



DECISION NOTICE OF SHERIFF FRANCES MCCARTNEY

in the case of

PARK PROPERTY MANAGEMENT LIMITED, 11 Somerset Place, Glasgow, G3 7JT

Appellant

and

MISS SAIRA AKBAR, 0/1, 56 Minerva Way, Glasgow, G3 8GQ

Respondent

FTT Case Reference FTS/HPC/PF/18/1769

28 January 2020

DECISION

The Upper Tribunal refuses the appeal.

REASONS FOR DECISION

Introduction

[1] This is an appeal against the decision of the First Tier Tribunal for Scotland Housing and Property Chamber (referred to as the “FTT”) of 4 February 2019.

[2] The Respondent was successful in part before the FTT. The FTT found the Appellants had breached sections 2.5 and 7.1 of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors (referred to as “the Code”). Further the FTT found

that the Appellants had failed in their duties as defined in section 17 (1) of the Property Factors (Scotland) Act 2011 (referred to as “the 2011 Act”). The FTT issued a proposed Property Factors Enforcement Order. That proposed order was subsequently confirmed. That order fell in two parts. It ordered the refund of property management fees by the Appellant for a period in 2018 and a direction that the Appellant obtain an engineer’s report regarding certain alleged defects in the property.

[3] Permission to appeal was granted by the FTT. Subsequently the Upper Tribunal allowed the appeal to proceed although late. The background as to why the appeal was late is not relevant to the issue now before the Upper Tribunal, and are not narrated in this decision.

[4] The issue before the Upper Tribunal is whether the FTT erred in law because it determined the appeal on the merits, refusing to uphold a preliminary matter raised by the Appellants. In short the Appellants say the appeal should not have been considered by the FTT because the homeowner had not exhausted the complaints process prior to making the application, as required by section 17 (3) of the 2011 Act. That section requires the complaints process to be exhausted by the homeowner. The Appellant’s position is that if there were complaints, such complaints were made by the homeowner’s brother in his capacity as a tenant of the property, and not the homeowner herself.

The relevant law

[5] Section 17 of the 2011 Act permits an application to be made to the FTT for determination of whether a property factor has failed to carry out its duties or failed to comply with its Code of Conduct. Section 17 (2) requires any such applications to include the homeowner’s reasons as to why the factor has failed in such duties.

[6] Section 17 (3) states, in relation to applications to the FTT:

“(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 the 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.”

[7] Section 2.5 of the Code reads:

“You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response time should be confirmed in the written statement (Section 1 refers).”

[8] Section 7.1 of the Code reads:

“You must comply with any request from the homeowner housing panel to provide information relating to an application from a homeowner.”

The FTT’s decision

[9] The hearing before the FTT took place on 7 December 2018. That hearing was assigned on 17 October 2018. The Respondent and her brother Mr Fariad Akbar were both present, with Mr Akbar was noted as her representative (at paragraph 4 of the decision).

The Appellants were represented by Mr Paul McDermott. The Appellants raised two preliminary matters.

[10] The first concerned the validity of the application to the FTT given that it was Mr Akbar who had been corresponding with the Appellants rather than the Respondent herself. The Appellants lodged a timeline of correspondence between themselves and

Mr Akbar, arguing their complaints process was not exhausted as the complaints were lodged by Mr Akbar who was only a resident and not the homeowner.

[11] The FTT rejected that preliminary issue. It held that “the complaint had been validly made as a representative of the Application” and therefore the FTT should deal with the substantive issues.

[12] The secondary preliminary issue concerned the email addresses that Mr Akbar, as the homeowner’s representative, had sent complaints to and thus whether the Appellants’ complaint process had been complied with. The FTT also rejected that issue, noting that the two email addresses used by Mr Akbar were both in use and that one part of an organisation should be able to pass an email to the correct person. It noted from productions before it that at least one of the emails had been forwarded internally within the Appellants, and therefore rejected that the complaints process had not been followed.

[13] Accordingly the FTT rejected both preliminary issues and considered the substantive merits of the complaint before it.

The appeal to the Upper Tribunal

[14] The Appellants set out their grounds for seeking to appeal the FTT’s decision on 15 February 2019. They sought to leave to appeal on a number of overlapping grounds, most of which related to facts regarding the complaints being submitted by Mr Akbar rather than his sister. Additionally the Appellant raised the question of the email address that Mr Akbar used to send in the complaints. The FTT granted permission on 11 September 2019.

[15] A Case Management Hearing was held on 12 November 2019 by telephone. The Respondent did not participate in that hearing. During the Case Management Hearing the Appellants indicated that they no longer intended to argue the point regarding the email

addresses, and therefore the sole ground of appeal concerned the question of whether the complaints process was exhausted by Mr Akbar acting as a representative. It was agreed that the appeal could be disposed of by written submissions alone.

The parties' submissions

[16] Both parties lodged written submissions.

[17] The Appellant sought to have the FTT's decision overturned. The Appellants argued that complaints can only be lodged by homeowners or their representatives, or that if a representative is to represent the homeowner, then such representative must be mandated in writing. At no time did Mr Akbar identify himself as a representative in that sense. No significance could be attached to the absence of a letter from the Appellants to Mr Akbar setting that they were not accepting the complaint as there was no mandate. Such a letter should not have been sent as such correspondence might breach data protection laws. The Appellant submitted that the Respondent's title deeds required a written mandate from anyone acting as a representative. The Appellant also submitted that stage two of the complaints process was not exhausted in any event and that in any event the Appellants had attempted to resolve the issue but got no response from the homeowner.

