Upper Tribunal for Scotland

[2019] UT 25
UTS/AP/18/0025

DECISION OF SHERIFF NIGEL ROSS

in the case of

HANOVER (SCOTLAND) HOUSING ASSOCIATION LTD,
95 McDonald Road, Edinburgh, EH7 4NS per T C Young Solicitors,
Melrose House, 69a George Street, Edinburgh, EH2 2JG

Appellant

and

ANN MORRISON, 9 Muirfield House, Gullane, EH31 2EL

Respondent

FTT Case Reference FTS/HPC/18/0240

6 March 2019

Decision

The tribunal allows the appeal; quashes the decision dated 30 July 2018 of the First-tier Tribunal; recalls the property factor enforcement order of even date; and makes no further order.

Reasons for Decision

[1] The appellant ("Hanover") provides factoring services at a private retirement complex at Muirfield House, Gullane. The respondent ("Mrs Morrison") is one of 38 home owners there. The relevant powers and duties of the factor are set out in the title deeds, and are subject to the statutory regime of the Property Factors (Scotland) Act 2011. There are

four documents registered in the burdens section of the Land Certificate, of which the relevant document is the Deed of Conditions by John G McGregor (Developments) Limited recorded 31 August 1987. There is a separate unregistered document, namely an unsigned and undated Management Agreement, which parties accept also served to regulate the powers and duties of Hanover as factor, and which bears to set out the services to be provided by Hanover.

[2] The complex includes an original residential building and nine blocks of dwelling houses. There are three structures which the home owners do not own, namely the warden's accommodation, the guest suite and the residents' sun lounge (the "sun lounge"). The sun lounge, which is the focus of this appeal, is built to the side of the main building and has two entrances; an internal entrance from the main building, and an external entrance from the grounds.

[3] Mrs Morrison is of the opinion that there is a problem with the external lighting to the sun lounge. There is an external light affixed to the external wall of the sun lounge, but it only operates intermittently, when triggered by an external motion sensor. During the hours of darkness, when exiting the sun lounge to the grounds, the light does not operate immediately upon exit. It is necessary to step into the darkness before the motion sensor detects movement and the light illuminates the path. She identifies that this lighting is inadequate, because elderly residents leaving the sun room during the hours of darkness exit into darkness. In her view, it is necessary to replace the existing external light with a light which shines from dusk to dawn, thereby illuminating the external pathway and entrance for the benefit of those entering and exiting the sun lounge after dark.

[4] The homeowners govern their communal affairs means of the "Property Council" constituted under the title deeds. Mrs Morrison took her complaint to the Property Council.

The other homeowners did not agree that the lighting arrangements required any further works, and rejected her proposal for a dusk-to-dawn light at the external entrance to the sun lounge.

[5] Mrs Morrison wrote to Hanover complaining about the inadequacy of the lighting. Few details of the correspondence are provided, but parties agree that after some protracted correspondence she was unsuccessful in persuading Hanover that it should replace the existing light. The only cost figures mentioned, but not disputed, are a rough estimate of £1000 to replace the existing light, and an operating cost of £300 a year in electricity.

[6] Mrs Morrison applied to the First-tier Tribunal ("FtT") for a decision on the matter. The FtT decision was issued on 30 July 2018. The FtT reviewed the terms of the Deed of Conditions and the Management Agreement. The decision was:

> "Given that Muirfield House is part of a sheltered housing development and the residents are elderly the Tribunal consider it to be unreasonable to expect residents to exit the sun lounge external door in darkness. Consequently the Tribunal determine that the Factor has breached their property factors duties to reasonably light the sun lounge."

The Appeal

[7] Hanover appeal on the basis that there is no such duty to be found in the Management Agreement, that in any event the title deeds allowed only the Property Council, not the factor, to direct these works because (i) the lighting was part of the common parts, as defined, and therefore such works required the homeowners' authority and (ii) the works were improvements, not maintenance, and that in any event Hanover did not act unreasonably. They submit that the FtT failed to address the issue of improvement or repair, did not consider all the issues when deciding reasonableness, and construed the title deeds incorrectly.

[8] The response on behalf of Mrs Morrison was to the effect that the sun lounge, and therefore the lighting attached, was not within the definition of common parts and therefore were a matter for the factor, that the works were not improvements, and that the FtT were entitled to reach their decision.

