Upper Tribunal for Scotland

[2022] UT 31
UTS/AP/20/0014

DECISION NOTICE OF SHERIFF IAIN FLEMING

On review and permission to appeal to the court of session of decisions

in the case of

SOUTH LANARKSHIRE COUNCIL, Legal and Administration Services, Council Offices, Almada Street, Hamilton, ML3 0AA
per Advocate, South Lanarkshire Council,
Advocates' Library, Parliament House, Edinburgh, EH1 1RF

Appellant

and

MR GERALD BOYD, 19 Tanzieknowe Road, Cambuslang, G72 8RD

Respondent

FTT Case Reference FTS/HPC/PF/19/4014

17 August 2021

[1] Following hearings which took place by Cisco Webex on 3 February and 23 April, both 2021, and written decisions of 20 April and 11 May both 2021, an application has been made by the appellant in terms of section 48 of the Tribunals (Scotland) Act 2014 (hereafter "the Act") and rules 30 to 32 of The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 (hereafter "the Rules) in terms of which the appellant moved the Upper Tribunal to:

(i) Review its decision of 11 May 2021 by setting it aside and re-deciding it, by deleting at paragraph 92 the date "2024" and substituting the following: "The later of either (a) 31 March 2024 or (b) the end of the second full financial year of the respondent and appellant (which is on 31 March annually) after the financial year in which these proceedings are finally determined (where "finally determined" means the date of the final determination of any appeal). "

And, in any event, either

(ii) Review five errors of law in the Upper Tribunal's decisions of 20 April and 11 May 2021 which the appellant submits that the decisions disclose; or

(iii) Permit the appellant to appeal to the Court of Session against the said decisions of 20 April and 11 May 2021, or so to appeal against any confirmed or adverse re-decided decision made in terms of the application for review.

[2] A hearing on the application took place by Cisco Webex on 9 July 2021. The appellant was represented by Mr Upton, Advocate and the respondent represented his own interest.

[3] Rule 30 (1) of the Rules provides that:

> "(1) The Upper Tribunal may at its own instance or on the application of a party review a decision (except an excluded decision) made by it if it considers it necessary in the interests of justice to do so and on review it may confirm, set aside, or set aside and redecide the decision."

[4] The scope of the First Tier Tribunal's power to review its own decisions was considered by the Court of Appeal in *Point West GR Ltd* v *Bassi* (2020) EWCA Civ 795; [2020] 1 WLR 4102. It was submitted by Mr Upton who appeared on behalf of the appellant that that case had equal application to the power of review by the Upper Tribunal. For the purposes of this application I am prepared to assume, although not decide, that the case of

Point West GR Ltd v *Bassi* may apply to not only First–tier Tribunal decisions as was clearly envisaged in the decision but also to a decision of the Upper Tribunal. In reaching that conclusion I am accepting the submission of Mr Upton which was neither opposed by the respondent nor amplified by Mr Upton.

[5] Reference was made by Mr Upton to paragraphs 46 to 48 of *Point West GR Ltd* v *Bassi* and the decision of Lewison L.J. -:

> "46. The exercise of the power to review a decision of the FTT was considered in *R (RB) v First-tier Tribunal (Review*) [2010] UKUT 160 (AAC) by a strong panel of the UT (Administrative Appeals Chamber) presided over by the then Senior President of Tribunals, Carnwath LJ. They held:
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> > i) the power of review on a point of law is intended, among other things, to provide an alternative remedy to an appeal**.** In a case where the appeal would be bound to succeed, a review will enable appropriate corrective action to be taken without delay;
> >
> > ii) It was not intended that the power of review should enable the FTT to usurp the UT's function of determining appeals on contentious points of law. Nor was intended to enable a later FTT judge or panel, or the original FTT judge or panel on a later occasion, to take a different view of the law from that previously reached, when both views are tenable. Both these considerations demonstrated that if a power of review is to be exercised to set aside the original decision because of perceived error of law, this should only be done in clear cases;
> >
> > iii) There were occasions when it would be desirable for a case to be reconsidered by the FTT so that further findings might be made even if it was likely to go to the UT eventually.
> >
> > iv) The key question was what, in all the circumstances of the case including the degree of delay that may arise from alternative courses of action, would best advance the overriding objective of dealing with the case fairly and justly.
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> 47. Thus the primary purpose of the power to review is to avoid an unnecessary appeal to the UT, where the FTT has made an obvious error of law. In this context an "error of law" would undoubtedly include a case in which the FTT had reached a factual conclusion which had no evidence to support it; or which was contrary to the only reasonable conclusion on the evidence. In this context a point of law is widely defined. In *Railtrack plc* v *Guinness* Ltd [2003] EWCA Civ 188, [2003] 1 EGLR 124 at [51] Carnwath LJ said:

