellant contends that the information contained in the CIE for the period 1 November 2015 to 31 October 2016 was inadequate and did not meet the test set out in section 3 of the code of clarity and transparency in all accounting procedures. As regards the purported error of law (3) the

appellant contends that: (a) the number of homeowners in arrears to a factor; and (b) the amount of the arrears due by each homeowner, are matters that should have been included in the CIE in order for it to comply with section 3 of the code. As set out at para 2 above, the UT refused the appellant permission to appeal on a very similar point to purported error of law (3) because, amongst other things, the appellant had already been provided with that information. The appellant now contends that that information should be contained within the CIE in order for it to comply with section 3 of the code.

[21] The FTT decision deals with this heading at paras 26 to 51. The FTT begin by acknowledging the UT decision, and, in particular highlight para 23 of that decision, which sets out how the UT considered the FTT ought to have approached the consideration of whether or not there was a breach of section 3 (see para 3 above). The FTT then identified that a CIE was issued to each homeowner annually. At para 29 the FTT correctly identified that they had to consider whether the information contained within the CIE for the period 1 November 2015 to 31 October 2016 met the objective test of "clarity and transparency in all accounting procedures", set out in section 3 of the code and the requirements in section 3.3 of the code. Section 3.3 of the code provides:

> "You must provide homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance."

The FTT, who had the benefit of the CIE for the period 1 November 2015 to 31 October 2016 before them, then set out how the annual charge was calculated and identified what was included in the CIE in respect of both income and expenditure. The FTT made clear, at para

36, that they gave the appellant an opportunity to set out why the CIE did not meet the requirements of section 3 of the code and also had regard to the arguments the appellant had presented to the UT previously.

[22] The FTT summarised the appellant's arguments at para 37 and then between paras 38 and 51 carefully explained why they did not consider them to be well founded. At para 40 the FTT explained that they considered the CIE to be clear and transparent and that it provided homeowners, in accordance with section 3.3 of the code, with both "a detailed financial breakdown of the charges made" and "a description of the activities and works carried out which are charged for". At para 42 to 49 the FTT gave a detailed explanation as regards why the CIE did not need to contain details about homeowners not paying their service charges. This was because section 4.6 of the code placed a specific requirement on a factor to keep homeowners informed of any debt recovery problems of other homeowners which could have implications on them [my emphasis] (the FTT noted for sake of completeness at para 47 to 50 that, in any event, there were not in fact any debt recovery problems in respect of homeowners which were having implications on the other homeowners). The FTT also made clear at para 45 and 46, under reference to the opening para of section 3 of the code, that details about homeowners not paying their service charges would need to be included in the CIE if it had an impact on: (i) the charges the homeowners were paying for; and (ii) how those charges were calculated. However, there was no such impact in the present case. In my view the FTT have approached the question of consideration of whether there has been a breach of section 3 of the code in accordance with the UT decision. They have set out cogent and full reasons for finding that the CIE for the period 1 November 2015 to 31 October 2016 complied with section 3 of the code and why

section 4.6 of the code applied in respect of owners not paying their service charges (it is also important to note that the FTT decision of 30 May 2017, at para 19, found that ASJ had not breached section 4.6 of the code because they had supplied the information in relation to bad debts that the appellant had sought). In the circumstances I am unable to detect any error of law in the approach of the FTT.

[23] In the circumstances I do not consider that it is arguable that the FTT has made an error of law in relation to points (1) to (3) set out in para 20 above. Further, even if it is assumed FTT erred in holding that section 3 of the code did not require the CIE for the period 1 November 2015 to 31 October 2016 to detail: (a) the number of homeowners in arrears to a factor; and (b) the amount of the arrears due by each homeowner, that purported error is, in my view, now academic because the appellant has already been supplied with that information by ASJ (and indeed Newton have also supplied him with that information for subsequent years) and therefore a successful appeal on point (3) would not have any practical effect. I am therefore not satisfied that points (1) to (3) amount to arguable grounds of appeal and I refuse permission to appeal to the UT in respect of them.