Decision

[9] This appeal turns on the construction of the terms of the title deeds and the Management Agreement. On examination of those deeds, it is apparent that the FtT decision erred in a number of respects, and the decision cannot stand.

Common parts

[10] The property section of the land certificate grants Mrs Morrison a one-thirty-ninth pro-indiviso right of property in common with others to *"(b)…such parts of the Buildings [*used in common*] and which include…the outside walls and cladding thereof…".* That description is apt to include the outside wall of the sun lounge, a communal area. They are all defined in (b) as "*the Common Parts*".

[11] The Deed of Conditions defines the sun lounge as "*Residents' Sun Lounge*", but the definition does not discuss external lighting. "*Common Parts*" expressly excludes the sun lounge, as the FtT correctly identified. However, the FtT did not recognise that the definition does not stop there, but proceeds to include various parts of the sun lounge, under reference to "*Buildings*", a defined term which expressly includes the sun lounge. Common Parts includes: *"(a) the solum on which the Buildings* [ie including the sun lounge] *are erected and the following parts of the Buildings…(iii) the outside walls and cladding thereof"* of the Buildings [ie including the sun lounge] and *"(xix) lighting equipment for the Curtilage and*

flood-lighting equipment, if any" and *"(b) the Curtilage*", which includes all access paths. In short, the sun lounge itself is not within the Common Parts, but its solum and external walls are. In any event, quite separately, the lighting equipment which lights the Curtilage is expressly included within Common Parts.

[12] The external wall of the sun lounge is therefore owned in common by all the proprietors, and forms part of the Common Parts. The same applies to the external lighting. That position is consistent between the title section and the burdens section of the land certificate. The FtT erred in excluding from Common Parts the external walls of the sun room (to which the external light is fixed) and the lighting equipment itself (being lighting for the Curtilage).

[13] The Management Agreement provides: *"Hanover Scotland will seek the authority of the Homeowners to carry out common repairs and maintenance in terms of an agreed annual budget. Beyond this, Hanover Scotland reserves the right to carry out additional work where it judges this to be in the best interests of Homeowners as a community…"*, which latter power is restricted to grounds of emergency, or works below £100 per Homeowner. Although the lighting works would fall into the last category, it is a matter for the judgement of the factor, taking into account the "best interests" of the community.

[14] The FtT correctly identified that the factor can only carry out works to the Common Parts where it has the prior authority of the homeowners. As an aside, the Deed of Conditions does (Clause SEVENTH (c)) allow the factor to carry out such works without permission, but only in an emergency, and only "interim" works. There is no evidence of emergency here, and these are proposed permanent, not interim, works. Accordingly, even if they considered such works to be necessary, Hanover would still require permission for installation of a new light. It is not proposed that the existing light be repaired or altered.

[15] Parties agree that the factor did not have the authority of the homeowners to carry out the lighting works. The same had been sought by Mrs Morrison and refused by the Property Council, representing the homeowners.

[16] It follows that the FtT erred in finding that Hanover were in breach of any duty to carry out common repairs and maintenance under the Management Agreement. They were given no authority to do so by the homeowners who, after all, were the people who would require to pay for the works. The Deed of Conditions did not impose any such duty, but instead gave an entitlement to the Superior (now superseded as a matter of law) or to the Property Council, to instruct the factor to do so. The Property Council, representing the homeowners, gave no such instructions. Hanover therefore had no duty to replace or alter the external light. Hanover were entitled under the Management Agreement to carry out such works where in their judgment it was in the best interests of the homeowners. The matter was left to Hanover's judgment. They decided the replacement of the light was not necessary.

Improvements v repair

[17] This submission is not discussed in the FtT decision. It is not clear if the FtT recognised that the issue required decision. Hanover's position is that, whether or not they had a duty to act, such a duty could not extend to works which went beyond repair or maintenance. Any such duty could not include a unilateral power to make improvements without the consent of the homeowners. The position for Mrs Morrison was that the works envisaged did not amount to improvement, but qualified as repair or maintenance.

[18] Mr Geary, in an able submission for Mrs Morrison, relied on a number of authorities discussing the difference between repair and improvement. These include *Morcom* v

Campbell-Johnson [1956] 1 QB 106, *Stewart's JF* v *Gallagher* 1967 SC 59, *Haydon* v *Kent County Council* [1978] QB 343 and *ACT Construction Ltd* v *Customs & Excise Comms* [1981] 1 WLR 49. These cases contain various formulations of the differences between repair and improvement, of which one example is *Morcom*, at page 115:

> "The test of whether work done is an improvement or repair is said to be: "if the work which is done is the provision of something new for the benefit of the occupier, that is properly speaking an improvement; but if it is only the replacement of something already there, albeit that it is a replacement by its modern equivalent, it comes within the category of repairs and not improvement."

