Upper Tribunal for Scotland

2024UT11
Ref: UTS/AP/23/0042 & UTS/AP/23/0043

**DECISION OF**

Sheriff Ian Hay Cruickshank

**ON AN APPLICATION TO APPEAL**
**(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND)**
**IN THE CASE OF**

Newton Property Management Ltd,

Appellants

- and -

Mr Neil Rattray, Mrs Gail Rattray,

Respondents

FTS Case references: FTS/HPC/PF/22/3618 & FTS/HPC/PF/22/4055

5 March 2024

**Decision**

Upholds the appeal; Quashes the decision of the First-tier Tribunal for Scotland Housing and Property Chamber dated 24 July 2023; Recalls the Property Factor Enforcement Order issued by the First-tier Tribunal: Remits the case back to the First-tier Tribunal to be reconsidered by a differently constituted Tribunal and to proceed as accords.

***Introduction***

[1] The appellants are Newton Property Management Ltd ("the appellants"). Since

September 2020 they have been property factors of the development at 13 Links Road, Prestwick.

This is an appeal from a decision of the First-tier Tribunal for Scotland Housing and Property Chamber ("the FTS") dated 24 July 2023 in which the application lodged by Mr and Mrs Rattray ("the respondents") was upheld. The FTS concluded that the appellants had failed to carry out the property factor's duties in terms of section 17(1)(a) of the Property Factors (Scotland) Act 2011 ("the 2011 Act").

[2] The FTS found in fact that the following had been established on the evidence and materials before it. The appellants became property factors for the Development with effect from 18 September 2020. The previous factor, Donald Ross, had arranged for the respondent's decking to be removed from their balcony to trace water ingress to flats below (at some undetermined point in 2020). He had advised the respondents that the balcony decking would be reinstated once repairs had been completed and at no cost to them. The appellant's instructed surveyors to prepare a report on the cause of water ingress and this was completed in December 2021. A contractor was instructed by the appellants in January 2022 to investigate the water ingress and repair the rubber membrane of the flat roof and carry out other works. The work was treated as a common repair and the cost shared between the development owners. Thereafter the appellants instructed another contractor to carry out further repairs in July 2021 (this being the date recorded in the finding-in-fact at paragraph 27 albeit that date does not appear to fit the time line). The respondents had also had their patio doors checked to ensure they were not the cause of water ingress. The appellants concluded that as the balcony was not common property the cost of reinstating the decking should be borne by the respondents and not shared between the various homeowners. The appellant's decision to that effect was challenged

without success by the respondents from February 2022. At the time the FTS made its decision some final work in relation to the water ingress problem was to be completed in July 2023.

[3] The FTS proceeded to issue a Property Factor Enforcement Order ("PFEO"). The PFEO issued by the FTS was amended after the notice period and having taken account of representations made, all as provided for by section 19 of the 2011 Act. It was issued in the following final terms:

1. The Factor must advise all the owners at the development that they had previously misinterpreted the Deed of Conditions and that in terms of Clause D3 although the balcony is private, the cost of repairing the balcony and patio door sill at 13J Links Road Prestwick should be treated as a common repair and the cost shared between all owners and request authority to instruct contractors to undertake the repairs. In the event of the Factor being unable to obtain the necessary consent from the owners they must meet the cost of the repairs from their own funds.
2. The Factor must instruct a reputable contractor to supply and reinstate the decking to the Homeowner's balcony at the property to a condition acceptable to the Homeowners and at no cost to them other than as a common repair to be shared between all owners in the development.
3. The Factor must instruct a reputable contractor to supply and fit a sill to the Homeowner's patio doors of a make and specification similar to the one previously removed also at no cost to the Homeowners other than as a common repair to be shared between all owners in the development.
4. The Factor must pay the Homeowners the sum of £500.00 from its own funds in respect of the distress and inconvenience suffered by them as a result of its failure to properly carry out its factor's duties.

[4] It should be noted that the respondents advised the FTS that they considered the cost of reinstating the decking would be in the region of £3,000.00 or possibly more. The original

decking had been uplifted at some unspecified point in 2020. It had remained uplifted since then as investigation and repair was carried out in relation to the issue of water ingress. It was no longer in a fit state to be re-laid.

