EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 41
XA9/22

Lord Malcolm
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in the Appeal

by

SOUTH LANARKSHIRE COUNCIL

Appellant

against

Decisions of the Upper Tribunal for Scotland dated 20 April and 11 May 2021

Appellant: Upton; Ledingham Chalmers LLP
Respondent: No appearance

7 September 2022

[1] This is an appeal under section 48 of the Tribunals (Scotland) Act 2014. The appellant is South Lanarkshire Council. The respondent is Gerald Boyd. The appellant challenges two decisions of the Upper Tribunal ("the UT"). The first, dated 20 April 2021, upheld a decision of the First-tier Tribunal (Housing and Property Chamber) ("the FtT") that the appellant had failed to carry out its property factor's duties in relation to the residential tower block in which a flat owned by the respondent and his wife is situated. The second

decision, dated 11 May 2021, allowed in part an appeal against the terms of the FtT's Property Factor Enforcement Order ("PFEO") regarding the time limit for compliance, but otherwise refused the appeal.

Legislation

[2] Power to make a PFEO is conferred on the FtT by Part 2 of the Property Factors (Scotland) Act 2011. Section 17 provides for application to the FtT for determination whether a property factor has breached defined duties, including duties in relation to the management of common parts of land owned by home-owners. Section 19 confers jurisdiction on the FtT to decide whether the factor has failed to carry out his duties, and, if so, whether to make a PFEO. Section 20 provides that a PFEO may require the factor to execute such action as the FtT considers necessary, or to make payment, and it may specify particular steps to be taken.

Burdens affecting dwellinghouses in Rosebank Tower

[3] Rosebank Tower, 19 Tanzieburn Road, Cambuslang is a residential tower block containing 72 flats ("the Tower"). The appellant owns 53 of those flats, which it lets to tenants. The respondent and his wife own one flat. The other 18 flats are owned by other proprietors.

[4] The registered titles to all of the flats in the Tower incorporate burdens set out in a Deed of Conditions. Clause 1(1) of the Deed defines "the Property" by reference to a title plan. The plan delineates the Tower and subsidiary buildings, and their curtilage. Clause 1 further provides:

> "(6) 'Common Charges' means and includes:

…

(c) The remuneration of the Factor and the reimbursement to him of any expenses properly incurred by him in performing his duties in relation to the Property;

…

(f) Any other expenses, however arising, in relation to the Property which in the opinion of the Factor should properly be borne by all the proprietors of dwellinghouses in the Property;

…

(10) 'Factor' shall be the person (who may be an officer of the … Council), firm or company responsible for the general management and administration of the Property appointed in accordance with the provisions of Clause 9 of this Deed;"

In terms of clause 4 each proprietor of a dwellinghouse is responsible for its repair, maintenance and renewal. The clause also provides that if in the opinion of the Factor it is necessary, or desirable for the protection, appearance or general amenity of the Tower, that any works of repair, maintenance or renewal be carried out in or upon a dwellinghouse he may serve notice upon the proprietor requiring the performance of specified works within a stated period; and unless the proprietor appeals successfully to an arbiter, if the works are not carried out the Factor may have them carried out and then obtain reimbursement from the proprietor. In terms of clause 6 the Factor is authorised to instruct and have executed such works as he in his judgement considers necessary, or desirable, for the repair, maintenance or renewal of the Common Parts. It also provides:

"(c) The proprietor, or proprietors, of each dwellinghouse in the Property shall be liable, jointly with the proprietors of all other dwellinghouses in the Property, for payment as herein provided of charges in respect of heating provided by the common central heating system in accordance with the scale of charges laid down by the Factor from time to time and based on the number of apartments in each dwellinghouse, and of all other Common Charges in the proportion of one equal share in respect of each dwellinghouse …

…

(e) As soon as reasonably practicable after the end of each Quarter, the Factor shall prepare a Statement of the Common Charges incurred in respect of that Quarter and shall furnish a copy thereof to each of the proprietors of dwellinghouses in the Property …"

Clause 9 provides:

"…

(c) The Factor shall be responsible for the general management and administration of the Property and, without prejudice to that generality, he shall have powers conferred on him and perform the duties imposed on him by this Deed and any other functions assigned to him in relation to the Property by the persons entitled to appoint him:"

The FtT's decisions

[5] The appellant appointed one of its officers, a factoring manager, to be the Factor in terms of the Deed of Conditions. The current Factor is David Keane. He issued a quarterly statement to each of the proprietors of the privately owned flats, including the respondent, seeking payment of a share of the Factor's management fees. The respondent complained that he should only be required to pay a one-seventy-second share of the management fees for the Tower. He applied to the FtT for an order that the Factor had failed to comply with his property factor duties. At the hearing before the FtT the respondent maintained that the management fees were a Common Charge, either by virtue of being remuneration of the Factor or reimbursement of expenses properly incurred by him (clause 1(6)(c)). The solicitor for the appellant submitted that they were not remuneration. She had no submission to make on the question whether they were reimbursement of expenses reasonably incurred.