[19] These authorities demonstrate that every case will turn on its particular facts. The FtT decision is somewhat uninformative as to the physical characteristics, placement, fixing, lighting coverage or effectiveness of the existing light. Although I agree with Mr Geary's submission that an appeal tribunal cannot lightly interfere with the fact-finder's assessment, the FtT did not make any material finding on this question. After discussion at appeal the parties accept that a replacement light would be necessary for Mrs Morrison's purposes, rather than simply permanently switching on or altering the existing light.

[20] Even in the absence of detailed facts about the light and its performance, it is clear that Mrs Morrison wants something better and different, not simply a replacement of like with like. There is no want of repair or maintenance, only of performance. That, on any view, takes these works into the category of improvements, not repairs. For obvious reasons, the title deeds do not allow the factor to spend the homeowners' money in improving the complex without their consent. The Property Council expressly refused consent. Hanover had no authority to override or ignore that decision. The FtT erred in failing to identify that the works were improvements, not repairs, and therefore required the homeowners' consent.

Reasonableness

[21] The FtT's decision is based on a test of reasonableness. The decision is in error, for a number of reasons. First, it applied a non-existent test. There is no test of "reasonableness" in the Management Agreement. There are various strictures (for example "*in the best interest of Homeowners as a community*" and "*using its best judgment*") but these are specific to various tasks, such as carrying out either necessary or inexpensive works, and only in relation to judging whether such works are necessary. There is no overall test of reasonableness.

[22] Secondly, even were reasonableness to be the correct test, it would not be a subjective test. It would be an objective test. Mrs Morrison subjectively identifies these works as necessary. She made her determination clear during the appeal. If that were the test, Hanover would simply have to comply with her instructions as long as they were not unreasonable. They would also have to comply with the reasonable instructions of every other homeowner, however expensive or arbitrary or contradictory. Any one of the 38 homeowners could circumvent the wishes of the majority by going straight to the factor and making demands. That is not the structure which the title conditions anticipate. The FtT did not bear to carry out any objective assessment of what was reasonable. Relevant balancing considerations would inevitably include: that the homeowners regarded the works as not required; that the homeowners could refuse to pay Hanover who were ignoring their instruction; the "impossible position" of Hanover as they described it; the perpetual costs of £300 per year to be foisted on the homeowners ; the lack of any objective evidence that any other homeowner agreed with Mrs Morrison's views, or felt unsafe; the lack of factual evidence of any accident or incident; the lack of any objective, informed report or safety assessment, or other impartial test such as statutory requirements or local

authority regulation. The decision by the FtT did not refer to any such balancing considerations, and cannot be seen to be objective.

[23] Thirdly, no court or tribunal is entitled to impose its own view of reasonableness in the absence of any error by the decision-maker. It is long recognised that this would undermine the certainty and enforceability of contracts. There is a substantial body of case law on the principle that a court or tribunal, even if it disagrees with a decision, will nonetheless support that decision if it was taken within the powers of the decision-maker. Even if reasonableness were the test, the question for the FtT would be not what it thought was reasonable, but whether Hanover was entitled in logic and in law to make the decision. Hanover's decision can only be overturned if they acted outside their powers, or irrationally, or unfairly. It would require a detailed consideration of the validity of Hanover's reasons, not the Tribunal's own. This exercise was not carried out. There is no basis to anticipate that Hanover acted in any way wrongly, in error or unfairly. In fairness, this is a legal argument and it is not clear from the FtT's decision whether it was fully argued before it.

[24] As a codicil, some reference was made in submissions to the effect on the Deed of Conditions of statutory changes under the Abolition of Feudal Tenure etc. (Scotland) Act 2000, the Title Conditions (Scotland) Act 2003, and the provisions of the Property Factors (Scotland) Act 2011. I have not discussed these because neither party's submission turned on any of these points.

Disposal

[25] For all these reasons, this appeal must succeed. I will allow the appeal and quash the decision of the FtT dated 30 July 2018 and recall the property factor enforcement order made in that decision. Both parties elected to claim no expenses, so I make no award of expenses.