[5] The FTS upheld the application on the basis that the appellants had failed to comply with their factoring duties by failing to properly interpret the Deed of Conditions burdening the Development by wrongly concluding that the cost of reinstating the decking of the respondent's balcony should be met by them only and not be shared between the various other development owners. The Deed of Conditions is not further defined anywhere in the decision of the FTS. The Deed in question would appear to be the Deed of Conditions by Sun Homes Limited as proprietor of the development and registered in the Land Register of Scotland on 5 April 2017 as amended by Deed of Amendment of Conditions by Sun Homes Limited and registered on 14 December 2017.

[6] The appellants sought permission to appeal from the FTS. Four grounds of appeal were advanced. In their written decision of 1 September 2023 the FTS granted permission to appeal in relation to grounds 1, 3 and 4. Whilst the FTS granted leave to appeal on these grounds, other than stating that each ground raised an arguable point of law no other comment or observation was passed by the FTS.

[7] The appellants thereafter requested that the Upper Tribunal for Scotland ("the UTS") also grant permission to appeal on the ground refused by the FTS. The UTS granted permission to appeal on ground 2 in its decision of 11 October 2023 for the reasons stated therein.

***Grounds of appeal***

[8] Four grounds of appeal are advanced in the following terms:

1. As the Homeowners' balcony is not common part, even although the removal of its decking was required in order to carry out common repairs, the cost of reinstating the decking should not be treated as part of the cost of the common repair. The Deed of Conditions although providing for servitude rights of access with liability for damage caused when exercising such rights applies only to individual proprietors and not to the Factor's duties to manage the common parts of the development. The FTS failed to correctly interpret the Deed of Conditions and, in so doing, conflated two sections of the deed, namely, liability for common repairs and liability for damage. Although the Factor instructed the repairs to the properties below that of the Homeowners the latter's rights should have been directed at the other owners and not the Factor. As such, the FTS's interpretation of the Deed of Conditions is irrational and not supported by the terms of the deed.
2. In issuing the PFEO the FTS is asking the Factor to instruct works without being authorised to do so by the proprietors of the development and contrary to a decision of the proprietors not to treat the repair of the decking as a common repair. The PFEO would involve the Factor acting contrary to the Deed of Conditions to instruct works without the authorisation of the proprietors who had already voted against meeting the cost of these repairs. Separately, the PFEO in finding the Factor personally liable in the sum of £500 for stress and inconvenience is unreasonable and erroneous being predicated on the conclusion that the Factor had misinterpreted the title deeds and, in such circumstances, there should be no liability in this respect.
3. The FTS concluded at paragraph 40 of its decision that the former Factor, Donald Ross, "quite correctly advised the Homeowners that they would not be expected to meet any of the cost of reinstating the decking". Such conclusion was made without reasoning, explanation or without appropriate findings in fact.

4. No Tribunal acting reasonably would have interpreted the Deed of Conditions in the manner undertaken by the FTS. The FTS failed to acknowledge the distinction between liability for common repairs of the development and liability for damage caused by the exercise of a proprietor's servitude right of access over the Homeowner's flat and, in so doing, conflated the two.

***Procedure Before, and Reasoning of, the FTS***

[9] At a Case Management Discussion held on 27 February 2023, at which the respondents attended but the appellants did not, the FTS determined that there was a dispute regarding the facts and adjourned to a hearing. The FTS issued directions to the appellants to clarify their position with regard to matters raised at the CMD. Amongst these directions was a requirement that the appellants should lodge a copy of the Registered Deed of Conditions (unspecified) which burdened the development. In particular the FTS directions to the appellants included the following:

"The Tribunal with its interpretation of Part 3E of said Deed of Conditions and in particular to explain why if the Homeowner's decking had to be removed in order to gain access to trace and repair water ingress to adjoining property and carry out common repairs, and cost of making good the damage to the Homeowner's decking falls to be borne by the Homeowners."

[10] The appellants' complied with the direction issued by the FTS and provided a written response thereto. In the response to the above specific direction the appellants submitted there was no Part 3E to the Deed and believed the question posed by the FTS related to sections C and D and outlined what they considered to be the relevant parts. They provided their interpretation

of the Deed and submitted that where the Deed referred to "all damage must be made good" no mechanism was ascribed for recovering costs as relative to communal parts.

