Judgement (delivered ex tempore)

of

Sheriff Alistair G Watson, Sheriff of North Strathclyde at Kilmarnock

in causa

Irvine Housing Association,

Pursuer

V

Mr John Kilpatrick, Ms Sandra Somerville, Mr Felix McQuade and Mrs Patricia McQuade

Defenders

Kilmarnock, 26 September 2016

For the Pursuer: McMahon

For the Defenders: parties

The pursuers have brought identical actions in respect of each of the defenders, each seeking to recover exactly the same amount namely £627.45 in respect of unpaid factoring and management services covering a period between 2012 and 2016. It was agreed by all parties that although matters arise in three separate actions, the issues raised are identical in each case and the defenders effectively view their respective positions as being one of common cause. By agreement of all parties the matter therefore proceeded by way of a single conjoined evidential hearing before me on 16 August 2016.

A number of facts were agreed by all parties prior to the hearing of evidence, these agreed facts being: –

1. Each defender is an owner and occupier of the respective properties described in each summons.
2. The pursuer, Irvine Housing Association is, as a question of fact, the appointed factors in respect of said properties.
3. The pursuers did indeed provide factoring and management services over the period between 1 April 2012 and 1 January 2016.
4. The pursuers did invoice each of the defenders in the sum of £627.45 in respect of services which had been carried out at the respective properties.
5. None of the defenders has paid said sums claimed by the pursuer in respect of the services which were carried out.
6. Defence production 26.1 accurately sets out in detail a breakdown of the factoring work and obligations the relative to said defenders' properties.

It will be readily understood that there was little very little dispute at all between the pursuer and the defenders as to the factual matrix in this case. The defenders properly and clearly set out for the court at the outset of this proof their position which was effectively twofold. Firstly the defenders argue that they should not be held liable to pay for factoring services which have been provided by the pursuer. Secondly, in their view the sum sued for is excessive in relation to the actual works carried out and in the absence of detailed broken down information about said works.

The evidence

Evidence for the pursuer was provided by Ms Nicola Thom, the interim managing director of Irvine Housing Association. Ms Thom explained the history of the involvement of the housing association in the management of the phase of housing including those occupied by the defenders. She explained that the area in which the defenders homes are situated is an area of mixed housing. Irvine Housing Association bid for the management of the social

housing stock there in August 1995 with a modification of that bid in November 1995 and were successful in becoming the successor organisation responsible for management of social housing stock thereafter. She explained that at the time of the management takeover by Irvine Housing Association the majority of housing stock in the area was social housing and, by corollary, private housing stock the minority share. Against that factual background the housing association undertook factoring and management work in the areas and initially simply absorbed the cost of that for the entire housing stock both public and private.

The witness explained that over time the demographic of the area has altered and that at present the majority of housing in the area is now private, with the obvious corollary that the public, social housing stock is now the small number, the ratio being somewhere in the region of 60/40.

Ms Thom further explained that the primary source of funding for the operations of the housing association comes from the rents levied on the tenants of the social housing stock owned and managed by them. Accordingly, the consequence of this is that the rent paying tenants were effectively paying the share of management costs for the private owners who were not being charged. As the ratio of public to private occupiers has changed this, in the view of the housing association, had become an unfair burden upon the rental tenants. Accordingly Irvine Housing Association took a decision, following a period of consultation and explanation, to introduce factoring and management charges for private owner occupiers within the managed area. The witness spoke to the terms of a letter which had been sent to all residents in April 2011, to the terms of a newsletter sent to occupiers at around the same time and explained in further detail the consultation process which occurred and which included meetings and discussion sessions prior to the introduction of the charges.

The witness spoke to the terms of the burdens clauses in the titles of the respective properties and identified in each conditions imposing liability for factoring charges upon the heritable proprietor. The witness identified within the original management bid document from 1995 a statement at paragraph 510 making clear that the association, in the event of

succeeding with the bid, intended to apply the recovery of costs of formerly tenanted properties depending on prevailing circumstances and subject to ongoing reviews.

As to the level of charges levied by the pursuer, the witness spoke to the terms of the service contract with a third-party supplier for factoring and maintenance work which costs the pursuer circa £146,000 per annum at present. She was able to identify at this was very close to the anticipated spend in terms of the projected accounting for the Association and explained that the amounts levied equated to a *pro rata* breakdown share of the cost based on the proportion payable by each occupier in accordance with the number of properties in the phase concerned.

The only other party who chose to give evidence in the course of the hearing was Ms Somerville. She explained that she and her neighbours have taken something of a stand over these charges is a matter of principle along with a number of other Pennyburn homeowners. Ms Somerville's position was that she felt the charges should not be levied upon owners on the basis that at the time Irvine Housing Association bid for the contract they gave the clear impression to those living in the area that they would never be charged for such services. Ms Somerville felt that that statement, made at the time of the bid, was an unequivocal promise to those in the area who owned their houses, that those who lived in the area had an entitlement to rely on that promise and that to levy these charges was effectively to break the promise made to homeowners in the area. In essence, this was why, she explained, local homeowners had taken a stand on the issue.

Decision

This is a case in which I had no doubt that all parties involved, pursuer and respective defenders, proceeded with honesty and integrity in the progress of the case and in the giving of evidence where applicable. There is really no dispute that the pursuer carried out factoring and management services as described in the pleadings and that the defenders have chosen not to pay the amounts invoiced in respect of those services. The defenders were each very frank about that and explained that this is a reasoned position.

