

Tenement Repairs : what is a flat ?

PS Properties (2) Ltd v. Callaway Homes Ltd, Lady Dorrian, 4th
September 2007

A tenement comprised a ground floor and three floors above it. On the ground floor there were two shops. The first floor was taken up by one of the shops. The second and third floors had two flats each on them. The tenement needed repair. Some remedial work was carried out to secure the immediate stability of the stair. Structural engineers had prepared a report with proposals for permanent repair. The shop owners were concerned about the deteriorating condition of the second floor. The works proposed by the shop owners involved the relocation of the close from the front of the tenement to the side of the tenement. The top flat owners opposed this. They had their alternative proposed works. They consulted all of the other owners by serving a notice seeking a scheme decision under the Tenements (Scotland) Act 2004 to carry out their works. The shop owners refused to consent to the works. One of the second floor flat owners consented. The shop owners tried to buy the second floor flats. The top flat owners commenced their work. The shop owners then sought and obtained interim interdict against the continuation of the alternative work. The remaining second floor flat owner then accepted the scheme decision. The top flat owners bought the second floor flats. The shop owners then intimated that they no longer wished to relocate the entrance close but they were still unwilling for the alternative works to be carried out. The top flat owners sought recall of the interim interdict on the grounds that the alternative works no longer constituted a wrong given that since the interim interdict a majority of the flat owners had approved the works and there was therefore a Tenements (Scotland) Act scheme decision approving them.

The shop owners opposed this claiming that there was no scheme decision since a majority of the flat owners had not approved the top flat owners' proposals. They argued there were 8 flats because the first floor counted as two flats since that had been its original form before becoming part of the shop. They also argued that the work proposed by the flat owners was neither useful nor urgent and therefore the balance of convenience favoured the granting of an interim interdict to preserve the status quo until the rights of the parties were permanently worked out.

Lady Dorrian decided that

- (1) for the purposes of the Tenements Act scheme a flat was as defined in section 29 of the Act, and included any premises whether or not on the one floor;
- (2) whether property was a separate premises or flat was to be measured by reference to the title deeds at the time of the scheme decision and not historically;
- (3) there were 6 flats in the block and not 8, that a majority had voted for the alternative works and the carrying out of those works was not a prima facie wrong meriting an

interim interdict;

(4) in any event the longer the work was left uncompleted the greater the risk was to the building and there was an ongoing risk of vandalism while the work remained incomplete and that the balance of convenience favoured the flat owners carrying out the work and interim interdict recalled.

Comment

There have been few decisions on the scheme in the Tenements (Scotland) Act 2004. This case is a useful guide to the meaning of “flat” for the purposes of the scheme and indeed the Act. This is important when one is planning a scheme decision and deciding on whom to intimate a proposal and knowing when a proposal has been accepted by the majority required and become a “Scheme Decision”.