Upper Tribunal for Scotland

[2019] UT 22
UTS/AP/18/0022

DECISION NOTICE OF ANTHONY DEUTSCH

ON AN APPEAL

in the case of

DR BRYAN LYNAS AND DR ANNETTE FERRI per JAMES M CARMICHAEL & CO,

1 Duke Street, Glasgow, G4 0UL

Appellants

and

JAMES GIBB PROPERTY MANAGEMENT LTD, 65 Greendyke Street, Glasgow, G1 5PX

Respondent

FTT Case Reference FTS/HPC/PF/17/0530

Decision

Glasgow 23 November 2018. The upper tribunal refuses the appeal.

Introduction

[1] The appellants are currently the heritable proprietors of flat 3, Fairyknowe Court, Bothwell. They concluded missives to purchase that property on 2 July 2015 with a date of entry of 4 September 2015. The first tier tribunal found as a fact that the appellant's solicitor received a letter from the respondent's on 3 September 2015 in which it was stated:

> "Our records do not show any, extraordinary repairs anticipated under our instruction."

The appellants contend that the statement was false and that accordingly it was a breach of paragraph 2.1 of the Code of Conduct for Property Factors which provides:

> "You must not provide information which is misleading or false."

[2] At finding in fact number 51 the tribunal held that the homeowners did not acquire title to bring a complaint against the factor until 4 September 2015, which was the date of entry and settlement in relation to their purchase. It is against that finding that the applicants now appeal. Essentially the issue is one of jurisdiction.

Grounds of appeal

[3] The grounds of appeal are stated as follows:

1. The homeowners Drs. Lynas and Ferri concluded a valid and binding contract for the purchase of the subjects on 2 July 2015. Certain duties and obligations flowed from the concluded missives. Drs. Lynas and Ferri were on 2 July 2015 obliged to proceed with the purchase of the subjects. On said date they acquired title to make a complaint against the factors as homeowners. The factors owed a duty of care towards my clients and had a duty to provide Drs. Lynas and Ferri as potential purchasers with true and accurate information in relation to the material question of common repairs. It is well settled in the line of authority stretching from Hedly Byrne & Co Heller & Partners Ltd 1964 [AC] 465 that negligent misrepresentation inducing contract gives remedies of reduction and damages provided that the person making the statement (in this case the property factors) order duty of

care to the persons to whom the statement was made (in this case Drs. Lynas and Ferri the potential purchasers and now homeowners). A further analogy is a line of cases involving the duty of care owed by chartered surveyors to potential purchasers are heritable property, the principal authority of which is Martin v Bell Ingram 1986 SC 208.

2. Esto Drs. Lynas and Ferri did not acquire title to complain about the property factors misrepresentation at the time of concluding missives they certainly acquired such rights and title to complain about the factors conduct when they learned the full extent of the property factors' misrepresentation after they took entry to the property and were on any view property owners. Drs. Lynas and Ferri did not become aware of the misrepresentation made by the factors in the letter of 3 September 2015 until some weeks after they had taken entry to subjects and were presented with a substantial bill for common repairs. It was then and only then that as homeowners they realised that the correspondence from the factors dated 3 September 2015 was indeed grossly misleading and inaccurate. It is respectfully submitted that even if they did not have title to proceed with any complaint against the factors upon the conclusion of missives on 2 July 2015, they did acquire such title when the true extent of the misrepresentation was made known to them at a time when on any view they were clearly homeowners. An analogy might be the terms of section 17 of the Prescription & Limitation (Scotland) act 1973 where the 3 year time of that can be extended in circumstances in which [in] the opinion of the court it would [not] be reasonably practical for any pursuer to become aware of the existence of certain facts which would found and action.

The respondents made no written response to the appeal. I considered that the appeal was one which could be determined of the case papers.

Discussion

[4] The right to make an application to the tribunal for a determination that there has been a failure on the part of the property factor rests entirely upon the terms of section 17 of the Property Factors (Scotland) Act 2011 ("the 2011 Act"). The tribunal is a creature of statute which has no common law jurisdiction. Concepts such as negligent misrepresentation have no bearing upon the decisions which the tribunal is able to make or upon the remedies which it is able to grant. The jurisdiction of the tribunal cannot be extended by means of analogy with other different statutes. Anyone wishing to make an application to the tribunal must bring themselves and their application within the four corners of section 17 of the 2011 Act, which is in the following terms:

> **17 [Application to the First-tier Tribunal]**
>
> (1) A homeowner may apply to the [First-tier Tribunal] for determination of whether a property factor has failed—
> (a) to carry out the property factor's duties,
> (b) to ensure compliance with the property factor code of conduct as required by section 14(5) (the "section 14 duty").
>
> (2) An application under subsection (1) must set out the homeowner's reasons for considering that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty.
>
> (3) No such application may be made unless—
> (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, and
> (b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern.

(4) References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard.

(5) In this Act, *"property factor's duties"* means, in relation to a homeowner—
(a) duties in relation to the management of the common parts of land owned by the homeowner, or
(b) duties in relation to the management or maintenance of land—
(i) adjoining or neighbouring residential property owned by the homeowner, and
(ii) available for use by the homeowner.