[6] On 5 April 2020 the FtT decided that the management fees were not remuneration, but that they were expenses properly incurred by the Factor. It held that the fees were a Common Charge, and that by issuing statements and notifications requiring payment by the

respondent of other than a seventy-second share of the fees the appellant had breached its duty under clauses 6(c) and 6(e).

[7] The FtT found in fact:

> "(j) [I]n their quarterly statements to proprietors of the Private Flats the [Factor] divided 'common repair' charges and 'general block' charges for the Tower between all 72 dwellinghouses. Proprietors of Private flats such as the Applicant required to pay a one seventy-second share of such charges.
>
> (k) In contrast the [Factor] charged only the 19 owners of Private flats with the 'management fee' or 'factoring charge'. The overall cost of the management and administration of the Tower was not apportioned to all of the dwellinghouses in it.
>
> (l) The management fee was charged to homeowners such as the [respondent] to cover costs for services as set out in the evidence of David Keane noted below."

Mr Keane's evidence was that the management fee represented a proportionate share of the cost of providing the Factor service to all 8,518 private home-owners in mixed tenure blocks throughout the appellant's area. There were two main cost components associated with running the factoring service:

> A Staffing and general administration
>
> Each private owner's share was £117.32. This could be broken down into direct costs of the service provided to such owners of £67.81 and shared costs of £49.51, being a proportionate share of the costs incurred by the housing service in providing repairs and investment management within all council owned and managed properties. The direct costs covered factoring staff, central support (eg office information technology), direct administration (eg postage, stationery, printing ink), service management, and debt recovery staff. The shared costs covered inspections and instructions of work, housing and investment team costs, housing support costs, health and safety inspections in relation to common works, homeowners' enquiries

(eg as to anti-social behaviour), disputes with homeowners, and property council and property committee meetings.

B The actual cost of the repair undertaken which is the responsibility of the owner of the property – either private or council owned.

[8] On 13 May 2020 the FtT made a PFEO ordering the appellant to issue the respondent no later than 31 March 2021 with a statement of quarterly Common Charges which included notification that the proportion of the management fees due is one-seventy-second of the management fees for the Tower.

The Upper Tribunal's decisions

[9] The appellant was granted leave to appeal to the UT. At the hearing before the UT the counsel for the appellant advanced a new argument. He maintained that the management fees were not a Common Charge, but that they were nonetheless recoverable from private owners such as the respondent. He submitted that it was a necessary implication from the terms of clause 1(6)(f) of the Deed of Conditions that where the Factor was of the opinion that an expense should not properly be borne by all of the proprietors, it should be borne by those proprietors whom the Factor considered should bear it. The FtT ought to have found in fact that the benefit of the management fees was for private properties only, and it had erred in law in not doing so.

[10] On 20 April 2021 the UT refused the appeal. It rejected the appellant's construction of clause 1(6)(f). It held that the FtT had been entitled to decide on the material before it that the management fees were the reimbursement of expenses reasonably incurred by the Factor in performing his duties in relation to the Tower. The FtT had not erred in law in deciding that the fees were a Common Charge. Nor had it been bound to make a finding that the

appellant's flats gained no benefit from the factoring service. In any case, even if there had been such a finding it would not have made any difference to the outcome of the appeal.

[11] On 11 May 2021 the UT, of consent, allowed the appellant's appeal against the PFEO but only to the extent of substituting 31 March 2024 in place of 31 March 2021. *Quoad ultra* the UT refused the appeal.

The appeal to the court

[12] While the respondent appeared in person before the FtT and the UT, he did not enter appearance in the appeal (presumably because the very small sum at stake meant that it was not economic for him to incur court fees or to run the risk of incurring an order for expenses).

