SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT FALKIRK

[2021] SCFAL 014

FAL-SG475-20

JUDGMENT OF SHERIFF DEREK D LIVINGSTON

in the cause

DH

Claimant

against

SI and SI

Respondents

Claimant: Party
Respondents: Party

FALKIRK 10 February 2021

The sheriff, having considered the claim form and response and the submissions and evidence lodged on behalf of the parties finds the respondents liable to the claimaint in the sum of £1,000 with interest thereon at a rate of 8% per annum from the date of this order until payment, finds no expenses due to by either party.

NOTE

[1] I have dealt with this case without an evidential hearing standing the fact it appeared to me that this case does not involve material factual disputes but simply interpetation of the Tenements (Scotland) Act 2004 (the Act) and the Tenement Management Scheme (the TMS) set out in Schedule One to that Act.

Background

[2] The main facts here do not seem to be in dispute. The claimaint is the owner of the property at number 42 [redacted] Road, Falkirk whilst the respondents own number 38. Equally both properties are part of a property with various common parts along with the six other owners or joint owners (referred to as owners) of properties between 28 and 42. These form what is described in the title deeds as "the tenement" and there are eight flats in total.

[3] Amongst the common parts the roof is specifically included in the deeds. The burdens section for the various deeds provide for each owner a one eighth share of the cost of repairs and renewals of all subjects which are common and mutual to the tenement.

[4] The claimant tried to set up a meeting of the various owners of the properties within the tenement regarding repairs which he said were required to the roof of his property. Insufficient numbers attended. No indication was given that the purpose of the meeting was to change the allocation of liability for the roof. In any event no decision was made. However a ballot was then held by co-owner resulting in a "Scheme Decision" being carried by a majority of the owners which essentially, if valid, left the claimant and the respondents equally and solely responsible for the maintenance of the roof area solely above their properties.

[5] The claimant had necessary work carried out to that part of the roof at a cost of £8000 and billed the respondents for £4000 being one half of the cost with the remaining owners in the tenement not being asked for any contribution.

The Legal Matrix

[6] Section 4 of the Tenements (Scotland) Act 2004 is founded upon by the claimant. Section 4 states:

"Application of the Tenement Management Schemes

(1) The Tenement Management Scheme (referred to in this section as "the Scheme"), which is set out in schedule 1 to this Act, shall apply in relation to a tenement to the extent provided by the following provisions of this section.

(2) The Scheme shall not apply in any period during which the development management scheme applies to the tenement by virtue of section 71 of the Title Conditions (Scotland) Act 2003 (asp 9).

(3) The provisions of rule 1 of the Scheme shall apply, so far as relevant, for the purpose of interpreting any other provision of the Scheme which applies to the tenement.

(4) Rule 2 of the Scheme shall apply unless—

(a) a tenement burden provides procedures for the making of decisions by the owners; and

(b) the same such procedures apply as respects each flat.

(5) The provisions of rule 3 of the Scheme shall apply to the extent that there is no tenement burden enabling the owners to make scheme decisions on any matter on which a scheme decision may be made by them under that rule.

(6) Rule 4 of the Scheme shall apply in relation to any scheme costs incurred in relation to any part of the tenement unless a tenement burden provides that the entire liability for those scheme costs (in so far as liability for those costs is not to be met by someone other than an owner) is to be met by one or more of the owners.

(7) The provisions of rule 5 of the Scheme shall apply to the extent that there is no tenement burden making provision as to the liability of the owners in the circumstances covered by the provisions of that rule.

(8) The provisions of rule 6 of the Scheme shall apply to the extent that there is no tenement burden making provision as to the effect of any procedural irregularity in the making of a scheme decision on—

(a) the validity of the decision; or

(b) the liability of any owner affected by the decision.

(9) Rule 7 of the Scheme shall apply to the extent that there is no tenement burden making provision—

(a) for an owner to instruct or carry out any emergency work as defined in that rule; or

(b) as to the liability of the owners for the cost of any emergency work as so defined.

(10) The provisions of—

(a) rule 8; and

(b) subject to subsection (11) below, rule 9,

of the Scheme shall apply, so far as relevant, for the purpose of supplementing any other provision of the Scheme which applies to the tenement.

