Upper Tribunal for Scotland

[2020] UT 26
UTS/AP/19/0033

DECISION OF SHERIFF PINO DI EMIDIO

on an application to appeal

in the case of

MR HENRYK ZUKOWSKI AND MRS MAUREEN ZUKOWSKI, 20 Kirklands Park Gardens, Kirkliston, EH29 9ET

Appellants

and

CHARLES WHITE LIMITED, City Point, 65 Haymarket Terrace, Edinburgh, EH12 5HD

Respondent

FTT Case Reference FTS/HCP/PF/18/2778

19 February 2020

Decision

The Upper Tribunal, having resumed consideration of the appeal:

1. Grants same and quashes the decision of the First-tier Tribunal for Scotland contained in its Notice of Direction dated 28 May 2019 to the extent that the First-tier Tribunal found that the respondent had authority to act by way of custom and practice;

2. Remakes that decision and Rejects the respondent's contention that it had authority to act as property factor on behalf of the appellants in respect of their interest as proprietors of 20 Kirklands Park Gardens, Kirkliston, EH29 9ET by way of custom and practice;

3. Quashes the Directions numbered (i), (ii) and (iii) contained in said Notice of Directions dated 28 May 2019;

4. Remits to the First-tier Tribunal to consider further procedure in light of the decision reached in this appeal.

Note of reasons for decision

Introduction

[1] There has been a long running dispute between the appellants and the respondent. The appellants are proprietors of a property that forms part of a development known as The Steadings, Newmains, Kirkliston. The respondent is a limited company that carries on the business of property factors. The appellants have made an application to the First-tier Tribunal Housing and Property Chamber ("FtT") complaining about the respondent's conduct while purporting to act as property factor of the development in which they own a property. They have raised an issue about a failure of the respondent to be formally appointed in terms of the applicable provisions of the titles for the development within which their property is situated.

[2] After other procedure, the FtT decided that it required to determine the respondent's authority to act as property factor as a preliminary issue. On 13 April 2019 the FtT issued a direction in which the respondent was requested to provide authority, in writing, for its legal appointment to act as property factor in the communal areas with specific reference to the deed of conditions. The FtT received certain written submissions in response to its direction and proceeded to deal with the preliminary issue it had identified without holding a hearing.

[3] It is common ground that the development is subject to the terms of a Deed of Conditions granted by Walker Homes (Scotland) Limited in about 14 December 1994. Clause (TENTH) of the Deed of Conditions makes provision for the appointment of a property manager. The power of appointment was reserved to the developers and to The Steadings Owners Association. It provides that any 20 members of the Owners Association could call a meeting on giving not less than 7 days' notice and the decision of a majority of members voting shall be final and binding.

[4] The respondent advised the FtT that (a) Safehands Limited were formally appointed as factors and continued so to act until 1 October 2003 when Safehands Limited transferred their management interests to the respondent; (b) on 19 January 2004 the transfer to the respondent was confirmed to all owners in a letter; (c) from 19 January 2004 the respondent continued to manage, maintain and represent the development on the basis of custom and practice; (d) with the exception of the appellants, owners had been positively engaged; (e) on 25 November 2016 notice was given in writing that a meeting of proprietors would take place on 14 December 2016 to consider an issue that had been recently identified that the owners of neighbouring development had an interest in a tree belt which was also part of the development in which the appellants had an interest; and (f) the meeting went ahead on 14 December 2016, it was quorate and those present confirmed that they wished the respondent to continue to act as property factor. The respondent maintained that it had been acting validly in terms of the titles but also as a fall back it argued that it had authority to act by custom and practice. The FtT had very little assistance from the respondent in its consideration of the respondent's fall back argument on the preliminary issue. None of the documentary material put before the FtT and this Tribunal contains any legal analysis by the

respondent of why and how custom and practice establishes a contractual relationship between the parties.

[5] The appellants submitted that the respondent was never formally appointed under the titles of the development and certainly not by custom and practice. They accepted that services have been provided by the respondent over a period of some 16 years.

The FtT's decision on the preliminary issue

[6] On 28 May 2019 the FtT issued a Notice of Direction in terms of Rule 16 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 requiring the appellants to provide certain information about his complaints about the respondent. This Notice of Direction contained within it the FtT's decision on the preliminary issue that it had identified. Although the decision was not stated in the form of a separate order, at paragraph 12 of the Notice of Direction the FtT stated that it rejected the respondent's argument that it had been appointed under the relevant deed of conditions. The FtT rejected the principal argument of the respondent that it had been appointed in terms of the deed of conditions. No appeal has been taken by the respondent against this adverse finding and there is no live issue before this Tribunal as regards that conclusion.

