



DECISION BY SHERIFF CHRISTOPHER DICKSON
FOR PERMISSION TO APPEAL

in the case of

JAMES GIBB PROPERTY MANAGEMENT LIMITED

Appellant

and

MR RICHARD PETROCELLI AND MS ELIZABETH BRUCE

Respondent

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

13 September 2018

DECISION

The Upper Tribunal, not being satisfied that there are arguable grounds for appeal, refuses permission to appeal to the Upper Tribunal.

REASONS FOR DECISION

Introduction

[1] This is an application by the appellant for the Upper Tribunal (hereinafter referred to as "UT") to give permission to appeal a decision on the First-tier Tribunal (hereinafter referred to as "FTT"), dated 21 May 2018.

[2] The decision of the FTT, dated 21 May 2018, decided that the appellant had failed to comply with a Property Factor Enforcement Order issued on 10 April 2018 (hereinafter referred to as the "PFEO"). The PFEO was in the following terms:

"James Gibb Residential Factors 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 Property Factor Enforcement Order.

(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 selection matrix was used, and, if so, what the weightings and quality were.

Commercially sensitive information which cannot be divulged may be anonymised 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 Property Factor Enforcement Order."

[3] On 16 April 2018 the appellant's provided the following information to the FFT:

"Direction 1

This payment was made, to the homeowner, from the firm's own funds, within the specified period.

Direction 2

Details of the insurance premiums and cover of each of the alternative quotes obtained

As stated in our response to last year's Direction (HOHP/PF/17/006), the quotations provided covered one lump sum for the whole of our portfolio (around 780 developments). As such, this information is both commercially sensitive and not useful to this case. In order to answer your question, though, I have calculated what

that premium would be for The Park from each broker/chosen insurer. These are as follows:

The Park Forres 2016			
Broker / Insurer	Net	IPT (9.5%)	Gross Premium
Marsh / Allianz	£6,687.00	£635.27	£7,322.27
Mackays / RSA	£6,695.49	£636.08	£7,331.57
Bruce Stevenson/ LV	£6,770.07	£643.15	£7,413.22

As we had a fixed two year deal with Marsh/Allianz, the only difference in this latest year's premium was a reflection of the increase in insurance premium tax (IPT) from 9.5% to 10%, increasing the development's overall insurance cost to £7,335.70.

During our recent correspondence, we also intimated that, going forward, we are working with our brokers to ensure that our quotations are presented to us in such a way that we can fully demonstrate the process and quotations involved in the selection process without the implications of commercial sensitivity.

We are in renewal discussions, currently, with our broker who are happy to work with us in order to allow full visibility of quotes in a more accessible manner.

We will always accept that, if we can improve the way in which we do anything in our business, we'll be happy to do so and, indeed, as mentioned above, we are changing our insurance quotation process in order to allow the visibility requested here without supplying commercially sensitive information.

As our current deal was for a two year duration, we have, of course, been unable to make changes until now.

In terms of cover, the cover provided was essentially the same in each case with no broker offering more or less than the others in the standard areas of cover. Marsh, however, included the following additional cover:

Removal of wasps and bees nest - £500 in any one claim
Replacement of locks and keys - £5,000 in any one claim
Tree felling and lopping - £10,000 in any one claim

If selection of the successful quotation was not made on the basis of the lowest price, advise if a price/quality selection matrix was used and, if so, what were the weightings and quality criteria?

Our chosen broker, Marsh, did actually deliver the best price for our customers but it wasn't the only factor taken into consideration. Equally important is the level of service

received from the insurers in the event of a claim, including their approval of claims, quotes etc. Historically, we have found the Allianz process to be the smoothest. As an example, if an owner's car damages a wall, some buildings insurers automatically step back from the claim, instead insisting that the driver makes a claim via their car insurance policy. Allianz, typically, settle the claim then work to have the costs recovered from the driver's insurers.

We also hold a quarterly claims review meeting with Marsh and Allianz where we discuss on-going claims, issues etc. This ensures that all parties are aware of all significant works on-going.

In summary we were delighted that Marsh *I* Allianz were able to deliver both on price and service.

We would also wish to re-iterate the following part of our response to the previous Direction: It is a fundamental part of our ethos and company values to be as open and honest as we can and to deliver the best possible service and value to our customers. The negotiations we had with the various insurance brokers as part of the 2016 renewal were hugely extensive and we used every means possible to minimise the premiums to our customers, particularly in a time where premium tax was increasing significantly. It was a genuine delight that we were able to secure what we consider is an exceptional deal for our customers."