> 'This case is no more than an illustration of the point that issues of "law" in this context are not narrowly understood. The Court can correct "all kinds of error of law, including errors which might otherwise be the subject of judicial review proceedings. Thus, for example, a material breach of the rules of natural justice will be treated as an error of law. Furthermore, judicial review (and therefore an appeal on law) may in appropriate cases be available where the decision is reached "upon an incorrect basis of fact", due to misunderstanding or ignorance .. A failure of reasoning may not in itself establish an error of law, but it may "indicate that the tribunal had never properly considered the matter…and that the proper thought processes have not been gone through.'

48. But as the UT held in *Vital Nut Co Ltd* v *HMRC* [2017] UKUT 0192 (TCC), a review is not an occasion on which the FTT can reconsider the whole case. They said:

> 'Of course, the fact that the 2007 Act and FTT Rules say nothing about the substance of a review of a decision once the 'gateway' requirements are met does not mean that the FTT can - through the review - re-write its original decision in an unfettered way. In *JS* v *Secretary of State for Work and Pensions* [2013] UKUT 100 (AAC), the Upper Tribunal made this clear. The Upper Tribunal conducted a thorough review of the relevant authorities, which we adopt and do not repeat.
>
> We consider the position, as regards the FTT, to be as follows: (a) The purpose of the review is clarificatory. The process is intended to give the FTT a second chance to provide adequate reasons for its decision without the inconvenience that might be involved were the Upper Tribunal to allow a reasons challenge and then have to remit the case… (b) The FTT should avoid the temptation to advance arguments in defence of its decision and against the grounds of appeal. The FTT should not engage or appear to engage in advocacy rather than adjudication....
>
> In short, whilst it is perfectly permissible for the FTT to use the review process to clarify what has already been decided, the FTT should refrain from seeking to justify its decision on other, even better, grounds or from seeking to defend its decision in advance from an attack that is anticipated in an appeal'."

[6] In terms of the original decision of the Upper Tribunal the appellant has until 31 March 2024 to comply with the Property Factors Enforcement Order (hereafter "the PFEO"). Insofar as the submission to include the second limb of the timeframe (paragraph (i) (b)) of the application) within which the appellant requires to comply with the

PFEO is concerned, Mr Upton explained that the appellant's current financial year runs until 31 March 2022. The appellant's next financial year will run from 1 April 2022 until 31 March 2023. It is during that year that the necessary data will be captured. The data requires to be captured for a full financial year. The appellant will require to have in place the necessary systems at the start of the financial year. It is accepted that the appellant is presently addressing the practicalities of what is involved in the introduction of the necessary systems. It was submitted that this can only be put in place from 1 April 2022. The submission was made in order to deal with the "possibility that there may be a further appeal." From the appellant's perspective "one does not know whether there will be a further appeal" since much was dependent on the outcome of the application for review and the application for permission to appeal to the Court of Session. The current application was designed to protect the appellant's position. It was emphasised that the purpose of including the second limb is not an attempt by the appellant to unnecessarily extend the time frame for implementation of the decisions of both the First-tier Tribunal (hereafter "the FtT") and the Upper Tribunal. Work has already begun on the necessary procedures to implement the decisions.

[7] In answer to questions from the Upper Tribunal it was thought by Mr Upton that perhaps a period of nine months would elapse between the marking of an appeal and the issuing of a decision by the Inner House of the Court of Session.

[8] Mr Upton indicated that in response to "an anticipated question from the Upper Tribunal" as to "why the procedures to implement the PFEO could not currently be put into place?" that this would not be a sensible use of public money when the outcome is speculative. It is not a good way, it was submitted, for public money to be spent when one does not know the eventual outcome of the litigation.