[11] The hearing before the FTS proceeded on 18 July 2023. The respondents attended but the appellants did not. In addition to responding to the FTS direction notice the appellants lodged written submissions and documentary productions for the consideration of the FTS. The appellants' written submissions included comment that they did no acquire the business of, nor did they take on the liabilities of the former factor. The respondents had been advised of this in a letter in August 2022 and this had been lodged as one of the appendices to the respondent's application. The response to the direction notice issued by the FTS confirmed that a majority of the co-owners had voted not to fund the repairs and therefore any remaining dispute in this respect was a matter to be dealt with between the various owners by civil means.

[12] Whilst not making a specific finding in fact to the following effect the FTS commented, at paragraph 6 of the decision, that the respondents stated the business of Donald Ross had been taken over by the appellants and, to begin with, it was agreed that the arrangement with the previous factor remained in place. The respondents referred to an email of 11 January 2022 from an employee of the appellants. This remained the position until a new property manager took over and referred to a further email dated 9 February 2022. Without further explanation the FTS recorded that "this email was somewhat ambiguous in its terms". Also in the same paragraph the FTS recorded that it had noted from the appellant's representations that it had advised the other owners that the balcony was private and it would be against its advice to meet the cost and the other owners declined to agree to meet that cost. Again, no finding in fact was made

regarding any meeting of the homeowners or what, if any, decision the homeowners came to in relation to the cost of replacing the decking.

[13] In the reasons for the decision the FTS noted at paragraph 38 that the appellants argued they were not bound by any prior agreement the respondents may have had with the previous factor. The FTS made no finding in fact in relation to this matter but went on to state in the said paragraph the following:

"It may be that they were not bound to prior commitments of Donald Ross. It is unfortunate that the Factor only saw fit to participate in these proceedings by written representations rather than attending the CMD and hearing as that might have provided a clearer understanding of the factor's reasoning in the proceedings."

[14] In its reasoning, the FTS stated that since February 2022 the appellants had "clearly misinterpreted the title deeds" and the respondents had suffered distress and inconvenience as a result. The FTS further stated:

"…it should have been quite apparent in terms of Clause D3 that "in the exercise of the rights conferred by this part, disturbance and inconvenience must be kept to a minimum and all damage made good." The terms of the Deed leave no room for doubt that the burdened owner (the Homeowners) has a right to have their property reinstated at the expense of the other owners (Clause A.1)"

***Submissions before the UTS***

[15] Both the appellants and the respondents lodged written submissions in advance of the appeal hearing. These were supplemented by oral submissions at the hearing which took place by WebEx on 13 February 2024.

[16] The appellants submitted that the relationship between themselves and the proprietors of the development was contractual and was governed, in part, by the terms of the Deed of Conditions. This was supplemented by the appellants' Written Statement of Services. The PFEO issued by the FTS required them to instruct, and potentially pay for, works which a majority of the proprietors had already decided was not to be treated as a common repair. The appellants had no authority to act against a decision of the proprietors. The FTS had failed to correctly interpret the factor's authority to act which was derived from the Deed of Conditions and their Written Statement of Services. The terms of the Deed of Conditions, being the sections referred to and founded on by the FTS, did not lead to this conclusion. In this respect the appellants had not misinterpreted the Deed of Conditions. The Deed had been correctly interpreted and the various proprietors advised accordingly.

[17] Concentrating on the Deed of Conditions as founded on by the FTS the appellants submitted that the section did not apply to their administration of the common parts. The section had no bearing on the appellants and was irrelevant. There was no provision in the Deed which permitted the factor to instruct works to any part of the Development without being authorised to do so by the various proprietors. The Deed did not allow for the factor to apply the division of costs between proprietors if the works were not common repairs. The proprietors had voted against the disputed costs and the appellants had no authority to act contrary to that vote. The FTS had not given proper consideration to this matter.

