Upper Tribunal for Scotland

[2021] UT 38
UTS/AP/21/0033

DECISION NOTICE OF SHERIFF F McCARTNEY

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

in the case of

MR PETER ALLISH, 16 Rozelle Avenue, Newton Mearns, G77 6YS

Appellant

and

HACKING AND PATERSON MANAGEMENT SERVICES, 1 Newton Terrace Glasgow, G6 7PL

Respondent

FTT Case Reference FTS/HPC/LM/20/2593

21 December 2021

Decision

The application for permission to appeal is allowed to be considered although late, and thereafter permission to appeal is refused.

Introduction

[1] This is an application for permission to appeal a decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) ("FtT"). The FtT issued its decision on 10 July 2021. It did so by virtue of the application by Mr Allish ("the appellant") as to whether

Hacking and Paterson Management Services ("the respondent") had complied with various duties of the Code of Conduct for Property Factors ("the Code"). The alleged breach of duties included:

(1) whether the respondents had complied with section 1.1a A of the Code, regarding the way in which the respondents had been appointed as factors

(2) whether the respondents had failed in what was said to be a duty to maintain a sinking fund

(3) whether the respondents had failed in their duty under section 6.9 of the Code to pursue a contractor to remedy defects in work carried out

(4) whether the respondents had failed in its duty to comply with section 2.4 of the Code regarding approval of additional works.

The tribunal found in favour of the appellant on point 2 relative to the respondent's duties regarding a sinking fund. It found the respondent had failed to fulfil its duty required by section 17(1)(a) of the Property Factors (Scotland) Act 2011, and proposed to make a Property Factor Enforcement Order.

[2] Both parties sought a review of the FtT's decision. That was refused by the FtT on 17 August 2021. On 8 August 2021 the appellant sought permission to appeal the FtT's decision, which was refused by the FtT on 26 August 2021.

[3] The appellant thereafter sought permission to appeal from the Upper Tribunal, albeit late. No submissions were made by the respondent as to the extension of the time limit for submitting an appeal. The appellant explained that due to his advancing years and the complexity as he found matters, he had not acted quickly enough. The Upper Tribunal is satisfied it is in the interests of justice to consider the application for permission to appeal although late.

Grounds of appeal

[4] The appellant seeks leave to appeal on two grounds. Firstly he argues that the FtT erred in its interpretation of section 6.9 of the Code as to whether the respondent failed in its duty to pursue a contractor over defects in services provided. Secondly he argues the FtT erred in rejecting his claim that section 1.1aA of the Code had been breached.

[5] A permission to appeal hearing was held by telephone. Mr Allish appeared for himself. Mr Gordon Buchanan appeared for the respondent.

Discussion

[6] On the question of the FtT's interpretation of section 6.9 of the Code, the factual background is as follows. There is no dispute between parties that the contractor employed by the respondents to undertake routine landscaping works did not carry out that work to a satisfactory quality. The FtT made various findings in fact on that issue, including at paragraph 96 where it found "that the quality of the work being undertaken by [the contractor] between 2018 and 2020 fell below an acceptable level". The FtT also made findings in fact regarding the complaints made by the appellant to the respondents, the respondent's investigation of those complaints, and that the respondents subsequently contracted with a different landscaping company after 2020.

[7] Before the Upper Tribunal, the appellant argued the FtT misinterpreted the obligation on the respondents in terms of section 6.9 of the Code. That section states a factor "must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided". The appellant argues that means an absolute duty on a factor, and the FtT erred because it did not consider the obligation in that way. He argues the evidence before the FtT was that there was no effective process by the respondents to act on the

complaints he made, and that the Code does not use words or phrases to dilute that responsibility, such as, for example, "where reasonable" or "where practical".