[9] In response the respondent indicated that in his view the situation was straightforward. The PFEO was in place to provide a statement that the management fee is payable. The PFEO is in simple terms. Analysis of what it covers would disclose that it would cover direct and not shared costs.

[10] The Upper Tribunal pointed out to Mr Upton that the premise for the decision to exclude the second limb of the original submission was a position volunteered by Mr Upton on 11 May 2021, namely his statement that he "had no instructions to appeal the decision of 20 April 2021." On 11 May he appeared to confine his submissions to a request that the period for compliance with the PFEO by the appellant be extended to 31 March 2024. Upon being granted an extension to the period of time for enforcement of the PFEO to 31 March 2024 he indicated that his clients would be "pleased" with that decision. In light of that and by means of explanation the Upper Tribunal decided the case on the basis that the appellant had not provided instructions to appeal at that stage. The statement of Mr Upton to the Upper Tribunal on 11 May, albeit provided as a matter of courtesy, was unsolicited. That being the stared position of Mr Upton a view was taken by me that the alternative second limb of the submission relative to the timeframe for the PFEO to be implemented was not being insisted upon. I had interpreted Mr Upton's statement to be an indication that at that time he had no instructions to appeal the earlier Upper Tribunal decision. Mr Upton explained that he was simply seeking to convey to the Upper Tribunal on 11 May the position "at the moment", that is to say "at that time." His submission should not be construed as being indicative of a relinquishing of the right to appeal.

[11] It is of course the case that the appellant has now exercised its right to appeal. There are timeframes in place and it is not suggested that the applications for review or for permission to appeal are out of time. However, the situation with which the Upper Tribunal

was faced on 11 May 2021 was one in which the now appellant had volunteered that there were no instructions to appeal. That being the case the basis upon which the Upper Tribunal proceeded was that as articulated on the day by Mr Upton. In light of same, while it is recognised that the appellant has every right to instruct an appeal at a later period of the induciae, rather than at an earlier period, the Upper Tribunal requires to deal with the situation as presented to it. On the particular day, namely 11 May 2021, it was made clear that there were no instructions to appeal.

[12] Having said that I recognise that it would not be in the interests of justice for the Upper Tribunal to reach a decision based on an incomplete set of facts or on the basis of a misunderstanding. If the professional position that I understood Mr Upton to be conveying was misunderstood and if that then formed the basis of the decision taken by the Upper Tribunal it is clearly now incumbent on me to consider whether it is necessary in the interests of justice for that decision to be reviewed.

[13] I now consider that issue. I consider whether the appellant will be prejudiced in light of the timescale. Data capture by the appellant will not begin until April 2022. Mr Upton has indicated that in his view (as an experienced Court of Session practitioner) that any appeal to the Court of Session is likely to be dealt with within a period of 9 months. It would appear clear that the determination of any appeal will perhaps be within the current financial year of the appellant or certainly very early in the next financial year. The appellant has until 31 March 2024 to implement the PFEO. This is a significant period. The issue under consideration was first raised with the appellant by the respondent in February 2019. The FtT hearing took place on 28 February 2020. While I appreciate the point about the use of public funds and have taken it into account together with all of the other arguments presented by Mr Upton there also needs to be considered as being part of the

consideration of the interests of justice questions of certainty and finality. Were it the case that I was to allow the application for review of the Upper Tribunal decision there would be no finite date for implementation of the PFEO. The information provided by Mr Upton is such that any appeal to the Court of Session would be dealt with within a time frame such as would allow or very nearly allow the appellant to adhere to the PFEO.

[14] There is a further factor which I consider to be relevant. Further information was provided by Mr Upton in the course of the hearing on 9 July. This information was not before the Upper Tribunal at the earlier hearings on 3 February or on 11 May. It would appear that a total of four tower blocks only (including Rosebank Tower) are affected by deeds of conditions which are in the identical terms to the deed which is under consideration in the present case. While there may be similarly worded deeds of conditions affecting other tower blocks this case focusses upon the specific interpretation of the deed of conditions referable to Rosebank Tower. Only 19 of the 72 occupants of flats within Rosebank Tower own their properties and accordingly it is only to these 19 owner occupiers within Rosebank Tower that this decision applies. The remaining three tower blocks all contain mixed occupancy of council tenants and owner occupancy. I was not advised what the specific constitution of the remaining blocks of flats were insofar as the numbers who are owner occupiers and the numbers who are council tenants. If the numbers are similar to Rosebank Tower then less than 100 properties are affected.