[18] In relation to what the respondents referred to as established custom and practice as provided for by the actions of the previous factor there was no basis to suggest the appellants

were bound by those actions. The FTS had reached conclusions without those being supported by relevant findings in fact. As a matter of fact the appellants had correctly interpreted the Deed and they had carried out their factoring duties appropriately.

[19] The respondents submitted that the FTS had correctly interpreted the Deed of Conditions. The section headed "Manner of Exercise of Rights" under Part 3 of the Deed relating to Servitudes was clearly intended to obligate benefitted property owners to repair all damage occasioned by any works carried out. It applied to all damage whether that related to repair of private or common parts. The spirit of the Deed implied that costs incurred as a result of making good damage caused whilst exercising the servitude right of access to effect common repairs should be treated as part of the cost of that common repair. The respondents submitted that because the cost incurred in uplifting the decking had been divided between the various proprietors by the previous factor this set an established practice. The proprietors had not been asked whether they were prepared to pay a share on the previous occasion, it was simply allocated to each proprietor.

[20] The respondents considered that the decking was in any event a "roof covering" which was defined in the Deed of Conditions as a common part. Reference was made to the appellants' Written Statement of Services which stated the factor would instruct maintenance and repair of all common parts. Only the appellants had suggested the balcony decking was private property.

[21] The respondents pointed to the application before the FTS. They had included written correspondence in which the appellants had instructed a contractor to attend to relay the decking. For a period of two years after taking over from the previous factor the appellants had

continued to act in line with the agreement reached with the previous factor. The FTS had before it numerous emails confirming there was agreement to relay the decking and share the cost between the various owners. It was only in August 2022 that the appellants had sent the respondents a letter stating that it was now considered that the cost of reinstatement was not to be shared.

[22] The respondents submitted that it was correct to conflate liability for common repairs with liability for damage. In exercising the servitude right of access the benefitted proprietor was obligated to make good all damage caused. If this remained a matter between proprietors then this should have been made clear by the appellants before commencement of works. The appellants were obligated by the agreement reached with the previous factor. Precedent had been set by the previous factor and the nature of the acquisition of the previous factor's business may have obligated the appellants to observe all liabilities and agreements entered into by that acquisition. As a result any agreement reached with the previous factor fell to be honoured by the appellants.

[23] The respondents also submitted that the appellants had not sought a vote prior to instructing repair of the leaking roof covering. The appellants' suggestion that the proprietors had voted against sharing the cost was spurious. A vote had been instigated by the appellants but they had not been open and honest with the proprietors and there had been no discussion about the division of cost by the previous factor. In any event the vote should not have been sought where it was clear that the appellants' interpretation of the Deed of Conditions was not justified. The outcome of the vote on this matter was irrelevant because the appellants had

breached specific sections of the Property Factor Code of Conduct as they had not been open, honest and transparent in dealing with homeowners.

[24] The observations of the FTS that the previous factor had "quite correctly" advised homeowners that they would not be expected to meet the reinstatement cost had a foundation in evidence. The FTS had seen the invoice issued by the previous factor which included the sharing of cost for the removal/refit of decking. In summary, the respondents considered that the decision of the FTS was justified and the terms of the PFEO were proportionate. Given the appellants' change in position and the intransigent attitude they had displayed towards resolving the matter then personal liability falling on the appellants for repair was both a fair and reasonable sanction.

***Discussion***

[25] The application before the FTS was in terms of section 17 of the 2011 Act. In terms of that section a homeowner may apply to the FTS for determination as to whether a property factor has (a) failed to carry out the property factor's duties and (b) failed to ensure compliance with the property factor code of conduct as required by section 14(5) of the 2011 Act. The latter is otherwise referred to as the failure to comply with the "section 14 duty". In this case reliance was not placed on a section 14 duty failure with reference to any part of the property factor code of conduct for the time being in place. The matter as presented to, and determined by, the FTS was based on the appellants' failure to carry out the property factor's duties.

[26] "Property factor's duties" is defined by section 17(5), so far as relevant in this case, as duties in relation to the management of the common parts of land owned by the homeowner.

