



DECISION OF SHERIFF PINO DI EMIDIO

ON AN APPLICATION FOR REVIEW OF A DECISION TO REFUSE
PERMISSION TO APPEAL (DECISION OF 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

and

FIRST-TIER TRIBUNAL FOR SCOTLAND (HOUSING AND PROPERTY CHAMBER),
4th Floor, 1 Atlantic Quay, 45 Robertson Street, Glasgow, G2 8JB

Respondents

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

Applicant: McBrearty QC, Gilson Gray LLP

Respondents: no appearance

18 March 2019

Decision

Introduction

[1] I heard submissions from senior counsel for the applicant at a hearing held on
14 January 2019 at Dunfermline Sheriff Court. I was furnished with a tabbed bundle of

papers at the hearing. In this decision I have referred to the applicant as “JGPM” and I have called the respondents “the homeowner”.

[2] The homeowner has brought two complaints before the First Tier Tribunal for Scotland (Housing and Property Chamber) (“FTTS”) in relation to aspects of the factoring arrangements for the property known as The Park, Victoria House, Forres, IV36 3AH (“the development”). These complaints proceed under the Property Factors (Scotland) Act 2011 (“the 2011 Act”). JGPM maintains that the second FTTS has erred in its decisions of 21 May 2018 and 26 July 2018. The latter decision was the refusal of the second FTTS to refuse permission to appeal (Tab 10 of the bundle). JGPM next sought permission to appeal from the Upper Tribunal for Scotland. On 13 September 2018 my colleague Sheriff Christopher Dickson in a written decision refused permission to appeal after consideration of the papers. As it is entitled to do, JGPM has now sought a hearing on its application for permission to appeal under section 46 the Tribunals (Scotland) Act 2014 (“the 2014 Act”).

Grounds of appeal

[3] The JGPM’s Grounds of Appeal are set out at length in tab 12 of the bundle. The detailed written grounds are difficult to follow and it is perhaps not surprising that senior counsel chose to develop his submissions without over-reliance on the written grounds.

The headline points are as follows:

“The [second FTTS] erred as a matter of law in deciding in the Decision [of 21 May 2018] that [JGPM] had not complied with the [PFEO] issued on 10 April 2018 ...

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 is no clear explanation of the method by which the premium applied to the development has been assessed’.
3. Error by the [second FTTS] in placing weight on the alternative quote obtained

by the Homeowner.

4. The [second FTTS] erred in giving weight to their assertion 'The information provided by [PFEO] s a repetition of what has already been supplied.'
5. The [second FTTS] erred in not accepting the provision of the [JGPM] of the premiums attributable to the Development in the form provided by JGPM.
6. The [second FTTS] erred in not recognising [JGPM]'s reasonable interest in protecting commercially confidential information."

Submissions for JGPM

[4] Senior counsel commenced with some background information about his clients and the insurance arrangements which were the subject of the decision of the First Tier Tribunal against which JGPM seeks permission to appeal. The decision that is challenged arises from the second of two complaints brought by the homeowner which were dealt with by the Housing and Property Chamber of the FTTS. There had been two separate complaints which led to separate tribunal processes and separate decisions by differently constituted panels of the FTTS. Both complaints related to the tendering process for insurance arrangements for the development and alleged breaches of the Code of Conduct for Property Factors in Scotland ("the Code").

[5] JGPM had embarked on a review of its 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.

[6] The homeowner's first complaint to the FTTS had been brought in late 2016. It is chamber number HOHP/PF/17/0006. On 12 July 2017 the first FTTS had determined it in favour of the homeowner and had required to payment of compensation. No Property

Factor Enforcement Order (“PFEO”) had been made as JGPM had paid out after the issue of the adverse decision which was accompanied, as is the norm, by a draft of the proposed PFEO.