[13] Counsel for the appellant initially moved that the court allow the appeal and quash the FtT's decisions and the UT's decisions. However, he then clarified that he only asked the court to allow the appeal in respect of the direct costs element of the management fee, not the shared costs element

[14] While counsel had outlined a number of submissions in his Note of Argument, he accepted that the crux of the appeal was the submission that it was a necessary implication from clause 1(6)(f) that the Factor was entitled to obtain payment of charges which were not Common Charges from one or more proprietors if he was of the opinion that they were charges which should properly be borne only by those proprietors. He submitted that if there was no implied obligation of proprietors to make such payment the Factor would be left having to bear those expenses himself, which would be absurd. The FtT had erred in law in failing to hold that there was such an implied obligation, and in failing to find in fact that only the privately owned properties benefited from the expenditure in respect of which

the management fees were charged. In those circumstances it had also erred in law in holding that that expenditure represented expenses properly incurred by the Factor in performing his duties in relation to the Property (Clause 1(6)(c)). It was not a Common Charge. The UT had erred in law in failing to recognise the FtT's errors.

Decision and reasons

[15] We are not persuaded that the FtT or the UT erred in law.

[16] We reject the submission that the respondent is obliged by the Deed of Conditions to pay the management fee even if management fees are not a Common Charge. In our opinion clause 1(6)(f) does not give rise to such an obligation, either expressly or by necessary implication.

[17] Clause 1(6) defines "Common Charges". Clause 1(6)(f) is a residual provision. It specifies that other expenses in relation to the Property (ie expenses other than those described in clause 1(6)(a), (b), (c), (d) and (e)) are Common Charges if in the opinion of the Factor they should properly be borne by all of the proprietors of dwellinghouses in the Property. That is the sum and substance of what clause 1(6)(f) does.

[18] We are mindful that where the Deed of Conditions imposes obligations upon proprietors to make payment of sums to the Factor it does so clearly. The imposition of liability for a one-seventy-second share of Common Charges (clause 6(c)) is one such obligation. Another is the obligation of a proprietor to pay the Factor for repair, maintenance or renewal work carried out to the proprietor's flat where the Factor has duly exercised the power in clause 4(b). Another is the obligation (clause 7) of the owner of each private flat to pay the Factor one equal share of the insurance premiums for a common policy of buildings insurance for all of the private flats.

[19] We are not convinced that the Factor will be unable to perform the functions conferred upon him by the Deed of Conditions unless the obligation posited by the appellant is implied. Counsel suggested examples of expenditure which the Factor might incur in respect of one or more proprietors which he said would not be Common Charges. One was where a proprietor lost his common entrance key and the Factor supplied a replacement. Another was where a flat was burgled and the Factor instructed a tradesman to make it secure. Yet another was where the Factor decided that all of the windows in the private flats in the Tower required to be renewed. While we agree that the examples may not give rise to Common Charges, they do not persuade us that there is any necessity to imply the proposed obligation. It seems to us that the first two examples involve the provision of services which are additional to the functions conferred upon the Factor by the Deed of Conditions (and therefore which he need not provide unless the proprietor agrees to pay for them). The third example is a service falling within functions for which the Deed does make provision for payment (under clause 4). On the other hand, the management fee is not an instance of the provision of a service which is additional to the functions conferred upon the Factor by the Deed of Conditions. It is an instance of a service falling within functions for which the Deed does make provision for payment, but the provision for payment is as a Common Charge in terms of clauses 1(6)(c) and 6(c).

[20] In view of our decision on the main question, it is not necessary to say much about the other arguments which counsel advanced. We are satisfied that the FtT was entitled to find that management fees are the reimbursement of expenses reasonably incurred by the Factor in performing his duties in relation to the Tower and are therefore a Common Charge. We are not persuaded that the FtT's fact finding was materially deficient. Nor are

we persuaded that the UT's decisions were erroneous in law in any of the respects suggested by the appellant.

[21] We add three brief observations. First, the implied obligation argument was not canvassed before the FtT. It is of course competent for the UT to entertain a ground of appeal that was not argued in the FtT, although it should be slow to do so in any case where additional findings of fact are required, and should not do so if unfairness results (cf *Advocate General for Scotland* v *Murray Group Holdings Limited* 2016 SC 201, at paragraph [39]). Here, when it permitted the new argument to be advanced the UT does not appear to have considered whether the evidence and the findings in facts might have been different if the argument had been in play before the FtT. Second, the Deed of Conditions contemplates the Factor appointed under it having powers and responsibilities for the general management and administration of the Tower and all of the dwellinghouses within it. That is very difficult to reconcile with a Factor whose core management and administration costs are contended to be incurred solely in respect of privately owned houses. Third, it is our strong impression that the evidence which the appellant chose to lead before the FtT was somewhat scant and lacking in clarity. Before the UT and before the court counsel sought to provide further explanation and elaboration of the position during his submissions. As he acknowledged, that was not a legitimate exercise. All relevant matters ought to have been adduced in evidence before the FtT.

Disposal

[22] The appeal is refused.