Upper Tribunal for Scotland

[2019] UT 8
Ref: UTS/AP/17/0009

DECISION NOTICE OF SHERIFF DEREK HAMILTON

in the case of

MR IAN FRIEL, Spiers Gumley Property Management, 194 Bath Street, Glasgow, G2 4LE

Appellant

and

MR ROSS LAFFERTY, Flat 3, 9 Church Hill, Paisley, PA1 2DG

Respondent

FTT Case Reference FTS/HPC/PF/17/0059

DECISION

The Upper Tribunal (Housing and Property Chamber) refuses the appeal and affirms the decision of the First-tier Tribunal to uphold the respondent's complaint that (a) the appellants had failed to carry out their property factors duties, and (b) had failed to comply with Section 2.5 of the Property Factors (Scotland) Act 2011 Property Factor Code of Conduct, and to thereafter make a Property Factor Enforcement Order.

Reasons for Decision

[1] Parties very helpfully set out their respective positions in very detailed submissions contained within the Notice to Appeal and the Response to the Notice to Appeal. Those submissions were supplemented by parties' oral submissions at the appeal hearing. I am

grateful to parties for focusing, as they should, on the legal issues before me, rather than the factual matters underlying them. In this decision where I refer to "the Act" I am referring to the Property Factors (Scotland) Act 2011. Where I refer to "the Code" I am referring to the Property Factors (Scotland) Act 2011 Property Factor Code of Conduct.

[2] The First-tier Tribunal found that the appellants had failed to carry out their property factor's duties in that they imposed charges upon the respondent for work done to property that was not a Common Part. The appellants were quite clearly frustrated with their predicament in relation to repairs to balconies within the development. The Deed of Conditions was silent on balconies, and the appellants were unclear as to whether the balconies were Common Parts or belonged to the individual owners. Whatever way the appellants decided the matter, their decision had the potential to be challenged. The appellants were thus frustrated that there was a finding against them for failing to carry out their property factoring duties, on the basis that they followed legal advice in deciding the balconies were Common Parts of the building, and that they invoiced the respondent for work done on that basis.

[3] I imagine there will be extreme cases where at one end of the scale the First-tier Tribunal might for example have little difficulty in finding that an unscrupulous factor that regularly and deliberately invoices homeowners for private property work will be in breach of their factoring duties and/or the Code of Conduct. At the other end of the scale perhaps, where a factor, genuinely unsure of what is and what is not a Common Part has to make a decision one way or the other, the First-tier Tribunal might have more difficulty in finding that the factor was in breach of its factoring duties and/or the Code of Conduct. Much might depend on how the factor reached its decision and how it communicated its decision making process to the homeowners. All of that would be for the First-tier Tribunal to consider.

[4] The issue of whether or not a property factor in its decision making and in its actions was in breach of its factoring duties and/or of the Code of Conduct is a matter for the First-tier Tribunal to deal with having considered all of the evidence before it.

[5] The appellants were also found by the First-tier Tribunal to have breached Section 2.5 of the Code of Conduct. The appellants confirmed at the hearing before me that they accepted their falling in respect of the Code and were not insisting on their appeal against the finding of the First-tier Tribunal in relation to the Code.

[6] The appellants appeal the decision of the First-tier Tribunal on four distinct points of law. They restricted their appeal to the finding of the First-tier Tribunal that they were in breach of their factoring duties, having not insisted on their appeal in relation to the Tribunal's findings in relation to the Code. I will deal with the four distinct points of law in the order that they are set out in the Notice of Appeal.