Heading 3 - Compliance with the PFEO

[24] The point raised under this heading is focused in the appellant's letter of 16 March 2019 at paras 37 to 42. The appellant contends that the FTT erred in deciding to revoke the PFEO made on 28 September 2018. The FTT have set out full reasons for doing so at paras 52 to 59. In short the PFEO required, amongst other things; ASJ, in terms of section 4.4 of the code, to draft and provide each homeowner and the Association with a clear statement of how service delivery and other charges will be affected if one or more homeowners did

not fulfil their obligations. At para 55 the FTT made clear that they considered that ASJ had not complied with this requirement. However, the FTT went on to explain that they considered it would be pointless insisting on ASJ to comply with this requirement given that they were no longer the factor for the Association and decided to revoke it on the basis it was no longer necessary.

[25] Section 21(1) of the 2011 Act provides that:

> "(1) Where the First-tier Tribunal has made a property factor enforcement order it may, at any time -
>
> (a) [...]
> (b) where it considers that the action required by the order is no longer necessary, revoke it"

The FTT have given clear reasons why they considered that the PFEO was no longer necessary and section 21(1)(b) of the 2011 Act entitled them to revoke it.

[26] In the circumstances I do not consider that it is arguable that the FTT have made an error of law in relation to exercising their discretion to revoke the PFEO made on 28 September 2017. I am therefore not satisfied that this point amounts to arguable grounds of appeal and I refuse permission to appeal to the UT in respect of it.

Heading 5 - Application FTSIHPCIPF/18/2228 - compliance with section 4.7 of the code

[27] The appellant's position in respect of this heading is set out in paras 51 to 64 of his letter of 16 March 2019; however, it is very difficult to ascertain what point of law the appellant wished to raise. At para 61 of his said letter the appellant stated:

> "The FTT has therefore made errors in both its findings and in law concerning Section 4.7 of the Code. Its findings in paragraph 61 were that, 'There is no evidence that the Factors, or Newton, have ever sought payment from the remaining homeowners in respect of unpaid charges of homeowners in arrears'. That is not the requirement of the Code. The requirement of the Code is that the factor must 'have

> taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs.' All homeowners were liable for such costs and the homeowners' account was charged by AS&J. Despite that, AS&J failed to disclose the debt in their accounts and failed to demonstrate what steps they had taken to recover the charges".

The appellant's point, although it is far from clear, seems to be that the CIE for the period 1 November 2015 to 31 October 2016 identified that the homeowners had been charged £369.79 in respect of debt recovery but ASJ had failed to demonstrate what steps they had taken to recover the unpaid charges, which resulted in ASJ breaching section 4.7 of the code.

[28] Section 4.7 of the code provides:

> "4.7 You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs."

Therefore what section 4.7 requires is for the factor to be able to demonstrate he had taken reasonable steps to recover unpaid charges from a homeowner who has not paid their share before charging the remaining homeowners for those unpaid charges.

[29] The FTT, at para 61, made clear that there was no evidence that ASJ or Newton had ever sought payment from the remaining homeowners in respect of unpaid charges of homeowners in arrears and concluded that section 4.7 of the code did not apply. In my view, it is not arguable that the FTT have made an error of law in their approach to section 4.7 of the code. Section 4.7 is concerned with unpaid charges of a homeowner and not costs incurred in respect of steps taken to recover unpaid charges. Indeed, in order to comply with the requirement to take reasonable steps to recover unpaid charges from a homeowner who has not paid their share one would expect the factor to incur some cost in doing so. In the present case neither ASJ or Newton have sought payment from the remaining