[7] The FtT then went on to deal with the respondent's fall back argument on the preliminary issue. It stated the following.

> "However, given the length of time the [respondent] has now been managing the development together with the support of owners as evidenced by the outcome of the vote on 14 December 2016, the tribunal is satisfied that the [respondent] has authority to act by way of custom and practice. "

I have treated what is stated in the quoted passage of the Notice of Direction of 28 May 2019 at paragraph 12 as an operative decision of the FtT.

Grounds of appeal

[8] On 18 June 2019 the appellants sought permission to appeal to this Tribunal from the FtT. The request was restricted to that part of the decision of the FtT contained in its Notice of Direction of 28 May 2019 that was to the effect that respondent had authority to act as property factor by custom and practice. On 1 July 2019 the FtT gave the appellants permission to appeal its decision that the respondent had authority to act as a property factor by way of custom and practice.

The respective positions of the parties in this appeal

[9] The appellants continued to insist that the respondent were not validly appointed in terms of the titles. The submission for the appellants is lengthy and full of much irrelevant material. It contains little of assistance on the legal issues raised in the appeal but the appellants maintained their essential point that the respondent has not been properly appointed as factors. The respondent's custom and practice argument continued to be hotly disputed. Importantly, the appellants also continued to take issue with the regularity of the meeting of 14 December 2016.

[10] The respondent has not appealed against the conclusion of the FtT on its principal argument. In its written Response received about 29 August 2019 it has sought to support the conclusion of the FtT on its fall-back position on the preliminary issue. The respondent does not seem to rely on any arguments based on personal bar or acquiescence or similar concepts.

Reasons for decision

[11] The FtT does not say anything about the legal conditions necessary to establish a contract between the parties by custom and practice. This is normally by means of the implication of a term in the contract between the parties. Such implication involves examination of the relevant facts as well as the drawing of legal conclusions from them. The FtT has decided the preliminary issue without hearing evidence. It has not made findings in fact and has not explained when the contract was entered into and what the terms of the contract were.

[12] Authority suggests that in order that a custom or commercial usage may be binding upon parties to a contract by implication, it should be certain, uniform, reasonable and notorious – see *"Strathlorne" Steamship Co.* v *Baird & Sons* 1916 S.C. (H.L.) 134. None of these matters appear to have been put before the FtT for consideration. In *William* Morton *& Co.* v *Muir Brothers & Co.* 1907 S.C. 1211, which contains an extensive analysis of the necessary approach (as well as a detailed account of the business practices in the lace curtain manufacturing industry in the Irvine Valley in the early years of the 20th Century), Lord McLaren said:

> 'The conception of an implied condition is one with which we are familiar in relation to contracts of every description, and if we seek to trace any such implied conditions to their source, it will be found that in almost every instance they are founded either on universal custom or in the nature of the contract itself. If the condition is such that every reasonable man on the one part would desire for his own protection to stipulate for the condition, and that no reasonable man on the other part would refuse to accede to it, then it is not unnatural that the condition should be taken for granted in all contracts of the class without the necessity of giving it formal expression.'

[13] In order to establish a contract that contains an implied term by custom and practice it would be necessary to prove what the custom was, how long and in what terms the

custom was exercised as well as how and when the contractual relation between the parties was created. The reasons for reaching the conclusion that there existed a contract containing such implied terms would require to state why these customary terms were included in the contract and explain why any objection has failed to prevent a contract containing such implied terms being formed. There would normally require to be findings in fact and in fact and law directed to these issues. The decision might also cover such issues as the basis for findings that any such term was reasonable, well recognised in the locality, known to both parties and not contrary to law.