[4] By representations, dated 25 April 2016, the homeowner provided information to the FTT in relation to a recent insurance quotation by Bridge Insurance Brokers Limited, for the development in question, which was significantly lower than that of Marsh *I* Allianz, which was the insurer chosen by the appellant.

[5] The decision of the FTT, dated 21 May 2018, found that the appellant had complied with para 1 of the PFEO but had failed to comply with para 2 of the PEO for the following reasons:

- "(a) The information from the Factor [*the appellant*] is a repetition of what has already been submitted; there is no new information in the Factor's response. The Factor 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, the Factor states that it was based on cost, supplemented by previous experience of the claims handling process with the selected broker/insurer. The Factor 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 Tribunal 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 and that

chosen by the Factor. It has not been clearly demonstrated that the selection of insurer by the Factor was the best choice for the Homeowners."

[6] The appellant contends that the above two paragraphs contain the following six errors of law:

1. Error of law in deciding that the Factor had failed to provide the "required completed information on the quotations";
2. Error in deciding that the Factor 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 Tribunal in placing weight on the alternative quote obtained by the Homeowner;
4. The Tribunal erred in giving weight to their assertion "The information provided by the Factor is a repetition of what has already been supplied";
5. The Tribunal erred in not accepting the provision by the Factor of the premiums attributable to the Development in form provided by the Factor; and
6. The Tribunal erred in not recognising the Factor's reasonable interest in protecting commercially confidential information.

[7] The appellant initially sought permission from the FTT to appeal to the UT.

However, the FTT, by decision dated 26 July 2018, responded to each purported error of law and refused to give the appellant permission to appeal. The appellant has therefore applied to the UT for permission to appeal to the UT on the six purported points of law set out above.

The relevant law

[8] Section 46 of the Tribunals (Scotland) Act 2014 (hereinafter referred to as "the 2014 Act") provides:

"46 Appeal from the Tribunal

- (1) A decision of the First-tier Tribunal in any matter in a case before the Tribunal may be appealed to the Upper Tribunal.
- (2) An appeal under this section is to be made-
 - (a) by a party in the case,
 - (b) on a point of law only.
- (3) An appeal under this section requires the permission of-
 - (a) the First-tier Tribunal, or
 - (b) if the First-tier Tribunal refuses its permission, the Upper Tribunal.
- (4) Such permission may be given in relation to an appeal under this section only if the First-tier Tribunal or (as the case may be) the Upper Tribunal is satisfied that there are arguable grounds for the appeal.
- (5) This section-
 - (a) is subject to sections 43(4) and 55(2),
 - (b) does not apply in relation to an excluded decision."

[9] Rule 3 of The Upper Tribunal for Scotland Rules of Procedure 2016 (hereinafter referred to as "the 2016 Rules") provides:

"(6) The Upper Tribunal may, where the First-tier Tribunal has refused permission to appeal-

- (a) refuse permission to appeal;
- (b) give permission to appeal; or
- (c) give permission to appeal on limited grounds or subject to conditions;

and must send a notice of its decision to each party and any interested party including reasons for any refusal of permission or limitations or conditions on any grant of permission.

(7) Where the Upper Tribunal, without a hearing-

- (a) refuses permission to appeal; or
- (b) gives permission to appeal on limited grounds or subject to conditions,

the appellant may make a written application (within 14 days after the day of receipt of notice of the decision) to the Upper Tribunal for the decision to be reconsidered at a hearing.

(8) An application under paragraph (7) must be heard and decided by a member or members of the Upper Tribunal different from the member or members who refused permission without a hearing.

Where the First-tier Tribunal sends a notice of permission or refusal of permission to appeal to a person who has sought permission to appeal, that person, if intending to appeal, must provide a notice of appeal to the Upper Tribunal within 30 days after the day of receipt by that person of the notice of permission or refusal of permission to appeal."

[10] Section 23 of the Property Factors (Scotland) Act 2011 (hereinafter referred to as the 2011 Act) provides

"23 Effect of failure to comply with property factor enforcement order

(1) It is for the First-tier Tribunal to decide whether a property factor has failed to comply with a property factor enforcement order made by the First-tier Tribunal"

[11] Section 46 of the 2014 Act makes clear that the appellant can only appeal to the UT on a point of law (section 46(2)(b) of the 2011 Act) and that permission to appeal to the UT can only be granted if the UT is satisfied that there are arguable grounds for appeal. Rule 3(6) of the 2016 Rules makes clear that the UT is entitled to: refuse permission to appeal; give permission to appeal on all grounds sought; or give permission to appeal on limited grounds. The question therefore, at this stage, is whether the UT is satisfied that the points of law, identified by the appellant, set out one or more arguable grounds for appeal.

