



DECISION OF

Sheriff Ian H Cruickshank

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

Mr Andrew Carson

Appellant

- and -

Hacking & Paterson

Respondent

FTS Case reference: FTS/HPC/PF/23/1149

20 March 2024

Decision

Refuses permission to appeal the decision of the First-tier Tribunal for Scotland, Housing and Property Chamber dated 18 December 2023.

Introduction

[1] Andrew Carson (“the appellant”) requests permission to appeal a decision of the First-tier Tribunal for Scotland Housing and Property Chamber (“the FTS”) dated 18 December 2023. The case before the FTS related to an application for a Property Factor Enforcement Order (“PFEO”).



This arose out of a long standing issue in relation to the repair of a wall or fence forming part of a common boundary close to the appellant's property and separating the development from an area of ground in public ownership.

[2] The appellant sought to establish there had been various breaches of the Code of Conduct for Property Factors. In particular he submitted that there had been breaches of paragraphs 2.1, 2.7, 5.1, 5.2, 6.1, 6.2 and 7.1 of the code of conduct.

[3] The FTS refused the application. Thereafter, the applicant sought (simultaneously it appears) a review of the decision and permission to appeal the decision. Both the review and permission to appeal were refused by the FTS in their written decisions of 15 January 2024.

[4] This application for permission to appeal is focused on the FTS's refusal to uphold breaches of paragraphs 5.1 and 5.2 of the code of conduct only.

Grounds of appeal

[5] The grounds of appeal relate to interpretation of the Owner's Public Liability Insurance Policy arranged by the respondents on behalf of the property owners. In simple terms the appellant submits that the FTS did not consider all the information put forward by him. The FTS overlooked and ignored the evidence relevant to the policy of insurance. The FTS had failed to understand that any changes to risks (as defined at pages 15 and 16 of the policy schedule), as occasioned by boundary fence and public access issues, could invalidate the policy. The FTS did not provide adequate reasons for their decision



Discussion

[6] A hearing to determine whether permission to appeal should be granted took place by WebEx on 18 March 2024. The appellant represented himself and the respondents were represented by Mr Cosgrove being an associate factoring director in their employment.

[7] At the outset of the hearing the appellant conceded he may have erred in referring the FTS to paragraphs 5.1 and 5.2 of the code of conduct. He insisted on presenting his appeal. This was on the basis that the FTS should have given consideration to the whole of part 5 of the code of conduct relating to insurance. The appellant now accepted that paragraph 5.1 related to the respondents requirement to have, and provide information in relation to, professional indemnity insurance. It was paragraph 5.11 which was relevant. It related to public liability insurance covering common areas. The FTS had erred in law in not considering this against the evidence before it.

[8] The respondent was content to rest on the written decision of the FTS. The FTS had not erred in law in their interpretation of paragraphs 5.1 and 5.2. They had not erred in law in refusing the application for a PFEO.

[9] The original decision of the FTS is detailed in its terms. The FTS gave careful consideration to the facts as presented by the parties. The matter called for a hearing of evidence on 2 October 2023. Neither party sought to call witnesses. Both parties lodged written submissions and documentary evidence, and following brief questioning by the FTS to clarify the



issues both parties indicated they were happy for the FTS to make its decision based on the written materials before it.

[10] The FTS went on to catalogue the history of what was a long running issue between the appellant and the respondents regarding the fence on common ground close to the appellant's property. The findings in fact (found in paragraphs 3 – 47 of the written decision) are extensive. The decision also provides detailed conclusions as to why the FTS did not find a breach of paragraphs 5.1 and 5.2 of the code of conduct. 2023. At paragraph 63 the FTS stated as follows: "The (appellant's) reference to these paragraphs of the Code appeared to be in regard to his concern that the public liability insurance obtained on behalf of the owners...would not be sufficient to cover the additional risks engendered by the fence being unrepaired. Neither of these paragraphs is concerned with that matter....There is therefore no breach of these paragraphs."

[11] The substance of this appeal is that the FTS did not give appropriate consideration to the public liability insurance arranged by the respondents for the benefit of the co-owners in relation to common areas. The appellant founded his application on breaches of paragraphs 5.1 and 5.2 of the code of conduct. He now accepted he had been wrong to rely on these paragraphs. The appellant had not referred the FTS to paragraph 5.11. Even had he done so I fail to see how, in the circumstances, that paragraph would have assisted the appellant in seeking to establish there had been a failure on the part of the factor to comply with the code of conduct. Paragraph 5.11 simply requires a property factor to provide homeowners with certain information regarding public liability insurance. It is clear the appellant had that information. In any event the FTS was entitled to rely on the submissions before it and the paragraphs of the code to which it had been



referred. It was not incumbent on the FTS to consider additional paragraphs of the code to which it had not been referred.

Conclusion

[12] This is an appeal in terms of section 46 of the Tribunals (Scotland) Act 2014. As such, an appeal is to be made on a point of law only. In terms of section 46(4) permission to appeal may be given only if I am satisfied that there are arguable grounds for the appeal. The appellant has conceded he erred in relying on paragraphs 5.1 and 5.2 of the code of conduct. For the purposes of permission to appeal the FTS based their decision on the paragraphs of the code to which they were referred. They did not err in their interpretation or applicability of these paragraphs. Accordingly, there are no arguable grounds upon which permission to appeal can be granted. Permission to appeal is refused.

Sheriff I Cruickshank
Member of the Upper Tribunal for Scotland