The Tribunal has no jurisdiction to determine the ownership of heritable property

[7] Firstly, the appellants could provide no authority for their position. The appellants submitted at first instance, in support of their position, that the Court Reform (Scotland) Act 2014 did not extend the jurisdiction of Summary Sheriffs to questions of heritage. The Tribunals Courts and Enforcement Act 2007 established the First-tier Tribunal, and provided at Section 3(1) "There is to be a tribunal, known as the First-tier Tribunal, for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act." The Property Chamber of the First-tier Tribunal is a creation of statute and it has all of the functions conferred on the First-tier Tribunal relating to *inter alia* residential property. I am not aware of anything that restricts the Tribunal's jurisdiction in relation to residential

property, and I certainly was not addressed on such. I do not consider the restriction or extension of the jurisdiction of any other statutory creation to be of any relevance.

[8] Secondly, the application by the respondent to the First-tier Tribunal was made in terms of Section 17 of the Property Factors (Scotland) Act 2011. Section 17(1) provides;

> "(1) A homeowner may apply to the First-tier Tribunal for determination of whether a property factor has failed –
> (a) to carry out the property factor's duties,
> (b) to ensure compliance with the property factor code of conduct as required by section 14(5) (the 'section 14 duty')"

[9] The respondent made a complaint on both grounds.

[10] Section 10(5) of the Act provides;

> "(5) In this Act, 'homeowner' means—
>
> (a) an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor, or
>
> (b) an owner of residential property adjoining or neighbouring land which is—
>
> (i) managed or maintained by a property factor, and
>
> (ii) available for use by the owner."

[11] Thus, all owners of residential property are not "homeowners" for the purposes of the Act. It is only those owners that fall within the definition contained within Section 10(5) of the Act.

[12] Section 2(1) of the Act provides;

> "(1) In this Act, 'property factor' means—
>
> (a) a person who, in the course of that person's business, manages the common parts of land owned by two or more other persons and used to any extent for residential purposes,
> …….
> (c) a person who, in the course of that person's business, manages or maintains land which is available for use by the owners of any two or more adjoining or neighbouring residential properties (but only where the owners of those properties

are required by the terms of the title deeds relating to the properties to pay for the cost of the management or maintenance of that land), and"

[13] Section 2(2) provides (with my emphasis);

"(2) Despite subsection (1), the following are not property factors for the purposes of this Act—

(a) …..,

(b) an owners' association established by the development management scheme (within the meaning of the Title Conditions (Scotland) Act 2003 (asp 9)) so far as managing or maintaining common parts or land in accordance with the scheme,

(c) a person so far as managing or maintaining common parts or land on behalf of another person who is a property factor in relation to the same common parts or land."

[14] Thus, all those who manage or maintain common parts of property or land may not be a "property factor" for the purposes of the Act. It is only those property factors that fall within the definition contained within Section 2 of the Act.

[15] In all applications under section 17 therefore, the First-tier Tribunal will have to decide as a matter of fact, if the applicant is a homeowner, and if the respondent is a property factor, both in terms of the Act. In determining those issues, the First-tier Tribunal will require to consider a number of matters such as;

(i) is the applicant the owner of property,
(ii) if so is the applicant an owner of residential property,
(iii) does any such residential property have common parts,
(iv) are any such common parts managed,
(v) do the managers manage the property in the course of their business,
(vi) if so, do they manage the common parts of land owned by two or more other persons.

[16] The First-tier Tribunal therefore has many issues of title to consider. It is clear to me that, at the very outset the Tribunal must decide ownership of the property that is subject to the application, and it must decide if the applicant is an owner. It must decide if the property is residential and, importantly for the purposes of this appeal, decide if any such

residential property has common parts. It would be a defence to any application that the applicant was not a "homeowner" in terms of Section 10, or that the manager was not a "property factor" in terms of Section 2. An application before the First-tier Tribunal cannot get off the ground unless the Tribunal has power to determine the ownership of heritable property, and in determining ownership, that includes determining if the property has common parts.

[17] In this case, the respondent made an application to the First-tier Tribunal complaining *inter alia*, that the appellants had breached their factoring duties by imposing charges for work done to property which was not a Common Part. That is the substance of the complaint and of the application. The disputed work relates to work done to balconies.

