Upper Tribunal for Scotland

2022UT15

Ref: UTS/AP/22/0001

DECISION OF

Nigel Ross

ON APPLICATION TO APPEAL

IN THE CASE OF

Mr Aylmer Millen, 5 Hillpark Grove, Edinburgh, EH4 7AP

Appellant

- and –

James Gibb Limited, 4 Atholl Place, Edinburgh, EH3 8HT

Respondent

FtT case reference FTS/HPC/PF/21/1272

26 May 2022

Decision

The Upper Tribunal refuses the appeal.

Note

Permission to appeal has been granted in relation to ground 3 only, namely whether the First-tier Tribunal (the "Tribunal") erred in interpreting the meaning and effect of

section 6.4 of the Code of Conduct for Property Factors. Permission to appeal on grounds 1 and 2 was refused by decision dated 17 January 2022. Since then, the procedure in rules 4 and 5 of the Schedule to the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 has been completed. The respondent lodged a written response dated 15 March 2022. The appellant lodged a further response. Both parties indicated that neither of them required a hearing. Consequently, I have decided this case on the basis of written submissions only.

The dispute

1. The appellant is the owner of a flat in a development in Edinburgh. The respondent is the property factor. The appellant raised proceedings before the Tribunal in respect of various alleged failings of the respondent. He was partly successful, and the Tribunal issued a decision and PFEO dated 23 September 2021. The appellant sought to appeal on three grounds, and permission was refused on two of those grounds by both the Tribunal and the Upper Tribunal. The remaining ground of appeal is outstanding.

Ground of appeal

2. The appellant alleges a breach of section 6.4 of the Code of Conduct for Property Factors, a code of practice prepared under the terms of section 14 of the Property Factors (Scotland) Act 2011. The version of the Code founded upon by both the appellant and the Tribunal, at Section 6 is titled "Carrying out repairs and maintenance", and 6.4 states:-

   "If the core service agreement with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works".

3. The appellant referred the Tribunal to a "Development Schedule" and submitted that it was the core service agreement and included a provision for periodic property inspections. It therefore followed that an obligation arose under section 6.4 to prepare a programme of works. That had not been done. Repairs were reactive only. There was no process for maintenance. His position was that, even though the Development Schedule did not expressly provide for planned maintenance, it was not unreasonable to expect planned maintenance. The Tribunal referred to the Development Schedule, and found that there was no breach of section 6.4. They did so on the basis that there is no provision for a planned programme of works, and no obligation to put in place a programme for cyclical maintenance. His position in this appeal is maintained.

The respondent's position

4. The respondent provided a letter dated 15 March 2022 setting out their position. They refer to the obligation arising and submit it would benefit from further clarification. They refer to the current version of the Code, which was effective from 16 August 2021. That has completely re-written section 6.4, which is now in the following terms:

   "Where a property factor arranges inspections and repairs this must be done in an appropriate timescale and homeowners informed of the progress of this work, including estimated timescales for completion, unless they have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required. Where work is cancelled, homeowners should be made aware in a reasonable timescale and information given on next steps and what will happen to any money collected to fund the work."

Analysis of the respondent's obligations

5. Section 6.4 is conditional. It only imposes an obligation *"if the core service agreement includes periodic property inspections and/or a planned programme of cyclical maintenance…"* On the plain wording, the obligation arises only if one, or either, of those conditions is met.

6. The first question is what comprises the core service agreement. The only document founded upon is the Development Schedule, and this is the only "core document" relied upon. Although the Development Schedule refers to an underlying Written Statement of Services, no reliance is placed on that document by either party, and it is not produced. I will therefore treat the Development Schedule as the core document referred to.

7. The next question is whether the Development Schedule *"includes periodic property inspections and/or a planned programme of cyclical maintenance".* There are three references in that document to either inspections or maintenance. These are:-

   "Section 04 (WSS 4.1 – Routine Maintenance – Gardening Schedule) This can be found on your James Gibb+Client Portal";

   "Section 05 (WSS 4.1 – Routine Maintenance – Cleaning Schedule) This can be found on your James Gibb+ Client Portal";

   "Section 06 (WSS 4.1 – Routine Property Inspections) Routine property inspections of your development will be conducted by your development manager on a Bi-Monthly basis."