[8] The FtT considered this aspect of the appellant's case at paragraph 106 of its decision. It accepted the respondents acted upon those complaints, in respect the respondents eventually appointed an alternative contractor. It also noted that "the evidence before the tribunal is that the respondents pursued [the contractor] to remedy defects and any inadequate service reported by the homeowner". Whilst the FtT did not make detailed findings as to how the complaints were dealt with over the two year period, it did note the appellant was asked by the respondents to say whether he wished further action to be taken against the contractors, to which the appellant did not reply. That email included an offer that the respondents could pursue the contractors for a refund of monies paid if the appellant considered that to be necessary. Part of that email was reproduced at paragraph 58 of the FtT's judgment.

[9] Leave to appeal is refused on this ground. The appellant's argument that the FtT misdirected itself as to the legal obligations on the respondents do not apply on the facts in this case. This point turns on the facts before the FtT. Having asked the question, and not having received a response, the FtT found the respondents were entitled not to take any further action over the appellant's complaints. That must be the correct approach, given that if the respondents were to further pursue the contractor, the appellant's co-operation would be required in providing the respondents with information. In fairness to the appellant, he accepted that he had overlooked that email and had not responded. In light of that factual background, it cannot be said there is an error in law in the FtT's approach.

[10] Turning to the second issue, the appellant argues that the FtT erred in failing to uphold his complaint as to the basis on which the respondents act as factors. The appellant

takes no issue with the finding by the FtT that the respondent has authority to act (at paragraph 82 of the FtT's decision), but argues an incorrect factual position has been put in the statement of services. As the respondents are obliged to provide a statement as to their authority to act, the appellant argued unsuccessfully before the FtT that this incorrect statement breached the Code. The respondent's statement of services refers to having the authority to act through custom and practice. The appellant argued before the FtT that the respondents acted as factors having taken over the business of another factor, which had been appointed to act via the deed of conditions when the houses built and sold to individual homeowners. He argues that the FtT misdirected itself, as the obligation to provide a statement must include to provide an accurate statement. As the FtT accepted an inaccurate statement, the appellant seeks for the Upper Tribunal to quash the FtT's decision on this point.

[11] The obligation on the respondents is found in section 1.1aA of the Code. That reads:

> "the written statement should set out:
>
> A Authority to act
> a) A statement of the basis of any authority you have to act on behalf of all the homeowners in the group;"

[12] Before the FtT, the respondents accepted there had been a merger with the company referred to by the appellant around the date the he referred to. However, the respondent's position to the FtT was that no records were retained of that merger or the work taken over, and the respondents could not agree that the appellant's assertion was necessarily correct.

[13] The FtT made findings in fact relative to this issue at paragraphs 80 to 85 of its decision. Its findings include that services have been provided by the respondent since 2001, and the written statement of service provides the authority to act is based on custom and

practice. It is a reasonable inference from those findings that the FtT were satisfied that the respondent's authority to act was correctly The FtT found that the respondents had complied with section 1.1Aa as the respondents stated what they considered to be their basis of authority; that is on the basis of custom and practice. As such, the respondents complied with the obligation on them to provide this information. This was not treated by the FtT as an application under paragraph 2.1 of the Code. However, even if the FtT had done so, it would be principally a dispute relative to the facts. The FtT heard and saw the witnesses. The Upper Tribunal does not have a role in determining the facts where there is a dispute. That responsibility rests with the FtT alone.

[14] Having made that finding, the FtT gives reasons at paragraph 103 of its decision. It rejected the appellant's arguments. It did so on the basis that the requirement within the Code is to provide a statement. It noted that the respondent's statement matched an example in the guidance document on the Code. It also made a finding (finding in fact number 85) that the written statement of services referred to custom and practice.

[15] The appellant was unsuccessful in persuading the FtT that the statement was factually wrong. Accordingly, there is no point of law arising in relation to this second matter and leave to appeal is refused.

[16] The FtT has proposed a Property Factors Enforcement Order and the case is remitted to the FtT in relation to any outstanding matters regarding that Order.