



DECISION OF SHERIFF PINO DI EMIDIO

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

in the case of

JAMES GIBB PROPERTY MANAGEMENT LIMITED, 65 Greendyke Street, Glasgow,
G1 5PX per Gilson Gray LLP, 29 Rutland Square, Edinburgh, EH1 2BW

Appellant

and

MR RICARDO PETROCELLI and MS ELIZABETH BRUCE, 4 The Park, Victoria House,
Forres, IV36 3AH

Respondents

FTT Case Reference FTS/HPC/PF/17/0367

Applicant: McBrearty QC; Gilson Gray LLP

Respondents: no appearance

26 March 2020

Decision

The Upper Tribunal for Scotland:

1. Grants the appeal against the decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) dated 21 May 2018 and quashes said decision;
2. Remakes the decision and

- a. Finds that the appellant complied with both parts of the Property Factor Enforcement Order of the First-tier Tribunal dated 6 April 2018;
- b. Certifies that the appellant have complied fully with the said Order;
3. Finds no expenses due to or by either party in respect of the appeal; and
4. Orders that all further proceedings in this appeal are sisted until further notice in terms of Rule 7(3)(k) of the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016.

Reasons for decision

Introduction

[1] I heard submissions from senior counsel for the appellant at a hearing held on 27 September 2020 at Dunfermline Sheriff Court. In this decision I have referred to the appellant as “JGPM” and I have called the respondents “the homeowner”.

[2] The homeowner brought a complaint before the First-tier Tribunal for Scotland (Housing and Property Chamber) (“FtT”) in relation to aspects of the factoring arrangements for the property known as The Park, Victoria House, Forres, IV36 3AH (“the development”). These complaints were brought under the Property Factors (Scotland) Act 2011 (“the 2011 Act”). JGPM maintains that the FtT has erred in its decision of 21 May 2018 and has appealed under section 46 the Tribunals (Scotland) Act 2014 (“the 2014 Act”).

Grounds of appeal

[3] On 18 March 2019 this Tribunal granted JGPM permission to appeal on four stated Grounds of Appeal. The grounds are as follows:

1. Error in law in deciding that [JGPM] had failed to provide “the required complete information on the quotations”.
2. Error in deciding that [JGPM] was in breach of the PFEO on the basis there was no clear explanation of the method by which the premium applied to the development had been assessed.
3. Error by the [FtT] in placing weight on the alternative quote obtained by the Homeowner.
4. The [FtT] erred in giving weight to their assertion that the information provided by [JGPM] was a repetition of what had already been supplied.

Submissions for JGPM

[4] Senior counsel commenced by reminding me of the statutory background and a description of his clients’ business. That material is set out at paragraphs 8 to 15 of the decision of this Tribunal dated 18 March 2019 and is not repeated here. The appellant had grown substantially since the previous hearing in January 2019. In about August 2019 it had acquired another substantial property management business. As a result it now managed about 44,000 properties. The appellant is an even more significant player placing business across the market for common insurance.

[5] The decision under appeal arises from the second of two complaints brought by the homeowner. The two separate complaints led to separate tribunal processes and separate decisions by differently constituted panels of the FtT. Both complaints related to the tendering process for insurance arrangements for the development and alleged breaches of the Code of Conduct for Property Factors (“the Code”).

[6] Senior counsel submitted that, as a matter of generality, when dealing with a complaint of non-compliance with a Property Factor Enforcement Order (“PFEO”) the FtT must understand its own order. It cannot use the process of determining whether there is compliance with an order it has previously made to require more of the property factor than it did at the stage of making the PFEO. Further he emphasised the need for clarity in the terms of the order given the potentially serious consequences of a finding of non-compliance. If making a finding of non-compliance the FtT must be very clear as to why it has reached that conclusion.

[7] I was reminded that JGPM had embarked on a review of its common insurance arrangements for the period 2016 to 2018, ie for a two year period. Tendering had taken place in 2016. Once the common insurance had been put in place for the two year period there had been no separate tendering exercise in 2017. Homeowners whose properties were managed by JGPM were charged for their respective shares of common insurance premiums on an annual basis but JGPM’s block arrangements had been made for a two year period. No new tendering exercise had taken place for the second year.

[8] The homeowner’s first complaint to the FtT had been brought in late 2016. It was case number HOHP/PF/17/0006. On 12 July 2017 the first FtT determined it in favour of the homeowner and had required the payment of compensation. No PFEO had been made as JGPM had paid the proposed amount of compensation after the adverse decision was issued.