[15] Originally the Upper Tribunal was faced with a submission quoting that the appellant provides factoring services to 2000 blocks of flats and to 8518 private owners. More recently figures of 1547 buildings being factored by the appellant which are of mixed tenancy and 6683 privately owned properties are factored by the appellant. It would appear, however, that while these figures are factually accurate, they are not relevant to this

case as only four tower blocks are affected by a deed of conditions in the terms under consideration. Other tower blocks may be affected by "similar" deeds it was submitted. By their very nature deeds of conditions may be in similar terms but the current issue is the specific interpretation of one deed and it appears that it applies only to four tower blocks of flats. It is also important to remember that the sum under consideration is at maximum of £28.15 per annum per flat. I do not consider that it is necessary and in the interests of justice that the second limb of the application should be granted. For reasons which are more fully amplified later in this decision the sums involved are assessed at a maximum amount of £28.15 per owner occupied household per annum. The matter has now been heard by the FtT and the Upper Tribunal. The appellant currently has until March 2024 to implement the PFEO. This is a period of more than five years after the issue was brought to its attention. It is necessary in the interests of justice that both parties are aware of the period within which the PFEO requires to be implemented having regard to the principle of finality and certainty. While there may have been a misunderstanding as to the appellant's position with regard to a proposed appeal, for the reasons given, I do not consider it necessary in the interests of justice to review the decision.

[16] Thereafter the appellant invites review of the substantive decisions of 20 April and 11 May 2021. It is submitted that six (originally five) "clear and obvious" errors of law have been identified. [17] In the context of those powers of review, it is argued that it is material that the Upper Tribunal's Decisions of 20 April and 11 May disclose that it has made five ((later amended to six) clear and obvious errors of law. It is argued that it is necessary in the interests of justice that the decisions are reviewed so as to correct them. The arguments placed before the Upper Tribunal related to the adequacy of the fact finding of the FtT. Put shortly, the central finding-in-fact by the FtT was at paragraphs 5(l), 16, 17 and 19 of its

decision which adopted the evidence of a witness Mr David Keane, who was the appellant's factoring manager. Mr Keane gave evidence that the management (or factoring) fee comprised of two elements: shared costs and direct costs. The respondent's complaint was that the direct costs should be divided equally between all 72 dwellings. That had already been done for the shared costs and therefore only the direct costs are at issue. Within Mr. Keane's evidence about the direct costs (narrated by the FtT at paragraph 16 of its decision) the witness gave examples of what which services were encapsulated under the heading of shared costs. It was argued by the appellant that a critical finding in fact was missing namely one that encompassed "for whose benefit the various services were provided". The conclusion I reached having heard Mr Upton's submissions on the point before the Upper Tribunal is that the FtT's fact finding was sufficient.

[17] What is in the grounds for review is essentially a repetition of the issues which were brought to the Upper Tribunal's attention when the case was first argued, together with written and oral argument as to why the appellant submits that the Upper Tribunal erred in law in coming to its decision. I intend no disservice to the argument of the appellant if I characterise the submissions made as essentially being a submission that critical findings in fact are missing from the decision of the FtT. I have already issued a decision in relation to this point. I did not accept Mr Upton's submissions. I do not accept that there has been a clear and obvious error in law such as was envisaged in *Point West GR Ltd* v *Bassi* which would allow the Upper Tribunal to exercise its power of review. Indeed, it appears to me that the following passage of the case of *Point West GR* v *Bassi* at paragraph 46 applies.

> It was not intended that the power of review should enable the FTT to usurp the UT's function of determining appeals on contentious points of law. Nor was intended to enable a later FTT judge or panel, or the original FTT judge or panel on a

later occasion, to take a different view of the law from that previously reached, when both views are tenable.

[18] The scope of the Upper Tribunal's powers of review is not in dispute. The purpose of these powers is to give, in this case the Upper Tribunal, a second opportunity to provide what are deemed to be adequate reasons for a decision without the inconvenience that might be involved were the Upper Tribunal to allow a reasons challenge and then have to remit the case to the Inner House of the Court of Session. The review process should only be invoked in clear cases. I do not consider that this is a case that demonstrates a clear error of law, as opposed to a differing view on the adequacy of the fact finding of the FtT.