[18] I return to the form and substance of the Appellants' written submissions shortly.

[19] The Respondent lodged a short statement, asking for the appeal to be rejected and referring to some other complaints she had made herself (which were not before the FTT and do not form part of the Upper Tribunal's consideration of matters).

Discussion

[20] This is an appeal against a decision of the FTT. It is worth setting out that such appeals arise on a point of law only. It is not a rehearing on the substantive issues in dispute. It is not a rehearing of the case that was before the FTT. Rather it concerns the focused question as to whether the FTT erred in law in its decision.

[21] The written submission lodged by the Appellant is unhelpful in its format. It does not focus on the sole issue now before the Upper Tribunal; that is whether Mr Akbar was acting as the homeowner's representatives at the time that he lodged the complaints. The Appellants have taken the whole of the FTT decision and commented on individual paragraphs that fault is found with. I appreciate that the Appellant is represented by a lay representative. But it is important to understand that the Upper Tribunal cannot, and should not, rehearse all issues that were before the FTT. The role of the Upper Tribunal is to consider whether there is an error of law. Whilst it is important in the course of submissions to point to specific passages of the FTT's written decision and explain why, in law, the FTT are wrong, that does not require analysing each paragraph of a decision in the format that the Appellants have done so. To do so risks losing the focus of the Appellants' argument.

[22] The points regarding data protection and the stages of the complaints process are easily dealt with. Neither argument was made before the FTT. The Appellants have not provided specification as to how querying Mr Akbar's status as to whether he was a representative would breach "data protection legislation". This appears to be an afterthought as a way of explaining a failure to respond, rather than a substantive reason for not responding to Mr Akbar's correspondence. Similarly the issue of whether Mr Akbar followed each stage of the Appellants' complaints process appears to be connected with which email address were used by Mr Akbar at various stages. To that extent, the

Appellants had already expressly departed from that issue as a ground of appeal before the Upper Tribunal. But in any event, I note that the FTT recorded that it viewed productions showing that emails were passed from one part of the Appellants' organisation to another.

[23] The question of the title deeds requiring a written mandate might add something to the Appellants' arguments. But that was not a matter raised before the FTT. The title deeds are not produced. The Appellants do not explain why, as a matter of law, the wording of the title deeds mean that the FTT erred in law. In a similar vein in respect that it was not raised before the FTT but raised before the UT, the Appellants assert that they attempted to resolve matters with the Respondent but received no response. Both of those issues were matters of fact that could have been raised before the FTT. The Appellants did not raise either before the FTT. I place little weight on either.

[24] The Appellants do not argue that a representative cannot lodge complaints on behalf of a homeowner. Rather, they argue that the FTT should not have treated Mr Akbar as acting as a representative for his sister in this case. The FTT reached the conclusion that he was acting as a representative. Accordingly the Appellants must satisfy me that the FTT erred in law by reaching the conclusion that Mr Akbar was acting as a representative.

[25] The FTT records both parties' submissions on that point between paragraphs 6 and 11 of its decision. It appears the FTT heard extensively from each side as to the status of the correspondence between Mr Akbar and the Respondents. It concluded at paragraph 15 that

“[i]n the view of the Tribunal the Respondent knew, or ought to have known by taking reasonable steps to ascertain Mr Akbar's identify and position, that he was the representative of the Applicant”.

The FTT appear to have been unimpressed by the Appellant's position before it, referring to it as 'disingenuous'. It noted that the Appellant did not query Mr Akbar's status in

correspondence, or indicate it was not accepting the complaints as he was not the homeowner.

[26] Accordingly the FTT heard first hand from the parties on either side of the correspondence said to have formed the exhaustion of the complaints procedure. It assessed that information. It concluded that it was “satisfied that the complaint had been validly made by a representative of the Applicant” (paragraph 15). The FTT heard directly from the parties’ as to their actings. It concluded as a matter of fact that Mr Akbar was acting as a representative. The FTT noted that the Appellants did not refuse to deal with Mr Akbar on the basis that no mandate was provided, and gave the impression of accepting the complaints (but subsequently failing to respond to them). Whether a written mandate is required may depend on the circumstances. But the question of whether someone is acting as a representative is a matter of fact for the FTT to reach a conclusion on. The FTT did so in this case after hearing direct evidence on the issue. The Appellants do not explain why, as a matter of law, that conclusion was reached in error.

[27] I note the FTT in granting permission to appeal rather confusingly referred to a prima facie case of an error of law if a very strict interpretation of the law was taken. I have considered this in my overall assessment of the case. That is an unhelpful remark. The FTT concluded, on the facts, that Mr Akbar was the Respondent’s representative throughout, including at the point of lodging complaints. That is not a matter of interpretation of the legislation, but rather an assessment of the facts. The FTT reached their conclusion on the facts in front of them, and have expressed their clear conclusion in the decision that the complaints procedure was exhausted by the correspondence that it had before them, and on which they heard from witnesses on. Despite the wording used by the FTT in granting permission, I do not detect an error of law in the conclusion that the FTT reached.

[28] The appeal is refused.