(11) The provisions of rule 9 are subject to any different provision in any tenement burden.

(12) The Scottish Ministers may by order substitute for the sums for the time being specified in rule 3.3 of the Scheme such other sums as appear to them to be justified by a change in the value of money appearing to them to have occurred since the last occasion on which the sums were fixed.

(13) Where some but not all of the provisions of the Scheme apply, references in the Scheme to "the scheme" shall be read as references only to those provisions of the Scheme which apply.
(14) In this section "scheme costs" and "scheme decision" have the same meanings as they have in the Scheme.

5 Application to sheriff for annulment of certain decisions
(1) Where a decision is made by the owners in accordance with the management scheme which applies as respects the tenement (except where that management scheme is the development management scheme), an owner mentioned in subsection (2) below may, by summary application, apply to the sheriff for an order annulling the decision.
(2) That owner is—
(a) any owner who, at the time the decision referred to in subsection (1) above was made, was not in favour of the decision; or
(b) any new owner, that is to say, any person who was not an owner at that time but who has since become an owner.
(3) For the purposes of any such application, the defender shall be all the other owners.
(4) An application under subsection (1) above shall be made—
(a) in a case where the decision was made at a meeting attended by the owner making the application, not later than 28 days after the date of that meeting; or
(b) in any other case, not later than 28 days after the date on which notice of the making of the decision was given to the owner for the time being of the flat in question.
(5) The sheriff may, if satisfied that the decision—
(a) is not in the best interests of all (or both) the owners taken as a group; or
(b) is unfairly prejudicial to one or more of the owners,
make an order annulling the decision (in whole or in part).
(6) Where such an application is made as respects a decision to carry out maintenance, improvements or alterations, the sheriff shall, in considering whether to make an order under subsection (5) above, have regard to—
(a) the age of the property which is to be maintained, improved or, as the case may be, altered;
(b) its condition;
(c) the likely cost of any such maintenance, improvements or alterations; and
(d) the reasonableness of that cost.
(7) Where the sheriff makes an order under subsection (5) above annulling a decision (in whole or in part), the sheriff may make such other, consequential, order as the sheriff thinks fit (as, for example, an order as respects the liability of owners for any costs already incurred).
Schedule 1 contains the Tenement Management Scheme. The most relevant provisions in relation to this action are as follows:

Decision by majorities
2.5 A scheme decision is made by majority vote of all the votes allocated

Notice of meetings
2.6 If any owner wishes to call a meeting of the owners with a view to making a scheme decision at that meeting that owner must give the other owners at least 48 hours' notice of the date and time of the meeting, its purpose and the place where it is to be held.

Consultation of owners if scheme decision not made at meeting
2.7 If an owner wishes to propose that a scheme decision be made but does not wish to call a meeting for the purpose that owner must instead—

(a) unless it is impracticable to do so (whether because of absence of any owner or for other good reason) consult on the proposal each of the other owners of flats as respects which votes are allocated, and

(b) count the votes cast by them.

Basic scheme decisions
3.1 The owners may make a scheme decision on any of the following matters—

(a) to carry out maintenance to scheme property,

(b) to arrange for an inspection of scheme property to determine whether or to what extent it is necessary to carry out maintenance to the property,

(c) except where a power conferred by a manager burden (within the meaning of the Title Conditions (Scotland) Act 2003 (asp 9)) is exercisable in relation to the tenement—

(i) to appoint on such terms as they may determine a person (who may be an owner or a firm) to manage the tenement,

(ii) to dismiss any manager,

(d) to delegate to a manager power to exercise such of their powers as they may specify, including, without prejudice to that generality, any power to decide to carry out maintenance and to instruct it,

(e) to arrange for the tenement a common policy of insurance complying with section 18 of this Act and against such other risks (if any) as the owners may determine and to determine on an equitable basis the liability of each owner to contribute to the premium,

(f) to install a system enabling entry to the tenement to be controlled from each flat,

(g) to determine that an owner is not required to pay a share (or some part of a share) of such scheme costs as may be specified by them,

(h) to authorise any maintenance of scheme property already carried out,

(i) to modify or revoke any scheme decision.

