



DECISION NOTICE OF SHERIFF F McCARTNEY

ON APPLICATION TO APPEAL

in the case of

Miss Corrine Sinclair, Eastra, Stromness, Orkney, KW16 3HS

Appellant

and

Speirs Gumley Property Management, Red Tree Magenta, 270 Glasgow Road, Rutherglen,
Glasgow, G73 1UZ

Respondent

FtT Case Reference FTS/HPC/PF/19/4090

21 March 2022

Decision

[1] The appeal is granted.

Introduction

[2] This case concerns the duties on a property factor relative to flats at St Andrews Square, Glasgow. Applications to the First Tier Tribunal (referred to as the 'FtT') raised a number of complaints over the factor's services. At the stage of the case being considered before the FtT, there were two related applications. One was the current Appellant. The other

application was subsequently withdrawn, after permission to appeal was granted by the Upper Tribunal.

[3] Both applications lodged with the FtT concerned a number of complaints about the factoring services provided by the Respondent. It included complaints about the completion of certain work by contractors, the rates charged for electricity for communal parts of the building and the rates charged for communal buildings insurance. From the background documents provided to the FtT it was clear that, particularly on the last two issues, the Appellant had been frustrated over the response of the factors for a substantial period. It would be accurate to say there had been a breakdown in communication. An extensive folder of over 300 pages of supporting documents was lodged with the application, largely containing the email history over the 3 issues between the parties. It is not necessary to attribute blame to either party, but, as will be seen, the number of documents before the FtT perhaps led to the FtT losing sight of the issue in hand.

[4] The FtT rejected each of the complaints in both applications and subsequently refused leave to appeal to the Upper Tribunal.

[5] The Appellant originally sought leave to appeal on four grounds. Leave to appeal was only granted by the Upper Tribunal on two more limited grounds. This decision deals with those two limited grants of appeal.

[6] The Appellant appeared for herself. Mr Friel appeared for the Respondents.

Leave to appeal/Grounds of appeal

[7] The first of the two grounds over which leave was granted concerned the factors arrangement of communal buildings insurance. The Appellant submitted that the factor

was not in compliance with the Code of Conduct for Property Factors (issued in terms of the Property Factors (Scotland) Act 2011; referred to as “the Code”). She argued the FtT erred in its application of the Code to the facts and the FtT should have found breaches of section 5 of the Code. Whilst the Appellant sought to persuade the Upper Tribunal that it should find a breach of the Code, in fact the hearing focused on the reasons given by the FtT that there was no breach of the Code.

[8] The second matter for which leave to appeal was granted was on the issue of the commission paid to the factors relative to the arrangement for buildings insurance and compliance with the Code. Again the legal issue arising, insofar as the Upper Tribunal is concerned, relates to the reasons given by the FtT for rejecting the Appellant’s claim.

Background

[9] Over a period of some 6 years the factors had arranged, via a broker, the communal buildings insurance. The premium was split between the relative flats. The Appellant’s evidence before the FtT was that each flat’s share of building’s insurance comprised of one of the largest parts of the factoring fees for the flats (at around £400 per flat per annum). The Appellant took no issue with the fact that the factors arranged for the policy to be put in place, but rather disputed the factors had complied with the duties upon them in section 5 of the Code, given the cost of the policy arranged. That issue was raised with the factors in or about 2017. After receiving no positive response, another homeowner obtained comparable quotes from insurers in March 2018. These were then provided to the factors. After some delay and correspondence, the Respondents conceded the premiums previously paid were higher than they should be. It was accepted that a historical claim on the policy should have been disregarded. It was accepted that as a result of that claim being included on the claims history, the premiums were higher than they ought to have been.

[10] On that error being noted, the factors asked the broker to revert to the insurers to see if the cost of the policy could be reduced. As part of those discussions, via the brokers, the factors obtained agreement that future policies could be arranged at a discounted rate for 3 years. The Appellant argued this was not appropriate compensation (as some flats had been sold, so individual owners would not benefit if their flat had been sold meantime, and in any event the three year discount did not equate to compensating six years or so of overpayments). She detailed problems in obtaining copies of the insurance documents from 2011 onwards from the factors. In the application before the FtT, she asked the FtT to find breaches of a number of different parts of the Code relative to the factors actions over the communal insurance. In particular, in her written application to the FtT the Appellant reproduced parts of the Code with her own annotations, including paragraphs 5.2, 5.3, 5.5, 5.6 and 5.7. The annotations sought to explain why the factors had not complied.

