Upper Tribunal for Scotland

[2022]UT10
Ref: UTS/AP/21/0042

DECISION AND ORDER OF

Sheriff O'Carroll

IN AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL FOR SCOTLAND

in the case of

Mr William Gardner and Mrs Moira Gardner, 64 Silvertrees Wynd, Bothwell, G71 8FH
per Mrs Caroline Adams,
18 Silvertrees Wynd, Bothwell, G71 8FH

Appellant

- v -

Miller Property Management Limited, Suite 2, 2 Waverley House, Caird Park, Hamilton, ML3 0QA

Respondent

FtT case reference FTS/HPC/PF/21/0456

8 April 2022

The Tribunal ORDERS that:

1. The application by the appellant to the FTS concerning an alleged breach by the respondent of Section 3 of the Property Factors Code of Conduct is remitted to a differently constituted FTS to determine that part of the Appellant's application afresh.

2. No expenses are due to or by in respect of these appeal proceedings.

DECISION

The appeal by the appellant against the decision of the First-tier Tribunal dated 26 October 2021 to refuse the appellant's application in respect of an alleged breach by the respondent of Section 3 of the Property Factors' Code of Conduct ("the Code") succeeds and the matter is remitted to a differently constituted FTS to determine that part of the appellant's application to the FTS anew.

REASONS

Introduction

[1] This appeal hearing proceeds on the basis of the leave to appeal granted by this Upper Tribunal to the appellants, by way of decision dated 27 January 2022, against the decision of the FTS dated 26 October 2021 ("the FTS decision"). Reference should be made to that decision and the reasons thereto for the extent of the leave to appeal. This Tribunal held a hearing on 31 March 2022 by way of WebEx on that ground of appeal. The appellants were once again represented by Ms Adams and the respondent was once again represented by Mr Miller.

[2] The appeal is narrowly focused on the decision of the FTS that the respondents did not breach section 3 of the Code by charging the homeowners in the scheme total of £513 (amounting to £8.55 per home owner) in respect of gardening work carried out in 2020 on the common parts of the scheme. In short, the contention of the appellant which was clearly put in her application to the FTS and also in her application for leave to appeal made to the FTS, is that while the majority of the charges made to the homeowners for gardening work was properly chargeable, some of the work carried out by the gardening contractor was not properly chargeable to the homeowners because that work was properly classed as improvements rather than repair or maintenance or was otherwise work which was caught

by the terms of the deed of conditions; which the Appellants assert is the document which governs the rights of the parties so far as the work which may be properly chargeable to the homeowners.

[3] The relevant finding in fact of the FTS is contained in finding of fact 13 (a single finding in fact which comprises seven sentences and two separate grounds of complaint). The relevant part of that finding is as follows: "The contracted gardener incurred some additional costs in 2020 beyond the agreed contract price in place. These works were enhancements at a total cost of £8.55 per home owner. A full explanation has been provided to the applicants about these charges." That finding in fact is the only finding in fact relevant to this issue. There are no findings in fact as to the total cost of the contract, how and when the contract was entered into, between whom the contract was concluded, the content of that contract and what works were and were not included in the contract. Neither are there any findings in fact as to what the "additional costs" were. Neither is there any explanation given as to the meaning of the word "enhancements" and whether the costs were authorised by the deed of conditions or some other contract. Given that the entire thrust of the appellant's contention before the FTS was that there was a contract between the factor and a gardening firm and that the costs of the work were £5,400 and that the dispute concerned additional costs over and above the contracted costs for specified works, one would have expected there to have been clear findings in fact with regard to at least some of these matters. While as will be explained shortly, at page 5 of the decision, the FTS appear to have reached various narrative conclusions regarding many but by no means all of these matters, the failure of the FTS to state these conclusions as findings in fact rather than include them in the narrative of the decision explanation is less than ideal and does not answer all questions. The difficulties with this decision do not unfortunately stop there.