8. The Tribunal did not discuss any of these provisions, and do not give their reasoning for rejecting these as triggers for section 6.4 of the Code. I am not provided with access to the client portal, and neither party relies on the client portal. Accordingly, the exercise is limited to considering the wording only. On that basis, it is evident that the wording of Section 04 and Section 05 does not

create any obligation of periodic property inspections or cyclical maintenance. The wording does not create any obligation under section 6.4 of the Code. Accordingly the respondent is not shown to have breached any such obligation in relation to Sections 04 or 05.

9. The wording of Section 06, in the version founded upon, is more detailed. It provides that:

"Routine property inspections of your development will be conducted by your development manager on a Bi-Monthly basis."

10. That provision, on a plain reading, amounts to "… *periodic property inspections*". It is at first sight a breach of Section 6.4 of the Code. The respondent draws attention to the formula:

"… includes periodic property inspections and/or a planned programme of cyclical maintenance…",

and submits that both elements, namely periodic inspections and a planned programme, need to be present before an obligation arises. That is incorrect – the use of the words "and/or" impose the obligation if either, not just both, of the elements are present.

11. The Tribunal's reasoning is that there was no such breach, relying on the absence of a sinking fund. The logic seems to be that, if the respondent had not taken steps to implement the obligation, or the proprietors had not set up a sinking fund, then there was no obligation. That does not logically follow. The fact there was no mechanism for paying for a programme of works does not automatically remove the obligation to prepare a programme of works. The Tribunal appear to have erred in that regard.

12. Accordingly, it would appear that the respondent has historically been in breach of the terms of Section 6.4. A problem, however, is that Section 6.4 has been changed in the most recent edition of the Code, which was effective from 16 August 2021. The obligation to prepare a programme of works has now been removed. The original application to the Tribunal was heard on 12 August 2021 and determined on 6 December 2021. The superseded version was narrowly in force at the date of the hearing, but not at the date of the decision.
13. The new version of the Code does not, as the respondent argues, "clarify" or otherwise affect the old version. It is, instead, a replacement. The old version of the Code no longer applies.
14. The question is the effect of that. There are two questions – the nature of the obligation, and whether it can still be enforced.
15. In regard to the nature of the obligation, there was an obligation to prepare a programme of works. That, however, is the extent of the obligation. Only preparation of a programme is required. It is a very limited obligation. There is no obligation to commence works, or pay for them. No doubt that would be the next step, but it would be done in consultation with the residents and at the residents' expense, whether through a sinking fund or otherwise. Although those events are the logical next step, they are not demanded, or implied, or commenced by the terms of section 6.4. The remedy to the appellant is, or was, therefore of a very limited nature, and extended only to the preparation of a document.
16. Thereafter, the question is whether the Tribunal can or should award any remedy. The obligation to prepare a programme has now been removed. The

appellant can only ask for such a programme of works to be prepared for the period ending 16 August 2021. It would be an outdated and superseded programme. The whole purpose of the Code, however, is as a practical mechanism to administer the property, not as a technical exercise without effect. The appellant seeks the practical remedy that the respondents be forced to comply with the Code. The Code no longer contains an obligation to prepare a programme of works. There is no practical, as opposed to historical, remedy available to grant. No Tribunal acting reasonably could grant a PFEO which applied only retrospectively but which also could not provide a coherent, up-to-date basis for future works.

17. At the date of the decision, namely December 2021, the Tribunal reached the correct decision (namely the decision that would be reached now), albeit by reference to a superseded version of the Code. The Tribunal's decision, however it was arrived at, cannot now be said to be the wrong one. Even if the appellant were entitled to base his application, and this appeal, on the terms of the superseded Code, he would not be entitled to insist on a PFEO being issued. Such a decision would be a discretionary one for the Tribunal, and no such Tribunal, acting rationally, would issue a PFEO to enforce compliance with the superseded Section 6.4 of the Code. To do so would be to act irrationally, because it would result in an out-of-date document which could not form the basis for any enforceable right on the part of the appellant. The appellant has not, accordingly, been deprived of any remedy. The appeal is accordingly refused.

Nigel Ross

Member Upper Tribunal for Scotland

A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within 30 days of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.