



2023UT33

Ref: UTS/AP/23/0020 & UTS/AP/23/0021

DECISION OF

Tony Kelly

**ON AN APPEAL
IN THE CASE OF**

Indigo Square Property Limited , Indigo Square, 42 Holmlea Road, Battlefield, Glasgow, G44
4AL

per Indigo Square Property Ltd,
42 Holmlea Road, Battlefield, Glasgow, G44 4AL

Appellant

- and -

Mr Mark Welsh, Flat 1/1, Rothesay Court, 2473 Dumbarton road, Glasgow, G14 0NT

Respondent

FTS Case references: FTS/HPC/PF/22/1501 & FTS/HPC/PF/22/1883

Glasgow, 3 November 2023.

Decision

The Upper Tribunal refuses the appeal. The property factors enforcement order pronounced by the First Tier Tribunal is affirmed and enforcement of that order passes back to it.

Introduction

[1] On 25 May 2023 the First Tier Tribunal for Scotland (Housing and Property Chamber)



(“FTS”) decided that the factor – Indigo Square Property Limited - had failed to comply with its duties in terms of section 17(5) of the Property Factors (Scotland) Act 2011. It made a property factor enforcement order.

[2] The property factor appealed against that decision by letter dated 8 June 2023. The FTS distilled two separate grounds of appeal from that application. It granted permission to appeal in respect of ground of appeal 2. It refused permission to appeal in respect of ground of appeal 1. The appellant subsequently appealed against that refusal to grant permission to appeal. The Upper Tribunal refused permission to appeal in respect of ground 1: [2023] UT 22.

Hearing: 26 October 2023

[3] Mr Gilmour appeared for the appellants and Mr Welsh appeared personally at the hearing which took place at the Tribunal Centre in Glasgow.

[4] Mr Gilmour acknowledged that the ground of appeal in relation to which permission to appeal had been granted was correctly delineated by the FTS in the following terms:

“We also believe that the view of the panel members is flawed in its interpretation of the title deeds. Moreover we believe that the interpretation of the panel and the wording of the title deeds is so egregiously incorrect as to have a material impact upon scheme decisions in developments across Scotland”.

Appellant

[5] Mr Gilmour contended that there was ambiguity in the interpretation of clause eighteenth of the deed of conditions of the Land Certificate, which parties agreed governed the management of the property. Mr Gilmour contended that the ambiguity in interpretation could be taken from



the interpretations put forward before the FTS. In all the circumstances Mr Gilmour submitted that the ambiguity could be resolved with reference to extraneous documents and provisions. He referred to the Tenement (Scotland) Act 2004 and to Scottish Guidance. These were not produced. Mr Gilmour was not prepared to refer to the particular provisions of the Act he invoked to resolve the ambiguity. He was afforded an opportunity through a break in proceedings to familiarise himself with the material.

[6] Mr Gilmour's primary submission was that when one has regard to the provisions of clause eighteenth of the deed of conditions it refers, in turn, to clause ninth. Clause ninth makes reference to the owners' association effecting a common insurance policy. Mr Gilmour sought to place reliance upon a number of potential definitions of "common". He referred to the Tenement (Scotland) Act 2004 and in particular Schedule 1, rule 3 and section 18. This, it was submitted, assisted in connection with the coverage of common insurance policy. Rule 3.1(f) referred to "the tenement". This showed that the whole building required to be covered by a common insurance policy. There was no provision or power for individual owners to except themselves therefrom – see section 18(2). Mr Gilmour accepted that the FTS had correctly recorded his submission at paragraph 25. This mirrored the submission he made to the Upper Tribunal.

[7] Mr Gilmour also referred what he described as the considerable impact of allowing an owner to opt out of a common insurance policy. The benefit of a common policy was for all owners. This was how "all property factors in Scotland dealt with the matter". The interpretation favoured by the FTS flew in the face of that day to day working of property factors.



Respondent

[8] Mr Welsh submitted that the FTS had arrived at the correct interpretation of the deed of conditions. When one looked to clause ninth it provided a power to the owners' association to effect the common insurance policy. There was no ambiguity in the terms of clause eighteenth. The Upper Tribunal did not require to refer to the extraneous documents and materials in resolving the issue presented to it for interpretation.

Decision

[9] The deed of conditions forms part of the respondent's title to the property at Rothesay Court, Dumbarton Road in Glasgow. The Land Certificate GLA67773 incorporates the provisions of the deed of conditions.

[10] The relevant parts of the deed of conditions which are the subject of the dispute between parties are as follows:

“(NINTH) ... each feuar shall be obliged to join and shall automatically be a member of an Owners' Association, ("the Owners' Association") the purpose of which will be to carry out the terms of these presents, where applicable, and otherwise to preserve the amenity of the development and the enjoyment thereof by its members. The constitution of the Owners' Association shall be as follows until such time as two thirds of those members present and voting or voting by proxy at a meeting of the Owners' Association shall otherwise determine:- (One) We, the Superiors, or any two members may call a meeting of the Owners' Association which shall be held at such reasonable time on a weekday and place as we, the Superiors, or such members shall determine, on giving not less than seven days' notice in writing to all other members. Any member may be represented by a proxy and (a) Thirteen members present in person or by proxy shall form a quorum in respect of any decisions to be taken in relation to the development as a whole; and (b) Three members present in