[9] The homeowner’s second complaint was brought on the basis that JGPM had carried out a renewal of the common insurance for the period commencing in 2017. It was case number HOHP/PF/17/0367 and the present appeal relates to this second complaint only. As JGPM had not carried out any fresh tendering in relation to the insurance period that

commended in 2017, the second complaint could only have related to JGPM's actions when it carried out the tendering process in 2016.

[10] On 22 January 2018 the second FtT found JGPM to be in breach of paragraph 5.7 of the Code (para. 19) but also found that the decision to enter into a two year deal was not a breach of the Code (para. 20). The second FtT proposed a draft PFEO. On 6 April 2018 the second FtT issued a PFEO in the following terms:

“[JGPM] are directed to:

1. Pay to the homeowner £500 as compensation from their own funds and at no cost to the development homeowners. The said sum to be paid within 28 days of the communication to them of the [PFEO].
2. in relation to the selection of the insurance provider in May, 2016 (this being the information used as the basis of the renewal of the insurance in May 2017), to provide the Homeowner with details of the insurance premiums and cover of each of the alternative quotes obtained and advise if a price/quality matrix was used, and, if so, what the weightings and quality criteria were. Commercially sensitive information which cannot be divulged may be anonymized by substituting names with A, B, C, etc. The said information is to be provided within 28 days of the communication to them of the [PFEO].”

[11] On 16 April 2018 JGPM advised the second FtT that it had made payment to the homeowner in compliance with paragraph 1 of the PFEO. JGPM also provided written information in relation to paragraph 2 of the PFEO. The second FtT also received further representations from the homeowner.

[12] On 21 May 2018 the second FtT issued its decision finding that JGPM had not complied with the PFEO of 6 April 2018. In paragraph 6 it found that JGPM had failed to comply with paragraph 2 of the PFEO for the following reasons:

“(a) The information from [JGPM] is a repetition of what has already been submitted; there is no new information in [JGPM]'s response. [JGPM] has not provided the required *complete information on the quotations* which form the foundation of the premium charged to this development and it follows that there is no clear explanation of the method by which the premium applied to the development has been assessed.

(b) in the response relating to insurer selection, [JGPM] states that it was based on cost, supplemented by previous experience of the claims handling process with the selected broker/insurer. [JGPM] claims that the premium was ‘an exceptional deal for our customers’; however it is much higher than the quote obtained independently by the Homeowner. While the [second FtT] accepts that there may be additional factors, such as claims history and valuation of buildings to be taken into account when comparing different quotes, there is a significant difference between the Bridge quote [i.e. that produced by the homeowner] and that chosen by [JGPM]. It was *not clearly demonstrated* that the selection of the insurer by [JGPM] was the *best choice* for the Homeowners.” (emphasis added)

[13] With reference to paragraph (a), the second FtT had not actually ordered the “complete information on the quotations” to be produced. JGPM submitted that the material it did provide constituted compliance with the PFEO. It was hardly surprising that the information provided was a repetition of what had already been submitted as no new tendering process had taken place. The second FtT had proceeded on the basis that the actual quotations were required when it had not specified this in the PFEO. Therefore it was submitted the second FtT erred in finding that there was a failure to comply with its PFEO as it had misunderstood its own order.

[14] With reference to paragraph (b), the second FtT had placed weight on the existence of an alternative quote obtained by the homeowner. There could not be a meaningful comparison for the very reason narrated by the FtT. More fundamentally, any such comparison was not relevant to the breach of the Code on which the PFEO proceeded. This was an error in law as the issue of compliance with the Code had to relate to the terms of the PFEO that the second FtT had previously granted and not to some irrelevant comparison with alternative material. The second FtT had misunderstood its own PFEO. The second FtT had erred in law in that the PFEO could not go beyond what required to be done by JGPM to comply with the provisions of paragraph 5.7 of the Code.

[15] The last sentence of paragraph (b) of the decision of 21 May 2018 amounted to an error of law. The second FtT had applied the wrong test. JGPM did not require clearly to demonstrate that the selection of the insurer was the best choice for the homeowners. The second FtT had reached a legally erroneous decision about the adequacy of the information provided by JGPM when it endeavoured to comply with the PFEO.

[16] The submission strayed beyond the strict terms of the grounds of appeal for which permission had been granted when it was suggested that (a) some of what the second FtT required in the PFEO was irrelevant to the complaint it had found established and (b) the second FtT had acted both irrationally and in breach of natural justice by imposing a PFEO in wider terms than that imposed by the first FtT which had proceeded on the same factual material relating to the same tendering process. This amounted to a double penalty on the appellant.

