



DECISION OF

Sheriff Tony Kelly

**ON AN APPEAL
IN THE CASE OF**

Mr Ewan Miller

Appellant

- and -

RMG Scotland Ltd,
per BTO Solicitors,

Respondent

FTS Case reference: FTS/HPC/LM/23/2092

Glasgow, 30 July 2024

Decision

The appeal is refused. The decision of the First Tier Tribunal for Scotland, Housing and Property Chamber is upheld.

Introduction

[1] The appellant applied to the First Tier Tribunal for Scotland, Housing and Property Chamber (FTS) under section 17(1) of the Property Factors (Scotland) Act 2011. The FTS issued its decision after a case management discussion, without the necessity of a further hearing.



[2] In a previous application before the FTS (ref. FTS/HPC/LM/22/1998) the appellant brought unsuccessful proceedings against the respondent. The appellant, along with other homeowners had sought to oust RMG Scotland as property factors in the development where they lived. RMG Scotland did not accept that process. The appellant sought to bring that dispute before the FTS. The FTS concluded that it did not have jurisdiction to rule upon the issue.

[3] In the course of those proceedings the respondent instructed solicitors. The solicitors submitted a note of their fees for the work undertaken in connection with that dispute. The respondent applied those fees to invoices issued by them to the various homeowners, including the appellant, at the development.

[4] In this application the appellant sought to bring those charges under review on the basis that they were irrecoverable in terms of section 7.3 of the Code of Conduct for Property Factors (“the Code”). The FTS refused the application. The appellant appeals to the Upper Tribunal.

Hearing: 27 June 2024

[5] Mr Miller, the appellant, appeared personally. Mr Kennedy, Advocate, appeared for the respondent.

Appellant

[6] Mr Miller commenced his submissions by helpfully outlining the background to the present dispute noting that the previous application to the FTS. That application dealt with the manner in which he was treated by the respondent and the management of his complaint in this regard. The application was refused by the FTS. No appeal was taken against that decision. No further application was made to the court which may have had jurisdiction to rule upon the issue



between the parties.

[7] The respondent had been billed approximately £3,500 of fees by their solicitors incurred in defending the appellant's previous application to the FTS.

[8] Mr Miller raised this second application on the basis that section 7.3 of the Code prohibited these charges. He drew my attention to the terms of that section. His previous application to the FTS was "personal – about me". It was a complaint. For Mr Miller the important words in section 7.3 were "handling" and "explicitly". He placed reliance upon the dictionary definition of "handle"; to manage a problem. This was broad enough to encompass all aspects of the manner in which his complaint had been dealt with.

Title

[9] The property title had not made the position explicit. An explicit provision for charging homeowners for handling complaints would put the matter beyond doubt.

[10] Mr Miller read from an analysis of a consultation carried out to canvass prospective changes to the Code. This included a suggestion to remove the terms of section 7.3. However, this section remained in the Code. If property factors could charge for dealing with complaints this would discourage homeowners from making complaints. This was an encouragement to property factors to manage complaints better.

[11] Finally, Mr Miller provided some background about the absence of constructive engagement between himself and RMG Scotland. He had raised a concern about the manner in which this had been dealt with by the respondent. He had been ignored by the respondent. He had exhausted the complaints handling procedure culminating in this application to the FTS. Mr



Miller confirmed that he had experienced difficulty in recovering the invoices containing the charges from solicitors. He had asked for details of the charges. They were not provided. A neighbouring homeowner had obtained copies of the invoices. They were disclosed in the course of the processing of this application before the FTS.

Respondent

[12] Counsel submitted that the key issue was whether, in dealing with the 2022 application, the FTS was handling a complaint in terms of section 7.3 of the Code. A Tribunal application was not handling a complaint. There was a division between an in-house, or in-office, process on the one hand, and Tribunal proceedings, on the other.

[13] Mr Kennedy placed reliance upon the definition of complaint. In the glossary of terms used in the Code in Appendix 1, “complaint” is said to be:

“An expression of dissatisfaction (either orally or in writing) from a homeowner or homeowners in relation to the standards of service provided by their property factor. Whilst complaints can be submitted orally, the Property Factors (Scotland) Act 2011 provides that an application to the First-tier Tribunal cannot 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 out the property 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.”

[14] Section 7 deals with complaints resolution and the requirement for a written complaints handling procedure. This included:



“Information on how a homeowner can make an application to the First-tier Tribunal if their complaint remains unresolved when the process has concluded.”

[15] The finalisation of an in-house complaints procedure was made clear by section 7.2:

“When a property factor’s in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed in writing.”

