



DECISION NOTICE OF SHERIFF I FLEMING

on an appeal in the case of

CHARLES DUNCAN, 28 Kelvin Court, Glasgow, G12 0AD
per Iain Bradley Solicitor, Unit 530, 103 Byres Road, Glasgow, G11 5HW

Appellant

and

ROSS & LIDDELL LIMITED, 60 St Enoch Square, Glasgow, G1 4AW
per Hardy Macphail, 5th Floor, Atlantic Chambers, 45 Hope Street, Glasgow, G2 6AE

Respondent

FTT Case Reference FTS/HPC/PF/18/1978

25 October 2019

Decision

The Upper Tribunal grants the appeal and directs that a First-tier Tribunal which is differently constituted from that which heard the original application should hear the application.

Introduction

[1] This is an appeal against the decision of the First-tier Tribunal (hereafter “the FtT”) dated 4 March 2019. In terms of that decision the FtT held that two “data protection breaches” had occurred at the instance of the respondents. Further the FtT held that it

could not “deal” with the said breaches as the handling of personal data of the homeowner is not a duty relating to the “ management of common parts of land owned by the homeowner” having regard to section 17(5) of the Property Factors (Scotland) Act 2011 (hereafter “ the Act”). Accordingly, despite finding that two breaches of the data protection legislation had occurred the FtT held that the factor did not fail in the duty referred to in section 17(1) of the Act; namely that the factor had failed to comply with the Property Factors Code of Conduct as required by section 14(5) of the Act. The ground of appeal is that the FtT misdirected itself in holding that it had no locus to consider the complaints emanating from the data protection breaches. The FtT granted leave to appeal the decision on 2nd April 2019.

[2] The Upper Tribunal sat on 15 October 2019. Written and oral submissions were provided by Mr Bradley, solicitor advocate on behalf of the appellant and by Mr Ritchie, solicitor on behalf of the respondent. Having heard parties the Upper Tribunal upheld the appeal.

[3] Section 14(5) of the Act states that a registered property factor (as the respondents are) must ensure compliance with the Property Factors Code of Conduct. The Code of Conduct in its introduction states that factors are responsible for ensuring that they conduct their business in a manner that complies with all relevant legislation and specifies, amongst other factors, data protection. Further, it is stated that the Code of Conduct is separate from and additional to statutory requirements.

[4] Section 17(1) of the Act states that a homeowner may apply to the FtT for a determination of whether a property factor has failed to carry out the property factor’s duties and to ensure compliance with the Property Factor Code of Conduct. It was argued by Mr Ritchie that section 17(5) of the Act defines property factor’s duties as duties in

relation to the management or maintenance of land. Data protection did not come within that definition. Mr Ritchie departed from his initial position that *res judicata* applied and indicated that he was not arguing that proposition.

[5] What was clear to the Upper Tribunal was that there was a factual dispute between parties about the nature and extent of the data protection breaches. The Findings in Fact of the FtT only confirmed that data protection breaches had taken place. In the absence of any further information the Upper Tribunal is unable to determine whether the data protection breaches come within the ambit of section 17(5) of the Act or indeed to determine the applicability of section 17(3)(b) of the Act and therefore grants the appeal and remits the matter back to the FtT to determine the factual position. A differently constituted FtT should be convened. Breaches of data protection legislation may come within the definition of duties in relation to the management and maintenance of land. Whether the particular breaches of the legislation do or do not come within the ambit of the legislation is dependent on the circumstances which are established. In the present case it will firstly be necessary for these circumstances to be established.

Discussion

[6] After hearing submissions on behalf of both parties the Upper Tribunal granted the appeal. It is not possible to determine from the original determination of the FtT what the precise facts were in relation to the breaches of the data protection legislation. Parties were in dispute as to the factual position. *Esto* section 17(5) of the Act applies to data protection breaches it was argued on behalf of the respondent that it had discharged its duty in terms of section 17(3) of the Act. Without specific findings as to the facts found to be established

the Upper Tribunal cannot determine whether the terms of section 17(5) and if appropriate section 17(3) are engaged in the circumstances of this case.

Conclusion

[7] The Upper Tribunal grants the appeal.

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.