[19] I am conscious that it is no part of my function in these proceedings to seek to advance arguments in defence of the original decision and against the grounds of appeal. The decision of 20th April which has already been issued dealt with the various points which were raised by Mr Upton.

[20] I do not accept that there has been a clear error in law. Nothing which Mr Upton advocated either in written form or orally on 9 July 2021 has altered that position. I do not consider that it is necessary in the interests of justice for the original decisions of the Upper Tribunal to be reviewed. Mr Upton accepted that in so far as the question of review is concerned, the term important point of principle or practice was very much included within the term interests of justice. I accept that. In considering whether it is necessary in the interests of justice for the motion of the appellant to be granted I have considered whether an important point of principle or practice has been raised. For reasons which are referred to later in this opinion I do not consider that such an issue is present. Essentially the purpose of the review is directed to circumstances in which there has been a clear and obvious legal error. Such a legal error has not in my view occurred in this case. Simply

because Mr Upton disagrees with the decisions of the FtT and the Upper Tribunal does not allow the matter to be revisited by means of review. A review is not an opportunity for the same or similar arguments to be presented again in the hope of achieving a different result. Accordingly the application is refused. It is not necessary in the interests of justice.

[21] In the event that his application for review was unsuccessful Mr Upton sought permission to appeal to the Court of Session against the decisions of 20 April and 11 May 2021. He referred to the six arguable grounds of appeal which are contained within his written document.

[22] In order to succeed it is necessary that the appellant meet the terms of section 48 of the Act which provides as follows:

> s. 48 Appeal from the Tribunal
> "(1) A decision of the Upper Tribunal in any matter in a case before the Tribunal may be appealed to the Court of Session.
>
> (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 Upper Tribunal, or
> (b) if the Upper Tribunal refuses its permission, the Court of Session.
>
> (4) Such permission may be given in relation to an appeal under this section only if the Upper Tribunal or (as the case may be) the Court of Session is satisfied that there are arguable grounds for the appeal.

The right of appeal to the Court of Session is characterised by section 50 of the 2014 Act as a "second appeal" in terms of section 50(7) . That section provides, so far as relevant to the application, that:

> 50 Procedure on second appeal
>
> (1) Section 48(4) is subject to subsections (3) and (4) as regards a second appeal.

(2) Section 49 is subject to subsections (5) and (6) as regards a second appeal.

(3) For the purpose of subsection (1), the Upper Tribunal or (as the case may be) the Court of Session may not give its permission to the making of a second appeal unless also satisfied that subsection (4) applies.

(4) This subsection applies where, in relation to the matter in question—

(a) a second appeal would raise an important point of principle or practice, or
(b) there is some other compelling reason for allowing a second appeal to proceed.

(5) For the purpose of subsection (2), subsections (2)(b) and (3)(a) of section 49 have effect in relation to a second appeal as if the references in them to the Upper Tribunal include (as alternatives) references to the First-tier Tribunal.

(6) Where, in exercising the choice arising by virtue of subsection (5) (and instead of re-making the decision in question), the Court of Session remits the case to the Upper Tribunal rather than the First-tier Tribunal—

(a) the Upper Tribunal, instead of reconsidering the case itself, may remit the case to the First-tier Tribunal,
(b) if the Upper Tribunal refuses its permission, the Court of Session.

(4) Such permission may be given in relation to an appeal under this section only if the Upper Tribunal or (as the case may be) the Court of Session is satisfied that there are arguable grounds for the appeal.

The rules give effect to these statutory provisions. Rule 32 sets out what an applicant must do when seeking permission to appeal. It provides:

(1) A party seeking permission to appeal must make a written application to the Upper Tribunal.

(2) An application under paragraph (1) must—

(a) identify the decision of the Upper Tribunal to which it relates;
(b) identify the alleged error or errors of law in the decision; and
(c) state in terms of section 50(4) of the 2014 Act what important point of principle or practice would be raised by a second appeal or what other compelling reason there is that shows the appeal should be allowed to proceed.