[7] 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 is chamber number HOHP/PF/17/0367 and the present appeal relates to this second complaint and not the first complaint. There was an underlying misconception in that the JGPM had not carried out any tendering in relation to the insurance period that commenced in 2017 because it had entered into a two year arrangement in 2016. The result was that the second complaint could only have related to JGPM’s actions when it carried out the tendering process in 2016 because there was no separate tendering process in 2017. The second FFTS also came to a decision in favour of the homeowner but on this occasion it made a PFEO in different terms in that it required the production of certain information by JGPM. The terms of the PFEO promulgated by the second FFTS are narrated at paragraph 18 below.

[8] Senior counsel provided some background information about his clients. He submitted that JGPM is a significant operator in the property factoring market in Scotland. It manages about 850 developments of differing sizes. About 26,000 homeowners own or live in these developments. The portfolio for insurance purposes is in the range £3 to £4 billion. The total value of its annual turnover is around £4 million with pre-tax profits of about £1.2 million. I was advised that it aims to carry out its business with integrity. It is not always easy to keep all homeowners happy but it tries to be fair and transparent in its dealings with them. Its Complaints Process was said to be compliant with the terms of the Code of Conduct for Property Factors (“the Code”). (Tab 28 of the bundle contains an extract showing paragraphs 5.1 to 5.9 of the Code). In 2018 it received 118 complaints from

homeowners. This is about 0.4% of its customer base. It seeks to engage positively with homeowners who have complaints. Those presently directing and controlling the business acquired it about 2012 when it dealt with about 4,000 homeowners. Subsequently in 2014 and 2015 there was significant expansion of the business by the acquisition of other property factoring businesses based in Edinburgh and Glasgow. This expansion also included a number of developments in the Aberdeen area and other parts of the North East of Scotland, including the development.

[9] On 6 April 2018 the second FTTS in chamber number HOHP/PF/17/0367 issued its written decision in which it found that JGPM had failed to comply with the PFEO it had made in that case. A decision of a FTTS that a factor has failed to so comply may have major and wide-ranging ramifications for the factor because of the re-registration provisions of the 2011 Act. Senior counsel referred me to the terms of section 4(1), 4(4)(iii) and (iv) and 4(5). These provisions as currently in force, and in so far as relevant, are in the following terms:

“(1) This section applies where a person makes an application to the Scottish Ministers in accordance with section 3

....

(4) The Scottish Ministers must enter the person in the register if, having considered the application and taken account of any representations made by virtue of subsection (2), they are satisfied—

(a) where the person has not previously been registered, that the person is a fit and proper person to be a property factor,

(b) where the person is, or has previously been, registered, that—

...

(iii) the person has, while registered, demonstrated compliance with the property factor code of conduct, and

(iv) the person has demonstrated compliance with a property factor enforcement order made against the person by [the First-tier Tribunal].

(5) Otherwise, the Scottish Ministers must refuse to enter the person in the register.”

[10] On the face of it, having regard to section 4(5) the Scottish Ministers do not have a discretion to refuse re-registration when a registered property factor has failed to comply

with a PFEO. There is an appeal to the sheriff under section 11 of the 2011 Act. The court can require that the factor is entered in the register if it is reasonable to do so. Senior counsel noted that while the sheriff appears to have a wide discretion under section 11, no such discretion seems to be built into the initial process under section 4. Accordingly a decision by an FTTS to find that a property factor has failed to comply with a PFEO may have extremely serious consequences for that factor's business as a whole if it were eventually to result in a refusal to re-register it under the 2011 Act regime. Senior counsel acknowledged that this submission proceeded on a construction of section 4 that was adverse to the registered property factor but it was at least a stateable interpretation of the provisions to which his clients had to have regard. I note also that section 8 of the 2011 Act enables the Scottish Ministers to remove a property factor from the register in a variety of circumstances. One of those is where the property factor has failed to demonstrate compliance with "any [PFEO] made against the property factor by [the FTTS]" (section 8(2)(c)(ii)).