[18] The issue to be considered by the First-tier Tribunal would be no different in a situation where for example, decoration was carried out to Common Parts of a building and, by the same tradesman, to the inside of a private property. If for whatever reason that internal private property work was somehow in error invoiced by the property factors to the various owners in the building, those owners would of course be entitled to challenge that charge. If there was an ongoing dispute on the issue, or if perhaps it was something that occurred regularly, and an individual owner was of the view that in failing to separate the works for the Common Parts from the private parts, and in invoicing the individual homeowners for the work done to the private parts, the property factor had breached its duties, the homeowner would be entitled to make an application to the First-tier Tribunal under the provisions of the Act. In deciding if the property factor had failed in its duties in invoicing for private property work, the Tribunal would have to decide if work was done to private parts of the building, and to make a finding in fact to that effect. That may be a

relatively straightforward matter to deal with in the given scenario, but deal with it the Tribunal must.

[19] The fact that the issue of what is and what is not private or Common Property may not be so straightforward (as in this case) does not detract from the Tribunal's duty to make findings of fact on the issue.

[20] I am satisfied therefore, that an application before the First-tier Tribunal cannot get off the ground unless the Tribunal in arriving at a proper decision on the issue before it, has power to determine on the facts before it the ownership of heritable property. In determining ownership, that includes determining if the property has common parts. In determining an application where the issue is whether or not the property factor has breached its factoring duties by imposing charges for work done to property which was not a Common Part, the Tribunal must be able to determine what is and what is not a Common Part.

[21] The respondent's application to the First-tier Tribunal relates to a potential breach of factoring duties, and in determining that, the Tribunal must make findings in fact to support its decision. The purpose of the Act is to allow homeowners to bring such disputes before a specialised tribunal. It cannot be the case that before applications are made, homeowners are obliged to resort to the courts for declarators re ownership of parts of their building. Whilst the First-tier Tribunal did not make a specific finding in fact that the balconies were private property, within the body of its decision it decided that the appellants were incorrect in concluding that the balconies formed part of the block. The First-tier Tribunal did state in their decision that the breach of the property factoring duties was founded on the basis that the homeowner had been incorrectly invoiced for work done to property that was not a Common Part.

[22] The First-tier Tribunal was asked to decide on the issue of a breach of the property factors' duties. In doing that it had to make a number of findings in fact. Those findings are made on the basis of information placed before the Tribunal. Those findings are findings of fact. They are not declarators, and their effect may or may not have any relevance beyond the terms of the First-tier Tribunal's decision in relation to performance of property factor's duties.

[23] For the above reasons, I am satisfied the First-tier Tribunal did have jurisdiction to determine the ownership of heritable property, and I repel the appellants' first ground of appeal.

The Tribunal has no jurisdiction to make a determination of the ownership of heritable property for any aspect of the Building as the Deed of Conditions for the Building prescribes that such questions must be referred to arbitration for determination

[24] I did not have sight of the Deed of Conditions by Oakshaw Developments Ltd, registered 25th October 2002, referred to in the papers. Parties did not dispute that the relevant provision of the Deed (Clause 22) was in the following terms;

> "…all questions, differences and disputes which may arise among proprietors of the apartments in the Development regarding their rights in the Common Subjects, or relating to regulations made for the maintenance of the Common Subjects, or of work to be carried out to the Common Subjects, shall be referred to the decision of a sole arbiter to be appointed by the Sheriff Principal for the time being of North Strathclyde at Paisley and the decision of the arbiter shall be final and binding upon the proprietors of the apartments in the Development."

[25] For the reasons given above, I am satisfied the First-tier Tribunal did have jurisdiction to determine ownership of heritable property. That jurisdiction is not restricted or excluded by the provisions of Clause 22. If the developers of the apartments had sought to provide that all questions of ownership or title had to be referred to an arbiter, thereby

excluding the jurisdiction of the First-tier Tribunal, (if even competent) the Deed of Conditions would have had to say so in the most clear terms. It was not claimed that the Deed did so.