[23] Accordingly, for permission to appeal to the Court of Session to be granted the appellant requires to identify a point of law, to satisfy the Upper Tribunal that there are arguable grounds of appeal and to identify that the second appeal would raise an important point of principle or practice. Alternatively, if an important point of principle or practice is not identified the Upper Tribunal is required to consider if it is satisfied that there is some other compelling reason for allowing a second appeal to proceed. I am satisfied that a point of law, namely the adequacy of the findings in fact of the FtT has been identified. I then need to consider if there are arguable grounds of appeal. Nowhere in the statute or secondary legislation is the phrase "arguable grounds for the appeal" defined. Case law in other situations is of limited assistance. For example, in *Czerwinski* v *HM Advocate* 2015 SLT 610, the court was formulating the appropriate test for the grant of leave to appeal in an extradition case in the absence of statutory guidance. After reviewing several potential schemes or tests, it settled on adopting the test applicable to criminal appeals: "do the documents disclose arguable grounds of appeal", in terms of section 107 of the Criminal Procedure (Scotland) Act 1995. On that ground of appeal it said this:

> "Arguable in this context means that the appeal can properly be put forward on the professional responsibility of counsel.
>
> In *Wightman* v *Advocate General* 2018 SC 388 Lord President Carloway (at paragraph [9]) observed that arguability and statability were synonyms. That was said to be a lower threshold than "a real prospect of success", the test applicable in deciding whether to grant permission for an application to the supervisory jurisdiction to proceed, in terms of section 27D(3) of the Court of Session Act 1988, as amended, see [2] – [9].The threshold of arguability is therefore relatively low. An appellant does, however, require to set out the basis of a challenge from which can be formulated as a ground of appeal capable of being argued at a full hearing."

[24] I am satisfied that there exists in the present case a ground of appeal which is arguable, namely whether the fact finding of the FtT was adequate. The next issue therefore

is whether this appeal raises important points of principle and practice in terms of section 50 of the Act. The points raised on behalf of the appellant are as follows:

(i) Whether the FtT should make a PFEO without an adequate basis in its findings in fact, and what is such an adequate basis.

(ii) Whether in terms of the deed of conditions costs require to be shared between all proprietors equally, or the factor may lawfully decide to charge some of them only to certain proprietors. It was submitted that this is an important point of principle, and in any event an important point of practice because:

(a) Deeds of conditions in exactly the same terms apply to at least three other tower blocks within the area of Rosebank Tower. Further, within these other tower blocks there is "mixed tenure housing", i.e. private factored properties and council owned properties and consequently the same issue arises.

(b) Deeds of conditions or other title conditions "in similar terms" apply up to 1,547 buildings in the "appellant's area" in which there is mixed tenure housing and which contain a total of 6,683 privately owned factors properties. As such it is argued that the implications of the Upper Tribunal's decision require to be considered against the terms of all of these title conditions. Mr Upton indicated that more than one party had made enquiry about the implications of the decision.

(c) The same issue as is identified in paragraph (b) is "likely to be true nationwide throughout Scotland" by other local authorities who provide factoring services at buildings held "on mixed tenure" and in relation to title conditions in similar terms.

(d) In the event that the decision of the Upper Tribunal remains, this does not address a retrospective question about a liability for a determined or determinable amount of money. The decision applies in perpetuity, indefinitely, or for as long as Rosebank Tower or any other building in mixed tenure is governed by title conditions. As a consequence, it is said that these decisions determine liability for "unquantifiable sums over unquantifiable periods of time" while bearing to constrain any judgement or discretion of a factor acting under such title conditions to the effect of permanently denying the factor in perpetuity any right to decide to charge a cost arising in relation to the building to only one or some of the proprietors.

[25] Mr Upton amplified his written submissions by confirming that his clients take the PFEO seriously, they recognise that they are bound to act reasonably and he confirmed that the FtT order will be implemented. His clients have considerable concern because they considered that the fact finding in the original FtT is inadequate and it is a matter of such significance and importance that it will require a "fresh approach."

[26] Attention was drawn by Mr Upton to the fact that decisions of the Upper Tribunal are publically promulgated and any decision is bound to attract a wide readership. Three properties with identical conditions and mixed tenure housing had already been identified but other local authorities with similar deeds will require to address their own deeds of conditions to determine whether the same reasoning applies.

[27] Beyond the immediate decision the Upper Tribunal provides guidance to those who "work in the field." Mr Upton emphasised the point that this particular outcome results in unquantifiable sums of money being paid.