The issue of quantum is in fact not a matter of any real dispute in as much as the productions before the court set out the terms of the maintenance contract and detail the work carried out within the terms of that contract. There was no suggestion in evidence that the scheduled works had not taken place. The pursuer's witness Ms Thom was able, in her evidence, to explain the *pro rata* shares owed by each individual proprietor and could properly relate that to the overall cost of the contract. Again, the defenders were not in a position to dispute, and did not dispute, the basis of *pro rata* distribution of charges or of the overall cost of the contract. Accordingly, I am satisfied that quantum is properly presented by the pursuer with an accurate factual basis in the productions such that I do not require to determine any issue of dispute on that aspect.

The central dispute in this case is the question of liability and whether there is an entitlement on the pursuer to levy these charges on the defenders at all, and whether, in consequence of that, there is a liability on the defenders to make payment.

The titles to each of the three properties concerned in this case have been produced for examination by the court. Two of the titles are in identical terms and the third in slightly different but extremely similar terms to the other two. In terms of each of the three titles the heritable proprietors, the defenders in the present actions, are liable to pay factoring charges to the appointed factor for a range of factoring services including the maintenance of roads and footpaths (insofar as not taken over by the local authority), common gardens and parts and lighting of the area. Examination of the obligations within each title reveals that the obligations match closely the tasks which have been described as being undertaken by the third-party supplier of factoring services at each location.

The titles to each of the three properties all proceed on the basis that there was a feu disposition in respect of each parcel of land in respect of which the appointed factor was Irvine development Corporation or its successor bodies. It is clear from the materials produced to the court that Irvine Housing Association is the relevant successor body envisaged by the title and as such is the appointed factor in terms of title unless replaced by an alternative factor (which event has not occurred). Accordingly in terms of the title held

by each of the defenders there is, on the face of it, an obligation to pay for common maintenance charges levied at the proportional share set out in said titles.

In fairness to the defenders no argument was taken by them in respect of the terms of the titles themselves. Effectively their argument, as I understood it, was that any obligation within the titles should effectively be treated as superseded by an unequivocal or unambiguous promise made by the pursuer at the time of the bid in 1995 that they would not in future levy management or factoring charges on homeowners within the locality.

It is important then to consider what was the position of the pursuer at the time of succeeding in the bid to become the statutory successor to Irvine development Corporation. At the time of the 1995 bid the pursuer was in competition with North Ayrshire Council to become the statutory successor to Irvine Development Corporation. At the time of those bids there was local communication and consultation. In order to assist local people in understanding the nature of the bids, and the potential consequences of them, the outgoing body (Irvine Development Corporation) sent to all tenants in the area a letter containing a booklet prepared for them apparently by Touche Ross outlining some of the main effects of the different proposals and comparing, side-by-side, some of the detailed outcomes depending on who should succeed.

In the Touche Ross leaflet, attempting with radical brevity, to summarise matters it is suggested that should the Irvine Housing Association bid succeed then

"No service charge will be made to owner-occupiers for landscape maintenance of communal areas within housing areas. The association has undertaken to continue to provide the same level of ground maintenance is the Corporation".

It appears to me that this is the document from which the defenders perceive an unequivocal promise to have been made by the pursuer not to levy maintenance charges in future.

An examination of the bid itself however reveals that this summary by Touche Ross was not an accurate reflection of the terms in which the bid was made and, in due course, succeeded.

The pursuer's bid document is produced in these actions. Section 510 of the bid document provides in terms

"The association also intends to apply the existing IDC policy and practices to the recovery of costs from owners of property (for example, where there is repairs or maintenance work which is common to both tenants, former tenants who have acquired under RTB and subsequent purchasers). This policy seeks to ensure that such owners are aware of their responsibilities ***and then to recover the costs of any work undertaken by the association on their behalf. The policy will be subject to ongoing review and will be modified if circumstances dictate this to be necessary****. It will be applied consistently but will always take account of the prevailing circumstances"*. [Emphasis added]

Ultimately, it is the terms of the bid document and its modifications which dictate the basis on which the legal transfer of responsibilities from Irvine Development Corporation to Irvine Housing Association took place and it is this to which the courts must give authority in terms of identifying the legal relationship between the pursuer and the defenders and in assessing the liability or otherwise of the defenders to make payment. I have already indicated that the document by Touche Ross does not accurately reflect the detail of the bid itself in this regard nor, it is important to note, was that document issued by or on behalf of the pursuer, Irvine Housing Association.

In the event, it would appear that the outline given in the Touche Ross document did reflect at least the short and medium term intentions and aspirations of Irvine Housing Association in as much as, following success, no factoring or management charges were levied on owner occupiers from the takeover of responsibility until 2011. It is clear that the reviews which were envisaged by the bid document have taken place. It is clear that appropriate consultation has, in due course, taken place. It is also clear that there was a rational explanation through the changing demographic of the area for the practice to be reviewed and to be altered in or around 2011.

Accordingly, I am entirely satisfied that however much the defenders feel that they have been unfairly dealt with by the pursuer, there exists no legal basis on which they would be entitled to withhold payment of the charges sought by the pursuer for work properly carried

out. I am satisfied that the pursuer's case has been properly made out in each of these actions and find that the pursuer is entitled to decree for recovery of the sums claimed by them. In each case therefore I grant decree in favour of the pursuer for the sum sought and will hear parties on the question of expenses when the matter calls before me once more on 26 September 2016.