[4] The reasoning of the tribunal is found at page 5 under the discussion relevant to paragraph 3 of the code. The relevant parts of the reasoning incorporate what appear to be narrative conclusions. It reads as follows, after accurately quoting the introductory words of section 3 of the code,:

"All invoicing issued by the respondent is detailed providing a thorough explanation of the charges made and how they were calculated. The applicant's particular complaints relate to the charges for gardening. The annual contract is £5400. This is a very competitive price in which the scope of works agreed for somewhat short of the anticipated scope of work set out in the title deeds. However the terms of the contract and identity of the contractor were approved by the Owners Association which had the status of a quorum of all owners. Additional charges were made by the gardening contractor in 2020 relative to enhancements. Full disclosure has been made by the respondent as to what these additional charges relate to. The additional charges totalled £513 which equates to a total cost to a homeowner of £8.55. The additional charges relate to marginal enhancement works including the provision of additional hedges between the two blocks on the development. The respondent's actions appear to the tribunal to be entirely reasonable. The complaint is not about the authority to act here but whether homeowners received value for money. The tribunal concluded that the additional costs could not be considered to be excessive."

[5] A number of problems emerge from this reasoning. The first is the reference to the "Owners Association". Its significance is unexplained. The meaning of the unfamiliar term "status of a quorum of all owners" is unclear and not otherwise explained in the decision. If the FTS was intending to find as a fact that all homeowners were bound by a decision of the Owners Association to approve the terms of the contract and identity of the contractor, it ought to have said so and to have made relevant findings in fact such as the legal status of the Owner's Association, the legal capacity of that Owners Association to bind the homeowners (who may or may not have been members of the Association) to pay charges pertaining to contracts agreed by that Owners Association, the manner in which the contract and identity of the contractor was approved by the Owners Association, and when, and the consequences of any such agreements.. That is because one of the contentions which was a live issue before the FTS was that the Owners Association had no legal authority to bind non-members and that the present appellants were non-members of the Association.

[6] Further, I note that finding in fact 6 finds that the Owners Association was "not one regulated by the relevant title deeds" and that "around one half of the owners in the

development are members of that voluntary organisation." Given that finding in fact, the reference to the Owners Association in the context of liability to pay a charge for additional gardening services is difficult to understand. In short, the FTS does not explain why an agreement with an Association which is unconnected to the deed of conditions is apt to make non-members of that Association liable to make payment of charges, (which the tribunal has characterised as "enhancements" at finding in fact 13). That is necessary since the complaint made by the appellant is that the charge was "improper"; that is to say a charge which is not properly founded in some legal obligation or otherwise properly exigible from the homeowners.

[7] The second difficulty that arises from the reasoning of the FTS above is its assertion that the complaint is "not about the authority to act but whether the homeowners received value for money." That approach is echoed in the FTS's "concluding comments" at page 6 where it states that "the applicant's underlying concern has been about whether best value for money is being received. They can take comfort in knowing that the tribunal finds that they are". It is quite unclear how it is that the FTS came to direct itself that the question before it so far as these disputed charges are concerned was not to decide whether the factor was legally entitled to recover certain gardening charges from the homeowners but rather was to decide whether the charges made were value for money or simply excessive or were unreasonable. In doing so, the tribunal appears to have failed to understand the question that it had to decide and has instead answered a different and irrelevant question.

[8] Unfortunately, the FTS reasoning on the application for leave to appeal dated 5 November 2021 provides little by way of explanation as to how and why the FTS came to its conclusion on this part of the application made to it or to dispel the difficulties I mention above. At page 4 of that decision it appears that the FTS, by that stage in the proceedings, has understood that the contention of the appellants was in fact concerned with the legal liability of the homeowners to make payment of the disputed charges. But in dealing with that realisation, although referring to the title deeds (which incorporate the respondent's duty to repair, maintenance and renewal, presumably as opposed to improvement or

enhancements) the FTS goes on to conclude that "there is nothing in the 'contract' between the parties which is prohibitive of the respondent's actions." This is a *non sequitur*. It takes one no further in determining the central issue which is whether the respondent was entitled, properly, to make a charge to each of the homeowners in respect of the disputed work amounting to a total of £513. If anything, the implication of the 'awareness' of the FTS that the title deeds (as is normal and commonplace) deal with repair, maintenance and renewal, is that no obligation is created by the title deeds in respect of payment concerning other matters such as improvements or what the FTS has characterised as "enhancements". But again, unfortunately, the FTS reasoning is somewhat opaque.