Scheme decisions under rule 3.1(g): votes of persons standing to benefit not to be counted
3.5 A vote in favour of a scheme decision under rule 3.1(g) is not to be counted if—

(a) the owner exercising the vote, or

(b) where the vote is exercised by a person nominated by an owner—

(i) that person, or
(ii) the owner who nominated that person, is the owner or an owner who, by virtue of the decision, would not be required to pay as mentioned in that rule.

Validity of scheme decisions
6.1 Any procedural irregularity in the making of a scheme decision does not affect the validity of the decision."

Submissions

[7] I will attempt to summarise these as briefly as possible.

[8] The claimant referred to the Act as containing procedures and provision for a decision by a majority. He stated that the rules of the TMS apply except in so far as inconsistent with any tenement burden and referred to section 4 of the Act. He referred to the respondents as being aware of the process and decision. He referred to the time limit for annulment set out under section 5 of the Act. He went on to state that the cost of the roof work would have been borne in one eighth proportions between the owners unless a Scheme Decision provided otherwise and referred to section 4(5) of the Act stating it brings in rule 3 of the TMS. He stated that the roof is "scheme property" and the maintenance thereof are "scheme costs" and that the six other owners had decided that the costs of the work above 42 should be borne by the claimant and respondent only. He stated the work had to be carried out and he was entitled to recover one half of the costs under what he described as the "binding Scheme Decision" from the respondent.

[9] The respondents accepted they had not engaged fully regarding matters. Their position however was that in terms of the titles for the properties between 28-42 each of the proprietors was liable for a one eighth share for certain repairs including the roof. Their position was a TMS was only appropriate for the procedure in conducting meetings to discuss repairs since the titles are silent on that but not for determining proportions of

liability for repairs to the common parts since that was in the titles. They referred to letters dated 1 June and 1 July 2020 and stated these simply referred to repairs being required and that a meeting would be held to discuss these. No reference was made to a decision possibly being made whereby an owner was not to be required to pay the allocated share as provided in rule 3.(1)(g) despite the terms of rule 2.6 providing for the meeting's "purpose" to be contained in the notice. Additionally rule 3.5 provides that people who will avoid liability cannot be counted for voting purposes. The respondents' argument was basically fourfold:

1. A scheme decision could not be made at the meeting since liability was already allocated in terms of the titles.

2. What took place was inequitable and incompetent because effectively others voted to burden their co-proprietors with their (the voters') share of liability.

3. The notice sent out about the meeting was invalid since it did not provide that the purpose of the meeting was to reallocate liability.

4. The vote was invalid since only one of those voting had the right to have his/her vote counted in terms of rule 3.5 and thus there was no majority of votes allocated as required by rule 2.5. In the circumstances there was no majority and the repair was not an authorised repair. They are however willing to pay one eighth of the original costs of £8000.

Decision

[10] In my view, this claims fails, at least for one half of the roofing costs.

[11] There are a number of reasons for that. In the first place it appears to me that the purported use of the Tenant Management Scheme ("TMS") here as set out in the Tenements (Scotland) 2004 was incompetent. Section 4 of the 2004 Act effectively makes the TMS a fall back scheme where either provisions in the title deeds do not exist (in this case allocating

repairs liabilities) or are in some ways defective or lacking. The titles provide for a 1/8th allocation of costs for each of the owners in the properties between 28 and 42 [redacted] Road, Falkirk. This is contained in the burden section of the various titles which provide for a 1/8th share of the cost of repairs and renewals of all subjects which are common or mutual to the tenement. In my view the titles are clear with the roof being stated to be common property and there being provision in the titles. It is therefore not competent to simply impose a scheme decision in relation to the liability for repairs. The claimant states that section 4(5) of the 2004 Act is applicable but, in my view, there is quite clearly a tenement burden and that subsection only applies in relation to scenarios where there is no tenement burden enabling owners to make a decision. Accordingly the scheme is inapplicable, at least in relation to liability in this case under section 4(6), in that the deeds provide for liability. In short whilst I agree with the claimant's position that the rules of the TMS apply except in so far as inconsistent with the burdens in the titles the titles here make provision for liability. As Professor Rennie stated in his commentary to the Act referring to the TMS, "Essentially this is a fall-back scheme where either provisions in the title deeds do not exist or are in some way defective or lacking".