[26] Understandably perhaps, the appellants were again frustrated that whatever decision they made in relation to the balcony, their decision could potentially render them liable to having to answer an application to the First-tier Tribunal. As the basis of any application to the Tribunal was a failure on their part, then whatever way they decided the ownership issue their decision was potentially open to challenge, and if succesfully challenged, they could be open to an application to the Tribunal for failing in their duties to invoice properly. The appellants argued that as the ownership issue was unclear, that issue should have been referred to arbitration as a preliminary issue. That would have enabled all interested homeowners who might be affected by the decision to take part in the arbitration. Arbitration provided a remedy for disputes between homeowners. It was argued by the appellants that the arbitration clause applied to disputes relating to the Common Parts. As the Deed of Conditions did not mention the balconies, and it could not be said with any certainty if they were private or a Common Part, it could not be said they were not a Common Part and therefore the arbitration clause should have been triggered.

[27] The appellants' frustration was that if the arbitration clause was not binding in a situation such as this, then whatever their decision was in relation to the ownership of the balconies, that decision would always potentially render them liable to have to answer an application to the Tribunal.

[28] The appellants were perhaps in an unenviable position. They felt obliged to act without delay in relation to a complaint of water ingress arising from a fault with balconies. It is easy with hindsight to suggest that in the absence of complete clarity within the Deed of

Conditions that the balconies were Common Parts, the appellants could perhaps have refused to deal with the repair without agreement from all homeowners. By dealing with the repair, they unfortunately left themselves open to a potential complaint either from those with balconies on the one hand, or those without on the other.

[29] The Property Factors (Scotland) Act 2011 is an act designed to enable disputes between homeowners and factors to be determined by a specialsied tribunal, rather than by a court. The tribunal process should be quicker and result in less expenditure than a court process. In this case the applicant's dispute is with the factor who sent him the invoice. It is not with the other homeowners, and the Act gives him a right of remedy by making an application to the Tribunal. The appellants got themselves involved in this issue (perhaps for very good and laudable reasons). The respondent took the view that they should not have done so as the Deed of Conditions did not specify the balconies were Common Parts. The respondent presumably could have simply refused to pay the invoice, thereby leaving him open to being sued for the amount of the invoice or, as he did, he could have made an application to the First-tier Tribunal seeking a decision that the appellants had failed in their duties by seeking to deal with a private property issue and by invoicing the applicant for part of the cost.

[30] The arbitration clause relates to disputes between homeowners in relation to the Common Parts. There was no agreement between the homeowners that the balconies were or were not Common Parts. I am satisfied the First-tier Tribunal was correct in finding that the arbitration provisions of Clause 22 did not provide that questions of ownership of property required to be remitted to arbitration and, as I am satisfied that the Tribunal had, *inter alia* for the reasons set out above, jurisdiction to deal with the issue of ownership of property, I therefore repel the appellant's second ground of appeal.

The Tribunal has erred in determining that the arbitration clause in the Deed of Conditions did not apply as there was only a dispute regarding ownership between the Appellants and the Applicant

[31] Clause 22 of the Deed of Conditions relates to the Common Subjects. If something is not part of the Common Subjects, Clause 22 does not apply. It is a matter of title if something is part of the Common Subjects. A number of owners within the Development cannot decide among themselves that something which is not part of the Common Subjects is so, or should become so.

[32] Clause 22 deals with questions, differences and disputes regarding owners' rights and interest in the Common Subjects. If something is not part of the Common Subjects it is not covered by the provisions of Clause 22. If there are no Common Subjects Clause 22 is irrelevant. There has to be a right or interest in the Common Subjects which is the subject of a question, difference or dispute before the arbitration provisions will apply.There was nothing placed before me to suggest that the arbiter had power to decide if part of a property was part of the Common Subjects. The arbitration clause was silent in relation to the balconies. It could not be concluded from the Deed of Conditions that the balconies were Common Subjects.