[11] Senior counsel then moved on to JGPM's tendering process for property insurance in 2016. JGPM did not tender in respect of individual developments but for the entire portfolio. This allowed it to obtain a better price for the common insurance across the developments it managed. It was also important to understand that in recent years there had been a diminishing number of insurers in the market who were interested in providing this kind of insurance. Some of the insurers were only interested in an invitation to tender on an "entire portfolio" basis. The tendering process was channeled through insurance brokers. The insurers who responded did so in relation to the whole portfolio which has a value in the range £3 to £4 Billion. The interested insurers provided quotations on a portfolio wide basis which took account of the location of each development and its claims

history. In turn, JGPM in consultation with the brokers sought to apply a premium rate of each development in the portfolio. This was expressed as a percentage development value. This process took account of the whole portfolio and went beyond simply the information available for a single development. JGPM's business model for placing its insurance business included payment of commission for the broker. This was part of the comprehensive ongoing service provided to its customers. The payment of commission was not hidden from homeowners and was a further source of income just as JGPM also charged the homeowner a management fee.

[12] Prior to the acquisitions by JGPM when it expanded after 2012, these various businesses had their own separate common insurance arrangements. When JGPM's common insurance arrangements for the developments it managed came up for renewal in 2016. JGPM sought to reconcile these varying insurance arrangements to achieve economies of scale. The common insurance policy for the main part of its Edinburgh business had traditionally been carried out through a single broker and a single insurer. One of the main acquisitions had been the former firm of Grant & Wilson. Grant & Wilson had been a major player in the Glasgow property factoring market with its own wholly separate common insurance arrangements. As a result JGPM decided to test the market in relation to the whole of its portfolio of developments. In deciding to proceed in this way JGPM took on a quite complex task of a kind not previously undertaken by it internally. It was presented with a number of different recommendations from different sources and had to carry out a comparison exercise of its own. JGPM had not previously had to undertake such a comparison exercise within its own organisation. This involved consideration not just of the levels of premium and excess but also a comparison of the policy terms offered by the different insurers and the experience of individual claims handling by individual

insurers. This exercise could not be done by brokers who provided advice as there were three brokers involved in the exercise. In the result JGPM's conclusion was that it would select the insurer who was already providing cover for most of its Edinburgh developments.

[13] Very importantly JGPM entered into a two year deal with those insurers for the insurance of all of the developments under its management. This concerned insurance cover for property valued at in excess of £3 Billion. The overall premium payable to the insurer was a very substantial figure. Premiums were fixed for the whole period of two years for all homeowners except in so far as any increases that might be made in the level of Insurance Premium Tax. There was no renewal process for common insurance in 2017.

[14] This tendering process had involved pulling together a wide range of information across JGPM's entire portfolio not just the Forres development. A lot of that information was commercially sensitive and potentially of value to a competitor or other insurers. This included information about commissions. There was a possibility that the insurance market could be distorted in that attempts might be made to undercut the successful insurer. The part of the overall premium that was attributed to the Forres development was about £7,000. This was a very small proportion of the whole premium. The information as to the value of the whole portfolio, the amount of the commission and the rate of attribution across the whole portfolio was of interest to competitors.

[15] Following its experience with the problems it had encountered in the 2016-18 common insurance review exercise JGPM had decided to revert to something closer to its original model whereby it has gone to a single broker for a quote. As a result, it has proceeded on a single quote recommended by the broker. This produces information in a form that is without difficulty. JGPM does not require to make an in-house comparison of material obtained from a number of different brokers. The relevant material for 2018 is to be

found in tab 14 to 19 in the bundle produced for this hearing. JGPM had not received any complaints from homeowners on this issue following the 2018 review exercise.

[16] Senior counsel next turned to consider further the two sets of decisions arising from the proceedings before the FTTS.