[16] Counsel then drew attention to the terms of the Property Factors (Scotland) Act 2011. Section 17 provided jurisdiction to the FTS where a homeowner could make application for a decision on whether there had been a failure to carry out property factors duties or to ensure compliance with the Code.

[17] For Mr Kennedy the omission of the word “complaint” in section 17(1) of the 2011 Act was significant. This pointed up a contrast between an in-house complaints procedure and an application to the FTS.

[18] An in-house treatment of a complaint would clearly be dealt with by the property factor. When an application was made to the FTS it could not be said that in lodging defences and resisting the application there was “managing or controlling or administering” of a complaint. The application submitted originally to the FTS was not about a complaint but concerned an alleged failure to comply with the Code.

[19] This was vouched by finding in fact 5 of the FTS decision of 6 November 2023:

“.... this application was not about the manner in which the appellant’s complaint was handled.”

[20] The FTS ought to have focused upon the legal expenses in issue in the application before



it. Mr Kennedy recognised the difficulty of the distinction drawn by the FTS between the handling of complaints in a complaints process as against “the respondent engaging legal advice and/or representation”.

[21] In relation to finding in fact 9, Mr Kennedy submitted that there was a typographical error in that “claim” should read “complaint”. Notwithstanding the difficulties in reading the terms of the FTS decision, there was sufficient material from which it could be inferred that the FTS were aware of the statutory scheme in operation and of the issue to be decided by it.

Title

[22] Mr Kennedy submitted that the Title relative to the property authorised payment of the invoices. Reference was made to the Burdens clause and the Proprietors association. The breadth of that provision allowed for the fees incurred by the respondent to be properly applied across the homeowners. The Burdens section provides for a proprietors’ association to be set up and for a meeting to be convened to determine works to be carried out. Legal expenses incurred in resisting the FTS application in 2022 were properly charged under this provision.

[23] In the event that the Upper Tribunal detected some error in the FTS decision it was open to it to make that decision in terms of section 47(2)(a) of the Tribunals (Scotland) Act 2014.

Reply

[24] In a brief reply the appellant submitted that the original application to the FTS was personal to him. Although finding in fact 5 noted there was a problem about jurisdiction of the FTS to deal with the dispute, other matters were brought before the FTS in the application. These included complaints about the standard of service. These were personal to the appellant.



Decision

[25] The FTS sought to draw a distinction between legal expenses and a process for dealing with the handling of complaints. If that were taken to its ultimate conclusion then the prohibition contained in section 7.3 of the Code could be obviated by the outsourcing of the complaint process to a legal firm. It cannot be the case that fees incurred (legal expenses of whatever nature) are not caught by the prohibition in the Code. For the FTS in this case the costs of legal advice and representation in resisting the 2022 application were not caught by the prohibition because they were legal expenses. The basis for this conclusion is not made clear.

[26] The reasoning of the FTS should leave an informed reader in no substantial doubt about the basis of its decision. It should demonstrate that it has not taken into account irrelevant considerations or left out of account relevant factors in articulating its decision. In so far as its decision-making process is not made clear, the informed reader may be left in doubt as to what factors informed its decision and what factors were left out (*Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345 at 347; *Ritchie v Aberdeen City Council* 2011 SC 570).

[27] I agree with Counsel's submission that the resolution of the point in issue in this appeal is a consideration of what the appellant brought before the FTS in 2022 under reference: FTS/HPC/LM/22/1998. The appellant in that application dated 21 June 2022 attached a number of papers apart. In the first paper apart headed "what is your complaint?", he stated:

"While I have wide ranging concerns about RMG's failure to meet many obligations under the 2011 code in relation to their general management of Woodilee, which many residents share and which resulted in the decision to replace them, *this complaint does not cover that and relates solely to their behaviour in relation to termination of their role*" (emphasis added).



[28] That finds expression in the FTS decision here at finding in fact 5, see [19] above. The FTS goes on to note that the decision of the FTS in 2022 was that it could not rule upon the issue before it at that time. This was why the application was rejected. If the original application did not feature the many concerns that the appellant possessed about failure to comply with the obligations in terms of the Code, then it cannot be said that the FTS was handling a complaint. In instructing solicitors to resist that application the property factor was not handling the appellant's complaints. That is an end to the issue in this appeal. I do not require to deal with the remaining arguments put forward by the respondents.

Conclusion

[29] The legal work done on the instruction of the respondents in resisting the appellant's application to the FTS in 2022 was not work done in respect of handling complaints. It was not caught by the prohibition in section 7.3 of the Code. The FTS did not err in refusing the application.

[30] For these reasons, the appeal must be refused and the decision of the FTS upheld.

Sheriff Kelly
Member of the Upper Tribunal for Scotland

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.