The FTT's refusal of permission to appeal, dated 26 July 2018

[12] The FTT considered the six purported points of law and responded in the following corresponding paragraphs:

- "1. The Factor did not provide the information required by the PFEO. The Factor was required to provide details of the insurance premiums and cover of each of the alternative quotes obtained and advise if a price/quality selection matrix was used, and if so, what the weightings and quality criteria were. The Factor provided the same information it had provided previously to the Tribunal, which related to three brokers, and not all the insurance companies that had provided a quote. Section 5.7 of the Code of Conduct for Property Factors states that 'documentation relating to any tendering or selection

process...should be available for inspection...by homeowners on request.' The Tribunal understands that to mean all documentation, and not just that chosen by the Factor as suitable for inspection.

The Factor was provided with an opportunity to make representations in respect of the proposed PFEO. At that time, should the Factor have had any difficulty understanding the term 'matrix', which is a commonly used term, or the form or structure of the Information required, the Factor could have requested further explanation. The Factor did not do so.

In all the circumstances, the Tribunal had sufficient basis for its findings.

2. The Tribunal accepts that there was no requirement within the PFEO on the Factor to provide such an explanation. However, the Tribunal did not make a decision of non-compliance based on the Factor's failure to provide such an explanation. The Tribunal founded upon the Factor's failure to provide the required information on the quotations.
3. The Tribunal did not make its decision of non-compliance based on the alternative quote obtained by the Homeowner. The Tribunal founded upon the Factor's failure to provide the required information on the quotations.

The Factor states that it had no opportunity to review or comment on the alternative quote before the Decision was granted, and that this is a procedural irregularity. The Factor appears to go on to comment upon an earlier version of the alternative quote, which was lodged by the Homeowner as part of the application to the Tribunal. The updated version of the alternative quote was provided to the Factor by the Tribunal administration on 30th April 2018. The Factor's Morgan Cooper acknowledged receipt of the alternative quote on the same date, stating that the Factor could not provide this policy for the homeowners as this is not a broker that the Factor works with. The Factor did not make any further representation in relation to the alternative quote. It is, therefore, incorrect to state that the Factor had no opportunity to review or comment on the alternative quote before the decision was issued on 23rd May 2018.

In its decision, the Tribunal recognises that there may be additional factors to be taken into account in considering the alternative quote. Consequently, the weight given by the Tribunal to the alternative quote was minimal.

4. The information provided by the Factor was a repetition of information already supplied to this Tribunal. The Factor ought to have been able to provide new information, namely the information relating to the tendering or selection process. The Factor insisted upon providing only its chosen information from three brokers and not from all the insurance companies involved in the tendering process.

5. The PFEO required the details of the insurance premiums and cover of the alternative quotes obtained, and not just the three brokers provided. By refusing to provide this information, the Factor did not comply with PFEO.
6. The Tribunal recognised the Factor's reasonable interest in protecting commercially confidential information. The Tribunal provided an opportunity for the Factor to anonymise such information 'by substituting names with A, B, C etc'. This Tribunal is not aware of any offer having been made to provide any such information confidentially. Had any such offer been made, the Tribunal would have had regard to the overriding objective that requires it to deal with proceedings justly."

Discussion

[13] The appellant, at this stage, in order to satisfy the UT that there are arguable grounds for appeal, requires, in my view, to point to a material error of law, which could result in the decision of the FTT decision of 21 May 2016 being quashed in terms of section 47(1) of the 2014 Act. An error of law would include: (i) an error of general law, such as the content of the law applied; (ii) an error in the application of the law to the facts; (iii) making findings for which there is no evidence or which is inconsistent with the evidence and contradictory of it; and (iv) a fundamental error in approach to the case: for example, by asking the wrong question, or by taking account of manifestly irrelevant considerations, or by arriving at a decision that no reasonable tribunal could properly reach (see *Advocate General for Scotland v Murray Group Holdings* 2016 SC 201 at paras 42 to 43).

[14] In my opinion, the six purported points of law do not disclose arguable grounds for an appeal to the UT.