There is no doubt that a failure to carry out the property factor's duties as so defined could, in some circumstances, encompass a wide definition. But whether or not a particular alleged breach of those duties does or does not come within the ambit of the statutory definition will be dependent on what facts are found to be established. Accordingly, it is for the FTS to decide what facts are established based on the evidence and materials before it. Thereafter, if so persuaded that the property factor has failed to carry out these duties, it is then a matter for the FTS to determine if it should make a PFEO (section 19). The purpose of a PFEO is to require the factor to execute such action as the FTS considers necessary and, where appropriate, make such payment to the homeowner as the FTS considers reasonable (section 20).

[27] It is therefore the task of the FTS to make an objective assessment of whether the factor has failed to carry out its duties. In doing so it must apply the correct test. That test is whether or not the factor has carried out its duties to a reasonable standard (see *Jones* v *Allied Souter & Jaffrey* [2019] UT 6).

[28] As observed above the FTS concluded that the failure on the part of the appellants, namely their failure of duty in relation to the management of common parts of land owned by the homeowner, was established on one specific failure. This was stated by the FTS as the appellant's misinterpretation of title deeds. That, so far as I can determine, related entirely to the interpretation given by the FTS to what they refer to in their decision as "Clause D3".

[29] As I have commented, nowhere in the decision is the Deed of Conditions further designed. It appears to me to be the Deed of Conditions as I have outlined above and as registered on 5 April 2017, all as further amended by the registered Deed of Amendment. There

are no findings in fact regarding the specific content of that Deed. The FTS concluded that the failure came from a misinterpretation of what they refer to as "Clause D3" and that failure further stated as being from February 2022.

[30] I have had sight of the Deed of Conditions as it appears in the Burdens section of the Land Certificate to 13J Links Road, Prestwick recorded in the Land Register of Scotland under Title Number AYR116485. It is replicated in the Burdens Section under entry 6.

[31] The particular clause referred to by the FTS as "Clause D.3" appears under the heading "Part 3: SERVITUDES". That Part of the Deed refers generally to Community Servitudes and confirms that the rights are imposed as servitudes on the Development in favour of each Unit. Part 3 is divided into sections A, B, C and D. Overall, from my own perusal of Part 3 it is clumsily worded and does not flow particularly well. Part 3 includes servitude rights of access for repairs including rights of access over or to the roof and any common part (specifically A.4) There is no subheading at section D but that part, from my reading of it, comprises the following: "D.1 The rights in this clause are imposed as servitudes on a Unit in favour of any other Units. D.3 This right includes all necessary rights of access to and egress for the other Unit."

[32] Below D.1 and D.3 there is a further subheading which reads "Manner of exercise of rights". Under that reads "In the exercise of the rights conferred by this Part, disturbance and inconvenience must be kept to a minimum, and all damage must be made good".

[33] Put simply, Part 3 of the Deed of Conditions creates servitude rights in favour of each Unit over the other Units in the Development. The servitude rights include a right of access which include access to common parts. If any Unit requires to exercise this servitude right over

any other Unit then inconvenience is to be kept to a minimum and all damage occasioned by the exercise of that right must be made good. In that respect, read as a whole, Part 3 provides for liability for damage occasioned in the exercise of the rights conferred. Accordingly, The FTS was right to conclude that "the terms of the Deed leave no room for doubt that the burdened owner (the Homeowners) has a right to have their property reinstated at the expense of the other owners (Clause A.1)". Does that interpretation allow the FTS to conclude that liability for damage, if uplifting of the balcony decking amounts to damage, can lie with the appellants as a result of a failure to carry out the property factor's duties in relation to the management of the common parts of land owned by the homeowner? Based on the reasoning given by the FTS, and based on the findings in fact, or perhaps lack thereof, read in isolation "Clause D3" does not, in and of itself, justify the decision reached.

[34] Part 3 of the Deed of Conditions, from my reading of it, has no specific provisions relating either to the definition of common parts or for responsibility for the maintenance or renewal of common parts. That is not to say the Deed of Conditions is silent on these matters. On the contrary it purports to provide detailed provisions for these matters elsewhere in the Deed. It is clear that the FTS was pointed to such specific provisions by the appellants but the FTS either did not consider these submissions nor did it consider these provisions of its own accord or if it did it reached no conclusion on whether such provisions were either relevant or irrelevant for determination of the matter before it. Herein potentially lies the first difficulty for the decision of the FTS in this appeal. The informed reader has no knowledge of these factors and what the FTS concluded in respect of these submissions.