[9] Finally, in that same paragraph on page 4, the tribunal states the following: "Moreover the total cost of £8.55 per homeowner for the minor garden enhancement works, for the benefit of the common area of the development are de minimis." There are several significant difficulties with that reasoning. The first is that the FTS, in adopting that common law brocard [fully, *de minimis non curat lex*" or 'the law does not concern itself with trifles'], might appear to be suggesting that it is not the function of the FTS to deal with claims of low value or perhaps that where the claim is of low value the FTS need not concern itself overly with the lawfulness of such charges. If that is what was meant by the application of that principle to determination of this case, it is in my view mistaken. The FTS has a statutory function which is to determine complaints brought to it. The statute does not entitle the FTS to refuse to deal with a claim made before it in a proper and rigorous fashion on the grounds that it considers the value is low. Moreover, the sum involved is only the homeowner's share of a rather larger sum, £513, which could not reasonably be described as a trifling sum, at least in the context of the sort of cases dealt with by the FTS.

[10] Further, it should be borne in mind that to focus only on what might be seen as a small amount of money may be misleading when one considers the importance of the issues at stake. In general terms, it is not uncommon to encounter disputes between parties over what might be seen at first glance as trivial or small sums of money which in fact cloak rather larger issues of principle and importance. This case is one such. As the appellant's

representative has been at pains to emphasise in the proceedings before this tribunal, the importance of the matter is to obtain a determination from the FTS that the respondents in this case are not entitled to make charges against the account of any of the homeowners unless those charges are agreed by every homeowner or are charges which are otherwise lawfully exigible in terms of the deed of conditions. This principle the Appellants assert is they say an important one which in the context of the current relationship between the homeowners and the present respondents needs clearly to be established and understood so as to avoid any future difficulties in charging of this kind.

[11] Thus, an important reason for this application to the FTS is to obtaining a decision which, the appellants hope, will be of general application and will assist the parties in the future to avoid future disputes.

[12] In addition, in cases of this kind, the determination of an issue brought by one home owner may well have more general application to other homeowners who have a similar relationship to the respondent where the matter to be determined by the FTS is common to all the homeowners. Again, in such cases, although the sum in dispute may apparently be a small, if the issue is one which is common to a wider number of homeowners, the significance of the dispute is much greater. It will be seen that this is also such a claim since the determination of this appeal may have a wider application to the remaining homeowners.

[13] In this regard, although not presently relevant to determination of this appeal, it may be worth bearing in mind the terms of section 19(4) of the Property Factors (Scotland) Act 2011: "… no matter adjudicated on by the First-tier Tribunal may be adjudicated on by another court *or tribunal*" [emphasis added].

[14] It follows from the foregoing, that this Tribunal is in little doubt but that the FTS has erred in law in its determination of the question as to whether or not the respondents were in breach of section 3 of the Code by making a charge of £8.55 to the appellants. It erred in law, in summary, (a) by failing to make relevant findings in fact pertaining to the issues in dispute; *seperatim* (b) by misdirecting itself as to the correct factual and legal issues

that it required to determine on the application before it; (c) by taking account of irrelevant matters and failing to take account of relevant matters.

[15] It follows that this matter requires to be returned to the FTS for redetermination. It is appropriate that the matter be dealt with by a freshly constituted tribunal. It should be apparent from the foregoing the manner in which the previous FTS has erred and the way in which the new FTS should approach the matter before it.

[16] It is important to add one further observation. In the appeal hearing before me, it became apparent from submissions made on behalf of the respondent that contrary to the findings of the FTS, the respondent's position was that there was no contract at all for the sum of £5400 (that being merely an estimate and not a quotation) and that the additional works done were not enhancements or improvements, again contrary to the findings of the FTS. There was however no cross-appeal to this effect. The appellant's position is that there was such a contract for that sum and that documentary material was put before the tribunal to that effect (although not specifically referred to in its findings in fact) and that the sum of £513 was the total additional sum charged to the homeowners over and above the contract price; which additional sum could be accounted for by the hedging improvements referred to in the FTS decision. In my view, standing the difficulties I have identified in the FTS decision and its approach to the matters placed before it, justice would not be done to either of the parties if the newly constituted FTS were to be required to rely on findings in fact 6 and 13 and the conclusions in the paragraph indicated at page 5 of the FTS decision. What is required is a fresh approach to the whole appeal ground (alleged breach of section 3 of the Code), *de novo*, with fresh findings in fact on all pertinent questions and fresh and clear reasoning on those questions.

SHERIFF O'CARROLL
Member of the Upper Tribunal
8 April 2022

Notice to the parties

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.