[12] Even if I am wrong about this, it seems to me that the respondents' submissions have force in relation to the vote that was taken. Rule 2 of the TMS is in my view applicable because there is no provision in the deeds for making scheme decisions. In the first place, the calling of the meeting appears to have been carried out without any specification of the fact that there might be an attempt to allocate percentages of liability different to what already existed. Rule 2.6 states the purpose of the meeting is to be provided. The letter apparently simply referred to the repairs being required and that a meeting would be held to discuss repairs. There is a difference between discussing the need for repairs and

allocating an increased liability for the roof to certain owners and at very least there was a lack of specification provided if that was the purpose of the meeting.

[13] That however in my view is something of a red herring since it appears that G, one of the other owners of the tenement, sent out a voting form regarding liability for the roof repairs at 42 on 6 July 2020 to the other owners. No mention of this form has been made by the respondents in their submissions but they have conceded they did not always deal with correspondence and for the purposes of the judgment I will assume that did take place and perhaps not unsurprisingly altruism did not win the day with the owners of the properties voting by a majority that the claimant and respondent should be equally liable for these repairs with no responsibility falling upon the other owners of the common property. That may have been a valid way of proceeding under Rule 2.7 although there might have required to have been a proof on the question of the numbers who voted, whether the respondents were given the opportunity to vote and whether consultation took place were it not that I can decide this matter based upon other issues.

[14] I entirely accept the respondents' position that the vote was effectively null and void since the votes of the other proprietors, determining that they should be left to pay nothing, could not be counted. Rule 3 is in my view applicable regarding matters not already in the burdens. Rule 3.5 provides that a vote in favour of a scheme decision to waive the obligation to pay is not to be counted if the owner exercising the vote "by virtue of the decision would not be required to pay…" Indeed the heading of Rule 3.5 states: "Scheme decisions under 3.1(g): votes of persons standing to benefit not to be counted".

[15] Accordingly based on the above, even assuming the ballot to allocate responsibility was otherwise valid, the vote by various persons whereby they would benefit or have no responsibility for payment was certainly not. The only votes which would have been valid

would have been that of the claimant himself and of the respondents (exercising a single vote) had they voted. Rule 2.5 requires a decision to be made by a majority of the votes allocated. The only valid vote was the claimant's which did not of course constitute a majority of votes allocated. There was therefore, in my view, no decision. Even less was there a "binding scheme decision". Accordingly questions of appeal or annulment do not arise.

[16] If one thinks about it the provisions of course in relation to owners not being able to vote to give themselves a nil liability are eminently sensible since otherwise a majority could gang up on a minority where there is no provision in relation to liability. I am of the view however that standing the specific burden provisions it was not open in any event for a majority to alter the liability set out in the burdens.

[17] The claimant refers to the provisions for annulment and effectively states that by not utilising these the respondents are barred from challenging the increase in their liability from one eighth to one half. I do not accept this. I do not accept any decision has been made standing the fact there was no majority bearing in mind what I have said earlier. In any case I do not consider that a procedure as fundamentally flawed as this can be treated as anything but a nullity.

[18] In my view, as matters stand, the respondents should be held liable for a 1/8th share of the costs incurred in relation to the roof. As I understand it, and it is not disputed by the respondents, the claimant incurred £8,000 in respect of repair costs to the roof and accordingly I am finding the respondents liable for £1,000. It is clear that the vote determined the repairs should be carried out and had that been the only issue I consider the respondents would not have been able to challenge that now since in my view that would have been a scenario set out in in section 5.

[19] There has clearly been very limited success by the claimant in relation to this matter. The respondents have mainly succeeded in their arguments but they have already indicated that their position is that there should be no expenses due to or by either party. This seems to me to be equitable in any case standing the outcome here.

[20] Finally, I would point out that this case has come about due to what, in my view, were partly misconceived actions by the claimant and others but also the respondents' persistent ignoring of correspondence and communications from the claimant. It is in all parties' interests that owners co-operate with each other to maintain and, on occasions, improve the fabric of their property. I would strongly recommend that parties make contact to avoid further problems of this nature and that the other owners, who as I have indicated do have liability here, also engage.