[35] It is clear from the submissions provided by the appellants that they queried whether the FTS was concentrating on the relevant parts of the Deed of Conditions. The appellants referred the FTS to Rule 8 and to the definition of common parts. The appellants referred the FTS to the provisions for maintenance and renewal of common parts as defined in terms of Rule 13. Furthermore the appellants pointed the FTS to Rule 12 and to matters to be decided by proprietors at a meeting in relation to maintenance of common parts. The appellants advised the FTS that a meeting of co-owners had voted by majority not to fund the repairs to the balcony decking. Whether the FTS considered these matters is not clear. Whether the FTS gave consideration to these matters and then discounted them as irrelevant to reaching their decision is not recorded.

[36] As I have noted, the appellants made further submissions to the effect that they were not bound by the commitments given by the previous factor. The FTS observed that it might well be that they were not bound by this commitment. If that is the case, it is clear that the FTS did not reach a conclusion on that matter which, in the circumstances, ought to have been the subject of a distinct finding in fact. Whereas the FTS found that the former factor gave this commitment there was no finding whereby that commitment was transferred to or accepted by the appellants. It would have, or could have, a very important bearing on the decision to be reached and on the issue as to where liability rested. What did the FTS make of the email correspondence it was pointed to by the respondents who founded on the correspondence to show that the appellants had changed their position? The FTS simply commented this was ambiguous without reaching a conclusion as to what they took from that correspondence.

[37] What of the issue of whether or not the home owners voted in favour of not meeting the cost of replacing the balcony decking as part of the common repairs. Was this as a result of the factor acting inappropriately or erroneously suggesting to the home owners that they were entitled to reach that decision. This is not specifically addressed in the decision of the FTS.

[38] Should the respondents be responsible for the cost of replacing their balcony decking? Based on what I have seen by way of the materials and submissions before the FTS the simple answer to that question is that they should not. The pertinent question however is who is responsible for the cost and, in particular, does the failure in the factor's duties lead the appellants to be personally liable for that cost. It is not for me to rehear the factual matters previously argued before the FTS. There is here an error of law by the FTS based on the lack of relevant findings in fact to answer that pertinent question and therefore a failure in the reasoning of the FTS to justify the decision it reached.

***Conclusion***

[39] In the above circumstances, I consider it is necessary to quash the decision of the FTS. For the avoidance of doubt I will recall the Property Factor Enforcement Order issued by the FTS. Thereafter it is appropriate to remit the case back to the FTS for the respondent's application to be reconsidered by a differently constituted Tribunal.

[40] By way of observation I would comment that the situation might have been easier for the FTS to deal with had the appellants attended at the full hearing in person. Clearly this was assigned to consider and reach a decision on disputed facts. Whereas the appellants responded to the written directions of the FTS and lodged both general submissions and documentary

productions nobody appeared to speak to these. It is a matter for the appellants to reflect on how they wish to participate before a differently constituted Tribunal moving forward.

[41] Finally, given my decision in this appeal, the PFEO has been recalled. In those circumstances its terms have not required to be considered in detail. That said, by way of further observation, I have some doubts as to the competency of the terms of Part 1 of the PFEO. In terms thereof the appellants were to advise all the owners at the development that the appellants had previously misinterpreted the Deed of Conditions and that although the balcony is private, the cost of repairing the balcony and patio door sill at 13J Links Road Prestwick should be treated as a common repair and the cost shared between all owners. The appellants were to request authority to instruct contractors to undertake the repairs. In the event of the appellants being unable to obtain the necessary consent from the owners they were required to meet the cost of these repairs from their own funds. My concern is that a PFEO in those terms appears to leave the appellants with no avenue to seek reimbursement from the various proprietors who would otherwise be obliged to meet their respective shares of any work instructed on their behalf as a common repair. The proprietors are to be told the works are a common repair but given a choice as to whether they wish to pay. That does not seem justified on a first reading of the PFEO but without hearing further argument on that point I have not reached a concluded view.

Sheriff Ian Hay Cruickshank

Member