Decision

[17] Paragraph 5.7 of the Code provides as follows:

“If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) should be available for inspection, free of charge, by homeowners on request. If a paper or electronic copy is requested, you may make a reasonable charge for providing this, subject to notifying the homeowner of this charge in advance.”

Paragraph 5.7 requires exhibition of documents for inspection unless something else has been requested. It does not compel a property factor to engage in any particular form of tendering or selection process designed to secure a specific outcome. The provision of information under the Code allows homeowners to be better informed so that they can make decisions on matters that affect them such as the level of cover and cost of premium. It is important to understand that this is all that paragraph 5.7 of the Code requires. The second

FtT lost sight of the limited nature of what was required by the paragraph 5.7 of the Code when it came to consider whether the appellant was in breach of the PFEO.

Ground 1

[18] The PFEO required that insurance details should be provided by the appellant. On 16 April 2018 the appellant provided details which are narrated in the second FtT's decision of 21 May 2018. The appellant addressed the terms of paragraph 6(b) of the PFEO in two parts. First, it provided details of the insurance premiums and cover for each of the alternative quotes obtained. It also advised that one quote included some additional cover. Second, it addressed the issue of a price/quality selection matrix and explained the service factors that led them to prefer one quote over another. That is all the appellants required to do. The second FtT has mis-interpreted its own PFEO as requiring JGPM to do more than has been provided for by the terms of that order. JGPM complied with paragraph 2 of the PFEO. The second FtT has erred in law when it decided otherwise. The appellant's submission on this ground is well founded.

Ground 2

[19] The second FtT required to have regard to the terms of the PFEO in order to determine whether there had been compliance with it. The requirements of the PFEO could not be enlarged after it had been promulgated. The only breach found by the second FtT was of paragraph 5.7 of the Code. On the face of it, the remedy would be to make an order requiring the appellant to comply with its obligations under that paragraph. The second FtT has gone beyond terms of its own PFEO by proceeding on the basis that there was non-compliance because no "clear explanation" was provided. This was required neither by

paragraph 5.7 of the Code nor, indeed, by the PFEO. The second FtT erred in law in construing its own order. The appellant's submission on this ground is also well founded. Having strayed beyond the four walls of the terms of the Code when formulating the PFEO, it is perhaps understandable that the second FtT appears to have lost sight of the nature of the breach when it came to the issue of compliance with the PFEO. The appellant's submission touched on these matters but the appellant did not have permission to argue these points in this appeal.

Ground 3

[20] Paragraph 5.7 of the Code did not require JGPM to carry out a comparison with a quote obtained by a homeowner. The second FtT's PFEO did not require any such comparison to be made. It was for the homeowner to decide what to make of the information provided under the Code. Where an individual homeowner obtains a quote for insurance of his own individual property, paragraph 5.7 of the Code does not require the factor to engage in a comparison exercise which does not compare like with like. The second FtT has erred in law in making a comparison with a quote obtained by the homeowner. It took account of an irrelevant factor when it approached the matter in this way. The appellant's submission on this ground is well founded.

Ground 4

[21] The second FtT has proceeded on the basis that there was non-compliance with its PFEO because there was repetition of information already provided by the appellant. The second FtT was advised that the only difference in premium related to the amount of IPT payable in the second year. It is not surprising that there should be repetition where

there had been no separate tendering exercise in the second year. Repetition did not amount to non-compliance where the information provided was what was required by the PFEO. The FtT erred in law in approaching matters in this way. The appellant's submission on this ground is well founded.

Conclusion

[22] In the circumstances and for these reasons, the appeal is allowed and the decision of the second FtT is quashed. In the event that the appeal was allowed, I was invited to remake the decision in terms of section 47(2)(a) of the 2014 Act and to make a finding that JGPM complied with the decision of the FtT. I agree and have made the appropriate order and also certified that there has been compliance with the PFEO.

Notice to the parties

[23] 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 2014 Act what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.

Postscript

[24] In light of the recent COVID-19 outbreak and the current advice from government, the Tribunal has now sisted further procedure such as may arise under the immediately preceding paragraph. This is due to the current uncertainty as to the duration of the COVID-19 outbreak and the consequent requirements for ongoing emergency measures. As a result, it is impossible to specify accurately the date, time and place of when proceedings in this appeal will resume. Further details of when the appeal will resume will be notified to parties when the situation is more certain. The Tribunal regrets that such an action requires to be taken and appreciates that it will add to the concerns of parties at this challenging time.