[28] In response the respondent indicated that in his view the problem is that the original deeds were drafted by Glasgow District Council and they were then transferred to South Lanarkshire Council and issues arose due to the format or laying out of the title deeds.

[29] Further, although reference had been made by Mr Upton previously to the maximum sum that could be achieved being £28.15 the respondent advised that he had been told originally by the appellant that the referable sum was £67.00. As far as the respondent is concerned, the simple question is why the appellant did not meet the costs. Reference was made to document R8 which was produced to the FtT.

[30] The Upper Tribunal reminded Mr Upton of his earlier submission before the Upper Tribunal presented on 3 February where he categorised the current litigation as follows; "a more trivial, sterile, time wasting piece of litigation is hard to imagine". This was in the context of a submission upon whether the appellant had an interest to sue, such was the limited sum involved. He had then submitted that the action was *de minimis* and said that the most by which the appellant could benefit was £28.15 annually. Mr Upton acknowledged that the submission was made but he did not depart from his current position, explaining that his earlier submission had been rejected.

[31] The Upper Tribunal refuses permission to appeal to the Court of Session. In terms of section 50(4) of the 2014 Act in relation to the matter in question it is necessary that the Upper Tribunal be satisfied that an important point of principle or practice would be raised by a second appeal or that there is some other compelling reason there is that the appeal should be allowed to proceed. No important point of principal or practice is raised.

[32] There is no other compelling reason to permit the appeal to proceed. Mr Upton's submissions were confined to what he submitted were important points of principle or

practice. He did not address the second leg of the test, namely whether there is some other compelling reason for allowing a second appeal to proceed.

[33] There are three sets of deeds of conditions which are in identical terms to those referable to Rosebank Tower. Estimates of the sum of money which is being considered range between £28.15 (the appellant) and £67.00 (the respondent) per property per annum. It was the position of the appellant at an earlier hearing that the sum of £28.15 per annum is an accurate statement of the liability. I prefer the quantification of the appellant to that of the respondent. It is the appellant who issues the invoices, who has access to an administrative resource and who has an overview of the situation. The submission of the appellant was that "the most which could be achieved by the appellant is £28.15" Accordingly the maximum benefit to the respondent would be the sum of £ 28.15 per annum. That is not the same as saying that figure is what he would achieve but is a statement of the maximum possible figure. It is a conspicuous volte face by the appellant to initially categorise an action as time wasting and trivial in seeking its dismissal and to later to seek to argue that an important point of principle or practice has been raised such as would justify the Upper Tribunal granting permission to appeal to the Court of Session.

[34] According to the written submission only one person has contacted the appellant to ask about the current proceedings. The identity or category of person (i.e. homeowner/ interested observer) was not provided and his, her or their particular interest was not explained. I accept that by the time of presentation of the oral argument at least one other person had been in touch with the appellant but again the nature of the enquiry or the capacity of the enquirer was not explained. I was not provided with information about why the enquiry was made. The reality would appear to be that while a figure referable to "up to a total of 6683 privately-owned, factored properties" is quoted within the written

submission for the appellant only the current tower block (Rosebank Tower) and three other tower blocks are affected by deeds of conditions in the precise terms of the deed which is under consideration. For reasons explained earlier and in the absence of specific figures being provided by the appellant as to occupancy levels or the constitution of the mixed tenure in terms of a distinction between council tenants and home owners I apply, for the purposes of illustration only, and as a rough guide, the figures relevant to Rosebank Tower. Within that tower block there are 72 occupants of whom 19 are owner occupiers. Applying these figures to the other three tower blocks, and applying a pragmatic and non-scientific approach, fewer than 100 properties in total would be affected by this decision. If the maximum benefit which could be obtained is £28.15 per annum per property then the maximum sum which is potentially being litigated over is £2815.00 per annum.

[35] With regard to the particular points raised by Mr Upton in support of the application I consider that this case is fact specific. The appellant's factoring manager testified before the FtT. There was a dispute at one point as to whether that witness's evidence was recorded properly. Both parties in this case sought to add additional evidence at the Upper Tribunal hearing. The appellant sought to introduce a new argument at the hearing before the Upper Tribunal. The findings in fact of the FtT are referable to this case only and are made on the basis of the specific evidence led and the specific legal submissions made before the FtT. The precise terms of the deed of conditions under consideration are relevant to only three other tower blocks. It may indeed be the case, given that the contention of the appellant is that the outcome of this appeal will result in financial disadvantage to the respondent, that no other proprietor in the tower block chooses to implement these rights.