[17] In the earlier case chamber number HOHP/PF/17/0006 (which is not the subject of this appeal), the first FTTS in its decision of 12 July 2017 found that JGPM was in breach of paragraphs 5.6 and 5.7 of the Code (Tab 3 of the bundle at pages 13-15 of its decision). The first FTTS had proposed a PFEO requiring payment of £500 to the homeowners as compensation. Later on 8 January 2018 the first FTTS issued a Certificate of Compliance JGPM having made the proposed payment without the necessity for the proposed PFEO to be formally made.

[18] In about October 2017 the homeowners made a second complaint against JGPM to the FTTS. This is chamber number HOHP/PF/17/0367 and the present appeal relates to this second complaint. This complaint related to the common insurance renewal in 2017. For the reasons set out above there had been no tendering process in 2017 as JGPM had entered into a two year deal for common insurance. On 22 January 2018 a differently constituted second FTTS issued a decision on the second complaint which was similar to that of the first FTTS (a copy is at Tab 6 of the bundle). It 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 FTTS proposed a draft PFEO. The proposed PFEO which is in the same terms is to be found at Tab 7. On 8 April 2018 the second FTTS, having noted that on 23 March 2018 it had refused an application for review as being “wholly without merit” issued the PFEO in substantially the terms of its draft. The PFEO is at Tab 8 of the bundle and was in the following terms:

“[JGPM] are directed to:

7. 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].
8. 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 to 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].”

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

[20] On 21 May 2018 the second FTTS issued its decision finding that JGPM had not complied with the PFEO (tab 9). Having considered the representations 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 if 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 FTTS] 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.”

[21] Following the issue of the PFEO JGPM applied to the second FTTS for permission to appeal to the Upper Tribunal. The grounds are set out at Tab 10. On 26 July 2018 the second FTTS refused permission to appeal. Its written decision is at Tab 11.

[22] With reference to the terms of paragraph 6(a) of the PFEO, senior counsel noted that the second FTTS had not actually ordered the “complete information on the quotations” to be produced. The essential complaint of JGPM is that the material it did provide was provided in good faith and did amount to compliance with the PFEO. Therefore the second FTTS has erred in finding that there was a failure to comply with its PFEO. It seemed to have proceeded on the basis that the actual quotations were required when it had not actually specified this in the PFEO.

[23] The complaints of JGPM about the decision of the second FTTS as to non-compliance did not end there. With reference to paragraph 6(b), it appeared that the second FTTS had placed weight on the existence of alternative quotations. However there could not be a meaningful comparison. More fundamentally any such comparison was not relevant and was an error of law. The issue of compliance had to relate to the PFEO that the second FTTS had previously granted and not to some comparison with alternative material. The second FTTS had misunderstood its own PFEO. Further the second FTTS had erred in law in that the PFEO in its terms had gone beyond what required to be done by JGPM to comply with the provisions of paragraph 5.7 of the Code.

[24] In essence there were three complaints amounting to errors of law about the decision of the second FTTS which gave rise to arguable grounds of appeal under section 46 of the 2014 Act:

- a. There had been an appealable error by the second FTTS in the interpretation of the terms of its own PFEO when it came to consider whether JGPM had

complied with the PFEO;

- b. Some of what the second FTTS required in the PFEO was irrelevant to the complaint it had found established;
- c. The last sentence of paragraph 6(b) of the decision of 21 May 2018 amounted to an error of law by having applied the wrong test. Having regard to the terms of paragraph 6(b) JGPM did not require clearly to demonstrate that the selection of the insurer was the best choice for the homeowners. The second FTTS had reached a legally erroneous decision about the adequacy of the information provided by JGPM in seeking to put itself in compliance with the PFEO. Given the decision of the first FTTS, there was a double penalty in what the second FTTS decided to require be done by way of enforcement. This was both irrational and a breach of natural justice.