[15] As regards point 1 and 5, para 2 of the PFEO clearly states that the Factor and appellant had to:

1. Provide details of the insurance premiums and cover of each of the alternative quotes obtained; and

2. Advise if a price/quality selection matrix was used, and, if so, what the weightings and quality criteria were.

Section 23(1) of the 2011 Act makes clear that it is for the FTT to decide whether a PFEO has been complied with. The FTT were therefore entitled to consider the terms of para 2 of the PFEO, consider the material provided in response by the appellant and decide whether or not the PFEO had been complied with the FTT (reading their two decisions together) appear to have considered the terms of para 2 of the PFEO, considered the limited information provided by the appellant (which is set out in full at para 3 above) and have given a clear explanation (subject to my observation below) as regards why they considered that para 2 of the PFEO has not been complied with. Indeed, given the limited information provided by the appellant, it is difficult to see how the FTT could have arrived at any other conclusion. In the circumstances, I do not consider it arguable that the FTT made a material error of law in respect of point 1 or 5.

[16] As regards point 2, the decision of the FTT, dated 26 July 2018, makes clear that the FTT accepted that the PFEO did not require the appellant to provide a clear explanation of the method by which the premium applied to the development had been assessed. The FTT explained that: (1) their decision was not based on the appellant's failure to provide such an explanation; and (2) their decision was based on the appellant's failure to provide the information required by para 2 of the PFEO. The decision of the FTT, dated 21 May 2018, does state, at para 6(a), that "it follows that there is no clear explanation of the method by which the premium applied to the development has been assessed". However, the subsequent observations of the FTT makes clear that they were not requiring the appellant to provide such an explanation and that the quoted part of sentence above appears simply to

be setting out the consequences of the appellant failing to provide the information required by para 2 of the PFEO. In the circumstances, I do not consider it arguable that the FTT made a material error of law in respect of point 2.

[17] As regards point 3, the decision of the FTT, dated 26 July 2018, again re-iterates that their decision of 21 May 2018 was based on the appellant's failure to provide the information required by para 2 of the PFEO. However, the FTT does go on to state that "the weight given by the Tribunal to the alternative quote was minimal". In my view it is certainly arguable that the FTT ought not to have placed any weight on the alternative quote (and therefore arguable that the FTT have taken into account an irrelevant consideration).

However, the FTT have repeatedly stated that their decision of 21 May 2018 was based on the appellant's failure to provide the information required by para 2 of the PFEO and it seems inconceivable that they would have reached a different decision even if they had not placed any weight on the alternative quote. In the circumstances, even if placing minimal weight on the alternative quote was an error of law, it does not appear to be an error of law which was material to the decision of the FTT of 21 May 2018 and therefore not an error of law which affected the ultimate decision reached by the FTT. In such circumstances, I do not consider it arguable that placing minimal weight on the alternative quote was a material error of law, which ought to result in the FTT decision of 21 May 2018 being quashed in terms of section 47(1) of the 2014 Act.

[18] As regards point 4, this appears to be merely an observation made by the FTT when considering, of new, whether the information provided by the appellant complied with para 2 of the PFEO. In the circumstances, I do not consider it arguable that the FTT made a material error of law in respect of point 4.

[19] As regards point 6, the terms of para 2 of the PFEO appear to have clearly recognised the appellant's reasonable interest in protecting commercially confidential information and provided a method for the appellant to produce information in an anonymised format. The decision of the FTT, dated 26 July 2018, notes that, first, the appellant had made no attempt to produce information in such a format, and, second, that had the appellant done so, they would have had considered it in a just manner. The FTT did not, therefore, refuse to consider any information presented in a way to protect commercial confidentiality. If the FTT had done so, that may (although it would very much depend on the circumstances) have led to an arguable ground of appeal. However, that situation did not arise and the FTT simply considered the information provided by the appellant and determined that the information did not comply with para 2 of the PFEO (which allowed for the required information to be provided in an anonymized format). In the circumstances, I do not consider it arguable that the FTT made a material error of law in respect of point 6.

[20] In all the circumstances, I am not satisfied that there are any arguable grounds for appeal and I therefore refuse permission to appeal to the UT

Reconsideration

[21] The terms of Rule 3(7) of the 2016 Rules have been set out at para 9 above. Given that permission to appeal to the UT has been refused, the appellant, if unhappy with this decision, may, in terms of Rule 3(7) of the 2016 Rules, make a written application (within 14 days after the day of receipt of the notice of this decision) to the UT for the decision to be reconsidered at a hearing made up of a different member, or members, of the UT.