[5] Section 17 (1) creates two separate grounds of complaint: failure to carry out the property factors duties and failure to ensure compliance with the Property Factor Code of Conduct ("the code"). The present application concerns an alleged failure of compliance in respect of section 2.1 of the code. It is not in dispute that the alleged breach occurred prior to 4 September 2015. No complaint is made concerning any failure to carry out the property factor's duties.

[6] A person applying to the tribunal must in terms of section 17 (1) be a homeowner. When the appellants brought their application to the tribunal they had become homeowners. The issues are whether, in terms of the 2011 Act, they require to have been homeowners when the alleged breach occurred and if so whether a person with a right under missives falls within the definition of "homeowner".

[7] No complaint is made concerning any failure to carry out the property factor's duties, however, in answering the first question it is important to have regard to section 17 (5) which defines the duties "in relation to a homeowner" by reference to land or residential property "owned" (in the present tense by) the homeowner. It follows that in relation to any present homeowner a failure of duty owed to a previous homeowner would not be a breach of duty which could ground an application to the tribunal. It is hard to imagine that the legislature intended that breaches of the code were to be treated differently.

[8] When the code itself is considered it is clear that it is intended to govern the relationship between the property factor and those who are currently homeowners. See for example section 1 which deals with the provision of written statements of services. The factor must provide the written statement to any new homeowner within four weeks of being made aware of a change of ownership of a property. Although section 2.1 simply states that the factor must not provide information which is misleading or false, when the whole of section 2 is considered it becomes clear that the obligation is aimed at current homeowners. See for example the preamble which states that "good communication is the foundation for building a positive relationship with homeowners" not the wider public.

[9] If, as I have concluded, upon a proper interpretation of section 17, any application must relate to a failure to ensure compliance with the code (i.e. a failure in respect of the section 14 duty) occurring during a period of time when the applicant was a homeowner the secondary question is whether a person with only a personal right under missives falls within the definition of "homeowner". The 2011 Act defines that term at section 10 as follows:

> (5) In this Act, *"homeowner"* means—
>
> (a) an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor, or
>
> (b) an owner of residential property adjoining or neighbouring land which is—
>
> (i) managed or maintained by a property factor, and
>
> (ii) available for use by the owner.

[10] A homeowner must be an owner of residential property or land used to any extent for that purpose. The word "owner" is not defined. The starting point in any statutory interpretation is to have regard to the ordinary meaning of the word in question. In its most common and well established use the word signifies a person with a right to control and

possess a piece of property. A person who has yet to pay the price for or take possession of a piece of property would not ordinarily be understood to be its owner. Moreover when a word possesses a technical meaning in a certain branch of law and is used in a context dealing with that branch it is to be given that meaning unless the contrary intention appears.

[11] The definition of "ownership" as it applies in Scots land law is discussed in *Gordon and Wortley – Scottish Land Law* (third edition) at paragraphs 13-01 to13-05. Relevant for present purposes is the authors' statement that "in Scots law, following civilian principles, there is only one owner at any one time – it has technically a unititular system of ownership and there is no intermediate real right or quasi-real right between ownership and the absence of ownership." Until the appellants paid the price and in return received a disposition someone else was necessarily the owner of the property.

[12] Dealing with the "content of ownership" Gordon and Wortley state that there are "two main substantive rights implied in ownership of land [ ] (1) the right to exclusive use, or better, the ultimate right to exclusive use, and (2) the right to use and enjoy the land, including the right to grant use and enjoyment to others." Neither of these main substantive rights which the authors identify would ordinarily arise under missives and there is no suggestion that they did in the present case.

[13] Unlike the 2011 Act a number of other statutes do include a referential definition of owner; see for example section 56 of the Building (Scotland) Act 2003:

> "'Owner', in relation to land or buildings, includes any person who, under the Land Clauses Acts, would be enabled to sell and convey the land or buildings to the promoters of an undertaking."

This definition simply extends the concept of "owner" to include parties under a disability who would ordinarily not be able to sell or convey land. It identifies power of sale as an element in the concept of ownership. While persons with a right under missives will

frequently enter into a back to back transaction for onward sale they require to complete their own purchase transaction before completing any onward sale.

[14] Whether the ordinary meaning the word "owner" is applied or the word is used in a Scottish land law sense a person with a right under missives cannot be understood to be a homeowner.

[15] I turn now to the appellants' *esto* case that a person who was not a homeowner at the time that the events complained of occurred can acquire a right to complain retrospectively by dint of their later becoming a homeowner. In Shields and Blackley (June 2017) which concerned complaints brought by former homeowners against the factors of properties, which each had owned at the time of the events giving rise to their complaint, the upper tribunal held that properly construed section 17 (1) of the 2011 Act required only that the applicant should have been a homeowner at the time of the alleged failure on the part of the property factor. That reasoning does not assist the present appellants. The required nexus between factor and homeowner did not exist at the time of the failure now complained of.

Conclusion

[16] In all circumstances I have refused 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.