[36] Simply because it is the case that "deeds of conditions or other title conditions" in similar terms apply to other buildings does not mean that the deeds of conditions are in the

same precise terms. No submissions were made in relation to the nature or extent of the similarity. Examples of the wording of other deeds of conditions which were claimed to be "similar" were not provided. By their very nature deeds of conditions may bear striking similarities, but the precise terms of each deed will be a matter of interpretation. The current case deals with Rosebank Tower and three other tower blocks which have precisely the same deed of conditions applicable. The existence of similarly worded deeds of conditions is not relevant. The decisions in this case relate to the precise terms of the particular deed of conditions.

[37] The question of whether in terms of the deed of conditions costs require to be shared between all proprietors equally, or alternatively a factor may lawfully decide to charge some proprietors only, is claimed to be an important point of principle or practice. That issue is dependent on the particular wording of the deed of conditions. It may be a point of relevance and importance to the appellant but it cannot be described as an important point of principle or practice. Any decision limited to the interpretation of the current deed of conditions will not be relevant to deeds which are differently worded.

[38] For an important point of principle or practice to be established it must be one that extends beyond the specific and limited interest of the appellant. For Mr Upton to argue that similar deeds of conditions or title conditions apply nationwide throughout Scotland and indeed someone in another jurisdiction may see the outcome of this decision and thereafter find it necessary to apply themselves to the wording of their own deeds of conditions is highly speculative, not vouched by any evidence of such practice and does not render this case as one in which the Upper Tribunal is satisfied that an important point of principle or practice arises.

[39] The fact that decisions of the Upper Tribunal are publically available was argued as a reason for the case demonstrating an important point of principle or practice. I disagree. This case is fact specific and is only applicable to deeds of conditions which are in identical terms to that under consideration. Since the deed applies to only four tower blocks it has no significance "nationwide." It was not contended that the specific terms of the current deed apply to any other properties beyond the four tower blocks identified. If disputes as to title conditions arise in the future they can be argued before the FtT. The specific interpretation of the current deed of conditions and indeed the adequacy of the fact finding of the FtT in the present case will be of no relevance to a differently worded deed. If others happen to read the Upper Tribunal decision they will recognise that its legal significance is limited because it is predicated on the evidence and submissions placed before the FtT and is relevant only to deeds of conditions drafted in identical terms.

[40] Finally, it was argued that the question of retrospectivity had not been addressed in this particular case. That is correct in as much as Mr Boyd specifically distanced himself from any claim referable to retrospective claims and limits his application only to the future. However, the question of acquiescence was not raised before the FtT. Mr Upton sought to introduce it in argument before the Upper Tribunal. I refused to consider it as permission to appeal on that point had not been granted and because it is an evidence based issue. However, it seems to me that the point could be argued in the future before the FtT and I made clear my understanding of the position within the original decision.

[41] Having considered all of the appellant's written and oral submissions I am not satisfied that an important point of principle or practice arises. The issue would require to be one of general importance and not one which is confined to the appellant's own facts and circumstances. (*Eba* v *Advocate General for Scotland* [2011] UKSC 29. In so far as the factual

position is concerned the issue which arises is confined to the appellant's facts and circumstances. Clearly, the outcome is of importance to the appellant. That importance however is confined to the appellant. It is my view that the submissions about the applicability of the decision in this case to others beyond the appellant are not vouched and are highly speculative.

[42] Further, there is no other compelling reason to show why an appeal will be allowed to proceed. The word compelling is a strong word which emphasizes the truly exceptional nature of the jurisdiction. *(Uphill* v *BRB (Residuary) Ltd* [2005 EWCA Civ 60.) No submissions were made by Mr Upton in relation to this aspect of the test.

[43] One final point arises. During the course of his submissions Mr Upton recognised the fact that he had previously made representations that the fact finding of the FtT in its decision was "slap dash". He withdrew that observation and sought to substitute it by categorising the fact finding as "somewhat brief in general". Mr Upton wished the Upper Tribunal to note the position.