person or by proxy owning dwellinghouses within a block of flatted dwellinghouses shall form a quorum in respect of any decisions to be taken solely in relation to that block; declaring that the Chairman of any meeting shall decide under which of the above Categories (a) or (b) any decision falling to be taken properly falls. Each member shall subject as aftermentioned be entitled to one vote but only with regard to decisions relative to common property in which he has an interest hereunder (in the case where two or more persons are feuars of one dwellinghouse only the first named in the Feu Disposition shall be entitled to vote although another member may be authorised to vote on his behalf by proxy and in the case where one party is feuar of more than one dwellinghouse within the development he shall have one vote for each dwellinghouse owned by him) and except with regard to changes in the constitution the decisions of a majority of those members present and voting or voting by proxy shall be final and binding on all members. (Two) At the first meeting of the Owners' Association there shall be appointed from the members a Chairman and a Secretary and such other members of Committee as the meeting shall determine. Such Committee may be authorised to carry out all the functions of the Owners' Association as are referred to herein, including such other functions as the members of the Owners' Association may determine in accordance with Clause (NINTH) (Three) hereof. It shall be an obligation of the Committee to call annual meetings of the Owners' Association at which time elections of new Committee members shall be held, with all previous Committee members being available for re-election. (Three) The Owners' Association (or Committee if authorised as aforesaid) shall have power to order the execution of all works required to common property, to instruct the external painting of all buildings and erections on the development, to effect a Common Insurance Policy for any of the blocks of flatted dwellinghouses on the development or the common property and to make any regulations which they consider necessary with regard to such insurance, to enforce any provision of these presents so far as it relates to common property or otherwise affects the amenity of the subjects or the enjoyment thereof by the majority of members, to make any regulations which they consider necessary with regard to the maintenance, cleaning, use and enjoyment of the said common property, to employ cleaners, gardeners and such other staff as they consider necessary for the foregoing purposes and the functions aftermentioned, to carry out such other functions with regard to the development as the members of the Owners' Association shall from time to time determine in meeting and to delegate to any Factor appointed as aforesaid such of the foregoing powers as it considers expedient. DECLARING that (a) (subject to the terms of Clause (SEVENTH)



hereof) all costs and expenses incurred by the Owners' Association or by the Factor including the reasonable remuneration of the Factor in implementing the foregoing provisions shall be payable by all the feuars affected by the same, jointly and severally, whether or not they consented to the same, within one month of payment being demanded, with interest thereafter at the rate of four per centum per annum over The Royal Bank of Scotland pie Base Rate for the time being until paid; and (b) all references to common property in this Clause and in Clause (EIGHTH) hereof shall be deemed to include Development Common Property, any other property common to all the feuars and any property common to the feuars within any block, unless a contrary intention is clear.

...

(EIGHTEENTH) (a) Each feuar of a dwellinghouse on the development shall be responsible either individually or through the Owners' Association as aforesaid for insuring his dwellinghouse and his interest in all common property effecting thereto against loss or damage by fire and such other risks as we the Superiors, or the Owners' Association shall from time to time determine for not less than the full reinstatement value thereof with a reputable insurance company and to regularly pay the premiums thereof, exhibiting to us, the Superiors, or the Owners' Association the receipts thereof if and when called upon to do so and in the event of failure by any feuar to so insure or pay such premiums we, the Superiors, or the said Owners' Association shall be entitled but not obliged to insure the dwellinghouse and others or to pay the same and recover the cost of same from the relevant feuar with interest thereon as aforesaid from the date of disbursement until paid; And in the event of any dwellinghouse and/or common property being damaged or destroyed by any insured risk the whole sums received from the insurance company shall be expended in repairing or rebuilding the dwellinghouse and/or common property to the satisfaction of us, the Superiors, or the Owners' Association the feuar making good any shortfall from his own funds declaring that the cost of repairing or rebuilding any common property so damaged or destroyed shall be divided equally among the proprietors having an interest therein on the basis of one share per dwellinghouse and that any shortfall on each share shall be met by the proprietor concerned; And notwithstanding the foregoing each feuar shall be bound fully to reinstate a damaged or destroyed dwellinghouse and/or common property within two years from the date of such destruction or damage.

[11] The appellant proffered a number of ways of approaching the interpretation of the deed of



conditions – from the standpoint of property factors in general and the appellants in particular, or an endeavour to ascertain the intention of the drafter of the deed deriving assistance from extraneous material to resolve the ambiguity said to arise on the interpretation of the clause.

[12] The meaning of clause eighteenth is plain. It provides that the owner (“feuer of a dwellinghouse”) is responsible for insuring his dwellinghouse. The responsibility is “either individually or through the owners’ association as aforesaid”. It is clear that an alternative is provided for in clause eighteenth in respect of insurance of a dwellinghouse. This can be affected individually or through the common insurance policy taken out by the owners’ association in terms of clause ninth. There is no ambiguity arising from the words used in clause eighteenth.

[13] Mr Gilmour submitted that clause ninth meant that a policy must be put in place by the owners’ association. The clause rendered it peremptory or mandatory for all owners within the development or block of flatted dwellinghouses to participate in or pay the premiums of such a policy. In Mr Gilmour’s submission that came from an interpretation he proposed of the word “common”.

[14] Clause ninth provides for the constitution of an owners’ association and makes certain provisions in respect of its operation. The association has the power to effect a common insurance policy. I am not persuaded of the interpretation propounded by Mr Gilmour in relation of clause ninth and in turn that it has any effect whatsoever upon the operation or interpretation of clause eighteenth for present purposes.



[15] The appeal is refused. The terms of the property factors enforcement order made by the FTS is affirmed. Enforcement of that order now passes back to the FTS.

Rights of appeal

*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.*

Sheriff T Kelly
Member of the Upper Tribunal for Scotland