[11] Before the Upper Tribunal, the Appellant sought to argue that (1) the FtT erred in not finding that the factors had breached the Code, which failing that the reasons given by the FtT for not finding a breach were insufficient; (2) separately the FtT had erred in that it did not deal with the argument raised before it as to compliance with the Code re the commission that the factors received re the insurance premiums.

Submissions

[12] On the issue of the Code, Ms Sinclair argued that the FtT erred in finding that the factor was not in breach of the Code. She pointed to paragraph 17 of the FtT's decision, which set out the steps that the factor had taken re the insurance premiums. She argued that the FtT should have found that those steps amounted to a breach of section 5 of the Code, which sets out the obligations on factors when arranging insurance on behalf of homeowners. Failing that, she argued that the FtT had not given enough reasons to explain why there was no breach of the Code. On the issue of reasons as to the question of commission, it was her position that the matter was before the FtT both by her written application and in oral argument before the FtT. The FtT had not dealt with her arguments in its decision.

[13] Mr Friel, on the other hand, argued that the FtT had reached the correct conclusion on whether the factors had complied with the Code, and that the reasons were adequate. The factors were not responsible for the actions of third parties (i.e. the brokers). Negotiating better insurance rates was beyond the scope of the Code. It was not for the Respondents to set market rates for insurance. All requests for information were appropriately responded to. The Upper Tribunal could have sight of insurance documents, with certain redactions that were commercially confidential, to be satisfied everything had been done that should have. It was accepted (at the hearing on leave to appeal) that the issue of commission paid to the factor was discussed at the FtT.

Discussion

[14] The Code sets out obligations on a factor to provide clear information on how the insurance premium is calculated, the premiums paid, any excesses, the name of the company providing the cover and the terms of the policy (section 5.2 of the Code). Commission received and charges applied for arranging home insurance must be disclosed (section 5.3 of the Code). Factors must, on request, show how and why the insurance provider was chosen, including why multiple quotes were not required (section 5.6) and provide copies of documents relating to the tendering process (section 5.7).

[15] The Appellant listed alleged breaches of sections 5.2, 5.3, 5.5, 5.6 and 5.7 of the Code in her application form. Accordingly the Appellant asked the FtT to find that the factors had failed to provide adequate information on the insurance policy (section 5.2), had failed to provide the required information on the progress of claims (section 5.5), had failed to respond to requests on adequate information on why the particular insurers were chosen after requests for that information (section 5.6) and information on the tendering process (section 5.7). She argued that the FtT was wrong not to find a breach of the Code and the Upper Tribunal should find a breach. She accepted at the hearing on leave to appeal that the stronger argument might be whether adequate reasons were provided by the FtT for rejecting each of her complaints.

On the question of commission, the argument was that no reasons were given by the FtT for rejecting her claim there was a breach of section 5.3 of the Code.

[16] The Respondents denied any breaches of the Code. The FtT noted there was little dispute on the facts between the parties. Paragraph 17 to 19 of the FtT's decision records the factors' submission to the FtT. Paragraph 17 reads as follows:

"[17] Mr Friel explained that in order to obtain the best rates for all the developments which the Property Factor managed, including the development to which this application relates, the Property Factor used an independent insurance broker, Deacon Insurance Brokers, to obtain the best quote which it could from insurers for all the developments which the Property Factor managed as one block policy. The premium was then apportioned to each development by the broker, and each homeowner was then charged the proportion of the premium relating to their property."

Discussion

[17] In relation to the first matter, as set out in the permission to appeal decision, the question is simply have the FtT given adequate reasons for rejecting Ms Sinclair's claim that the factors breached the Code? In other words, have the FtT properly explained their decision?

[18] The FtT's discussion on the issue of the Code and insurance is set out at paragraphs [35] to [37], [39] to [40] and [53] to [56]. Other parts of the FtT's decision appear to relate to the Code, but it is not clear in respect which of the three factual issues then before it that those parts of its decision relates to (in particular paragraphs [43] to [52]).

[19] It is trite law that a tribunal must give adequate reasons for its decision. Whilst the standard of adequacy of reasons will vary according to the decision in question, reasons are

required to allow each party to “be left in no doubt why they have won or lost ...” but also “that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not” (*Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 at 381).

[20] Turning to each section of the Code in turn and dealing with section 5.2 firstly, that section requires a factor to provide clear information on how the insurance premium is calculated, the premium, if there is an excess, the terms of the policy and who the policy is held with. The FtT rejected there was a breach, giving its reasons at paragraph [53]. That paragraph also appears to deal with the allegation that section 5.3 was breached by the factor. Paragraph [53] narrates that the factors provided ‘the insurance details when these were requested’, but noted there was a dispute about historic records being provided. Paragraph [54] of the tribunal’s decision goes on to narrate steps taken by the factors to liaise with the brokers to arrange a subsequent reduction in premiums, and concludes “where suitable adjustments and reductions were made to the premiums.... the Tribunal did not find that the Property Factor was in breach of this section of the Code.”