Discussion

[25] Section 46 requires that permission to appeal should be granted where there are arguable grounds of appeal. Senior counsel accepted that my colleague Sheriff Dickson at paragraphs [8] to [11] had correctly set out the relevant legal context in which this decision requires to be made. Therefore I will adopt and not repeat what is said in those paragraphs. He also accepted that at paragraph [13] Sheriff Dickson was correct to refer to the Opinion of the Court delivered by Lord Drummond Young at paragraphs 42 to 43 in the case of *Advocate General for Scotland v Murray Group Holdings* 2016 SC 201. The quoted passage discusses the terms of the Tribunals Court and Enforcement Act 2007 relevant to appeals from the non-devolved UK tribunals that fall within the scope of that statute. I have treated those passages as providing important guidance on the approach to be taken in relation to

the provisions in section 46 of the 2014 Act though I note that the discussion in that case relates to the provisions for appeal from the Upper Tribunal to the Court of Session under the 2007 Act. The parallel provision to section 46 of the 2014 Act in the 2007 Act is section 11. That section is not in exactly the same terms as section 46(4) which provides that permission is to be granted where: “the Upper Tribunal is satisfied that there are arguable grounds for the appeal.”

[26] I was not addressed as to the meaning of the expression “arguable grounds for the appeal” in section 46(4). In approaching the terms of section 46(4), I have had regard to the discussion by the Lord Justice Clerk (Lord Carloway) in *Czerwinski v HM Advocate* 2015 SLT 610 at paragraph [9] and the authorities cited there (*Hoseini v Secretary of State for the Home Department* 2005 SLT 550 and *Campbell v Dunoon & Cowall Housing Association* 1992 SLT 1136). That discussion related to a different statutory context but I have found it helpful in construing the terms of section 46(4).

[27] Paragraph 5.7 of the Code of Conduct 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.”

[28] I am satisfied that there are arguable grounds of appeal in respect of Ground 1. I consider that it is arguable that JGPM complied with paragraph 2 of the PFEO. If the second FTTS has mis-interpreted its own PFEO as requiring JGPM to do more than has been provided for in it, then that would be an error of law. On the face of it, in terms of the second paragraph of the PFEO, the second FTTS seemed to think that JGPM was obliged to do something that was not actually the performance of the duty imposed by paragraph 5.7

of the Code of Conduct. That paragraph merely requires exhibition of documents unless something else has been requested.

[29] I am satisfied that there are arguable grounds of appeal in respect of Ground 2. The second FTTS found that JGPM had failed to comply with paragraph 5.7 of the Code of Conduct. That paragraph relates to the making available for inspection of documentation relating to any tendering or selection process. In paragraph 6(b) of the decision of 21 May 2018 JGPM is taken to task for failing to provide explanations. It is arguable that this amounts to an error of law in that such explanations were not required by the terms either of the PFEO or by paragraph 5.7 of the Code of Conduct.

[30] I am satisfied that there are arguable grounds of appeal in respect of Ground 3. Having regard to the terms of paragraph 5.7 of the Code of Conduct it is arguable that the second FTTS has erred in the final sentence of paragraph 6(b) of the decision of 21 May 2018 in making a comparison with a quote obtained by the homeowner. Paragraph 5.7 of the Code did not require JGPM to carry out such a comparison but to provide information to the homeowner. It is then for the homeowner to decide what to make of the information provided under the Code which has the objective of promoting transparency. The second FTTS's own later gloss upon review on the terms of paragraph 6(b) is not conclusive.

[31] I am also satisfied that there are arguable grounds of appeal in respect of Ground 4.

[32] Senior counsel did not make oral submissions in relation to proposed Grounds 5 and 6. I propose to refuse permission in respect of these matters.

Conclusion

[33] In the circumstances I find myself in disagreement at this stage with the decision of my colleague Sheriff Dickson to the extent set out above. Permission to appeal is granted in

respect of proposed grounds 1 to 4 only. The clerk of the Upper Tribunal will proceed to intimate this decision to the parties and then the timetable set out in the Rule of Procedure for appeal will come into operation and be intimated to parties.