homeowners in respect of unpaid charges of homeowners in arrears and therefore it was necessary for the factor to be able to demonstrate that they had taken reasonable steps to recover the unpaid charges (although the factor would need to be in position to do so if they did subsequently charge other homeowners in respect of unpaid charges of homeowners in arrears). In any event the CIE for the period 1 November 2015 to 31 October 2016 details expenditure of £369 .79 in respect of debt recovery and, as the FTT pointed out at para 50, it would have been open to the appellant, in terms of section 3.3 of the code to make a reasonable request for "supporting documentation and invoices or other appropriate documentation for inspection or copying" to satisfy himself as regards the steps taken by the factor to recover debt. However, the FTT made clear, at para 50, that the appellant did not make such a request.

[30] In the circumstances I do not consider that it is arguable that the FTT have made an error of law in relation to their approach to section 4.7 of the code. I am therefore not satisfied that this point amounts to arguable grounds of appeal and I refuse permission to appeal to the UT in respect of it.

Heading 6 - Application FTS/HPCIPF/1812228 - compliance with section 3.3 of the code

[31] The point raised under this heading is focused in the appellant's letter of 16 March 2019 at paras 65 to 71. The appellant contends that the FTT have made an error of law in finding that the homeowner has no right to challenge the factor's figures, which are open-ended, unaudited and do not balance. This error relates to the CIE for period 1 November 2016 to 31 October 2017 (this ClE was prepared by ASJ for the period up to the date they ceased to be factor). At para 66 the FTT have found that there was a breach of section 3.3 of

the code due to the failure of ASJ to provide each homeowner with that CIE (that CIE was only provided to the appellant at the AGM). However, the FTT concluded that the CIE for the period 1 November 2016 to 31 October 2017 contained the same information as the previous CIE (namely the CIE for the period 1 November 2015 to 31 October 2016) and therefore , standing their decision as regards the content of that previous CIE, provided sufficient detail to comply with section 3 of the code. The FTT then concluded, in their discretion, that it was not necessary or appropriate to make a PFEO in respect of the breach of section 3.3 of the code.

[32] There is no suggestion that the appellant contended before the FTT that they should not accept the figures detailed in the CIE for the period to 31 October 2017 , but in any event, the FTT were entitled to do so.

[33] Section 19(1) of the 2011 Act provides:

> "(1) The First-tier Tribunal must, in relation to a homeowner's application referred to it under section 18(1)(a) decide -
>
> (a) whether the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, and
>
> (b) if so, whether to make a property factor enforcement order."

Section 19(1)(b) of the 2011 Act therefore makes clear that the FTT have a discretion whether to make a PFEO. The FTT in this case have explained at para 66 and 67 of their decision why they exercised their discretion not to make a PFEO. In short they concluded that as the appellant had already received the ClE for the period to 31 October 2017 at the AGM of the Association there had been no prejudice to him and therefore it was not necessary to make a PFEO. In such circumstances I am unable to detect any error on the part of the FTT in the exercise of the discretion afforded to them in section 19(1)(b) of the 2011 Act.

[34] In the circumstances I do not consider it arguable that the FTT have made an error of law in relation to their approach to the CIE for the period 1 November 2016 to 31 October 2017 or in relation to their decision not to make a PFEO. I am therefore not satisfied that these points amount to arguable grounds of appeal and I refuse permission to appeal to the UT in respect of them.

Disposal

[35] I have set out above why I am not satisfied that the appellant has identified any arguable grounds for appeal. In all the circumstances I refuse permission to appeal to the UT.

Reconsideration

[36] The terms of Rule 3(7) of the 2016 Rules have been set out at para 6 above. Given that permission to appeal to the UT has been refused, the appellant, if unhappy with this decision, may, in terms of Rule 3(7) of the 2016 Rules, make a written application (within 14 days after the day of receipt of the notice of this decision) to the UT for the decision to be reconsidered at a hearing made up of a different member, or members, of the UT.

Christopher Dickson
Member of the Upper Tribunal for Scotland

5 April 2019