[21] Those reasons are difficult to follow. Firstly, it is not clear why negotiating a reduction in premiums is connected to either the factor’s obligations to provide information on the policy (section 5.2) or information on any commission paid (section 5.3). It is not clear if the FtT thought there was no obligation in the Code to provide historic records. It is not clear what records the FtT found had been provided. Paragraph [54] also refers to not finding a breach of “this section of the Code”. Given that two sections were referred to in the preceding paragraph, it is hard to follow that part of the FtT’s decision.

[22] Turning to section 5.5 of the Code, the FtT rejected this claim, giving reasons at paragraph [55]. It notes that the Respondents were alleged to have failed to provide historic

documents. However, the Appellant's written application to the FtT refers to "countless enquiries regarding outstanding claims on our insurance and we were not kept up to date on progress" (page 5 of the Appellant's written application to the FtT). It does not appear that the reasons given by the FtT address the complaint raised by the Appellant, which was not on the question of historic insurance documents.

[23] On the alleged breaches of sections 5.6 and 5.7, the FtT deals with these together at paragraph [56] of its decision. Section 5.6 requires factors to provide information relating to how a particular provider was selected, and information if quotes were not obtained. Section 5.7 requires copies of insurance documentation to be made available for inspection free of charge, but allows factors to charge for copies.

[24] The Appellant complains that she had not received a breakdown of quotes or information on the tendering process, and that all requests for documents have been denied, even after an offer to meet the costs to the Respondent in providing it. The FtT rejects the Appellant's complaint, simply saying the Respondent "provided information explaining the process by which it arranged insurance together with insurance particulars." No findings are made as to the date of providing such documentation or what documentation was provided.

[25] I consider that the reasons given for rejecting the Appellant's application under on sections 5.2, 5.5, 5.6 and 5.7 are inadequate.

[26] There is insufficient information before me to determine whether there is in fact a breach of section 5 of the Code. The FtT's decision does not contain findings or a statement of facts. I consider further evidence would require to be lead, and that should be done before the FtT.

[27] Accordingly, the appeal is upheld in relation to the reasons provided by the FtT regarding sections 5.2, 5.5, 5.6 and 5.7 of the Code.

[28] The second issue before the Upper Tribunal is the question of commission for insurance premiums and whether the FtT has dealt with the Appellant's complaint of a breach of section 5.3 of the Code. That section reads:

"5.3 A property factor must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit that is paid to them or anyone in control of the business or anyone connected with the factor or a person in control of the business, in connection with the policy. They should also disclose any financial or other interest that they have with the insurance provider or any intermediary. A property factor must also disclose any other charge they make or apply for arranging such insurance."

[29] The decision of the FtT does not mention the question of commission, and whether the factors disclosed any commission paid to them by the brokers as they are obliged to do under the Code. Was that issue before the FtT? The Appellant argues it was. That appears to be correct; Mr Friel conceded before the Upper Tribunal (at the hearing on leave to appeal) that it was and the FtT heard full arguments on that issue. In addition there is reference to the question of commission in the Appellant's application to the FtT. In her paper apart (under the heading of "Requested Outcome following Tribunal Action") she asks the FtT to order the factors "...in compliance with the Code of Conduct to provide all proprietors with a detailed statement of commission received from the insurance."

[30] The FtT have not dealt with this point at any point in their written reasons. It cannot be said that the FtT have given adequate reasons for their decision.

[31] Accordingly the decision of the FtT is set aside also on the absence of reasons for rejecting the Appellant's complaint under section 5.3 of the Code.

[32] I have considered whether I have sufficient findings in fact to allow the Upper Tribunal to reach a substantive decision on the two issues before it. I have concluded that I

do not, and further evidence may need to be lead. Accordingly I set aside the decision of the FtT on the issue of sections 5.2, 5.3, 5.5, 5.6 and 5.7 of the Code, and order that a new hearing takes place before a differently constituted FtT.

[33] As a post-script, I should say that the matter before the FtT was factually complex. A large volume of documents was before it, not all of which appear to have been relevant to the issues that the FtT needed to consider. There was possibly a lack of focus regarding what was relevant to present to the FtT. Neither party had the benefit of either party being legally qualified. Parties will wish to focus on the precise breaches of the Code which are being alleged, which will assist in the swift resolution of matters.

Conclusion

[34] 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.