[33] Further, the respondent's issue was not with the other owners and was not with regard to any property, common or otherwise. His issue was with the conduct of the factors. If he believed, in invoicing him for work that he believed was carried out on private property, that the factors had failed to carry out their duties, for example in properly allocating charges, or had failed to ensure compliance with the code, for example by providing misleading information or by delaying in dealing with a reasonable request for

information to resolving a dispute, he was entitled to apply to the First-tier Tribunal as provided for in Section 17 of the Act. I refer to my reasoning in relation to issue number two above.

[34] Reference was made by the appellants to the respondent's failure to utilise the provisions of Sections 5 and 6 of the Tenements (Scotland) Act 2004. Those provisions apply in relation to decisions made by owners in accordance with a mangement scheme which applies in respect of the tenement (except where the management scheme is the development management scheme). If the balconies are not part of the property covered by a scheme covered by those sections it is irrelevant for the First-tier Tribunal's purposes that the applicant did not challenge the decision of the proprietors made on 9th May 2017. I was not addressed on whether there was a management scheme or a development management scheme in operation. The provisions apply to decisions made in relation to scheme property, they do not apply in relation to private poperty. The appellants did not argue that the property was scheme property.

[35] For the reasons stated here, and for those in relation to issue two above, I am satisfied the First-tier Tribunal was correct in finding that the arbitration provisions of Clause 22 did not preclude the respondent from lodging an application with the Tribunal, and I therefore repel the appellant's third ground of appeal.

Having determined that the property in question was private property it is incompetent for the Tribunal to make a PFEO

[36] An application to the First-tier Tribunal was made by the respondent in terms of Section 17 of the Act. The application was then referred to the First-tier Tribunal in terms of Section 18. The First-tier Tribunal decided that the respondent was a homeowner in terms of

Section 10(5) of the Act. It decided the appellants were a property factor in terms of Section 2 of the Act. It was therefore entitled to consider an application by the respondent in terms of the Property Factors (Scotland) Act 2011. Section 19 of the Act deals with "Determination of the First-tier Tribunal" and provides (with my emphasis);

> "19 Determination by the First-tier Tribunal
> (1) The First-tier Tribunal must, in relation to a homeowner's application referred to it under section 18(1)(a) decide-
> (a) whether 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) if so, whether to make a property factor enforcement order."

[37] The First-tier Tribunal found the appellants were in breach of their factoring duties and of section 2.5 of the Code of Conduct. The appellants are a registered property factor in terms of the Act and are therefore bound by the Code of Conduct. The respondent is a home owner. In terms of the Code the appellants have certain obligations and, if they are not complied with, the homeowner can apply to the First-tier Tribunal in terms of Section 17 of the Act for a remedy. The Code deals largely with service to homeowners. It is not restricted to dealings in relation to Common Parts. If that were so it would make a nonsense of the Code. Section 2.1 states that the property factor must not provide information which is misleading or false. Section 2.5 deals with response to enquiries. There will be many situations where there might well be an overlap between Common Property and private property. Section 3 states that transparency is important and homeowners should know what it is they are paying for, how the charges are calculated, and that no proper payment requests are involved. Where a payment request is improperly made because it relates to private property rather than common property, standing the provisions of Section 3, it cannot be the case that a property factor can say he is not bound by the Code. The Code is made in terms of Section 14 of the Act. The Code is not a Code dealing with common parts.

It is a Code for registered property factors in their dealings with homeowners. As I have already stated above, a "homeowner" means "an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor". The First-tier Tribunal was entitled to find the appellants were in breach of the Code. Having so decided, it was entitled to consider making a Property Factor Enforcement Order.

[38] At the hearing the appellants conceded that the Tribunal, having made a finding against the appellants in the circumstances that it did, the Tribunal was entitled to make a Property Factor Enforcement Order.

[39] I therefore repel the appellant's fourth ground of appeal.

[40] I make a finding of no expenses due to or by either party.