[14] As a matter of generality, the assertion by one party that certain terms are to be implied into an on-going contract with another party by custom and practice proceeds on the basis that the parties had reached agreement at the time when their contractual relationship began. Conceivably there might be some variation of the contract at a later stage that would incorporate an implied term or terms that did not apply at an earlier stage. In such circumstances reasons for the variation would have to be given. Where, as in this case, there is in place a valid deed of conditions which contains express terms applicable to all homeowners in the development which make provision as to how a property factor is to be appointed, there may be limited scope for the appointment of a property factor by way of custom and practice. At no point in the material submitted by it does the respondent seek to explain why the express provisions of the titles have not been followed or why the respondent sought to operate without the benefit of a valid vote in its favour until it called the meeting of 14 December 2016. This might seem rather odd at first glance when the respondent was well aware from at least 2005 that the appellants disputed that it was validly appointed as property factors. None of these matters have been addressed in the decision of the FtT in this case.

[15] The FtT's brief reasons for decision at paragraph 12 of the Notice of Direction provide no insight as to why the FtT concluded without hearing evidence that there was a contract established between the parties by virtue of custom and practice. The reasons stated by the FtT for its conclusion on the respondent's fall back argument focus on two matters, namely the length of time the respondent has been managing the development and the views expressed by the homeowners on 14 December 2016. The length of time the respondent has been managing the development can have little or no relevance to the question of implication by custom and practice in circumstances where the FtT has expressly found that the respondent was wrong to have relied expressly on the terms of the titles in the period from about 2003 to 2016. The custom and practice which the respondent is seeking to rely on would require to be established in evidence relating to the period prior to its taking on responsibility for the development in which the appellants reside and have an interest as property owners. Even if it did have some relevance to the fall back argument on the preliminary issue, the FtT was well aware from the parties' respective submissions that there had been a long running dispute going back over more than a decade.

[16] The second reason given by the FtT is that there was an expression of view in favour of the appointment of the respondent by a majority of the homeowners on 14 December 2016. This is irrelevant with respect to the question whether the continuing contractual relationship between the appellants and the respondent which commenced about 2003 was constituted by the implication of terms. Any such expression of view may mean that from the effective date of any decisions made at the meeting the respondent has established a valid legal basis for its appointment and for recovery of its charges under the deed of conditions, but this is not an issue directly addressed by the FtT. The FtT was aware that the appellants dispute the validity of the proceedings at the meeting on 14 December 2016.

Whatever may have been established at that meeting on 14 December 2016 is irrelevant to the question whether prior to that date the respondent was acting under an implied condition established by custom and practice. The FtT has not explained on what basis it has taken the view that there was a vote at the meeting which was relevant to the matters under consideration by it and why it has rejected the appellants' criticisms of what occurred at that meeting. Given the dispute between the parties about what is to be taken to have occurred at the meeting the FtT was not in a positon to reach a conclusion on that issue without hearing evidence.

Conclusion

[17] Neither of the factors relied on by the FtT justify the legal conclusion that the contract between the respondent and the appellants has been constituted by the imposition of an implied term established by custom and practice. Therefore the FtT has erred in law in its approach to the respondent's fall back argument on the preliminary issue.

[18] As a result of the conclusion I have reached on the question of custom and practice, I propose to quash that part of the decision of the FtT on the preliminary issue that is related to the question of custom and practice and to remake the decision to reject the respondent's fall back assertion. The FtT's decision on the preliminary issue which it has identified will be remade to the extent of stating that the respondent's fall-back position is also rejected. I will, in consequence, also quash the directions made by the FtT as these were predicated on the conclusion it reached on the issue of custom and practice. The case will be remitted to the FtT to consider further procedure in the light of the outcome of this appeal. The result is that the applicants have established that there was no contractual relationship between them and the respondent prior to 14 December 2016. The FtT has not explained fully the view it

has taken as to the effect of the decisions taken at the meeting on 14 December 2016. The scope of this appeal does not cover the legal effect of the meeting of 14 December 2016 as that issue was not addressed by the FtT. Whether the decisions made at the meeting are relevant to this application may depend on what period of time is covered by the complaints made by the appellants. The FtT may require to consider whether it should make further inquiries as to what was decided at the meeting and also in respect of the precise periods of time in respect of which the appellants are pursuing their complaints before the FtT.

Observation

[19] In its permission decision dated 1 July 2019 the FtT concluded correctly that there was a point of law identified by the appellants. The FtT did not go on expressly to address the second part of the test for permission to appeal, which arises from section 46(4) of the Tribunals (Scotland) Act 2014, as to whether that the point identified was arguable. Although the test would have been easily met in this case, it is good practice for FtT judges to make clear that the issue has been addressed in the consideration of applications for permission to appeal.

Notice to parties

[20] 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.