

Housing and Property Chamber
First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

STATEMENT OF DECISION: in respect of applications under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules").

Reference number: FTS/HPC/PF/19/2135

Re: Property at 1/3, 10 Fingal Road, Renfrew, PA4 8FH ("the Property")

The Parties:

Mr Alan Roberts residing at 1/3, 10 Fingal Road, Renfrew, PA4 8FH ("the Applicant") per his representative Mrs Barbara Roberts residing at 1/3, 10 Fingal Road, Renfrew, PA4 8FH ("the Applicant's Representative")

Hacking and Paterson, 1 Newton Terrace, Glasgow, G3 7PL ("the Respondents")

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondents had not failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Property Factor Code of Conduct ("the Code") and had not breached Sections 2.2, 2.11, 6.3, 6.4, 6.9 and 7.1 of the Code and had not failed to comply with its Property Factor duties in terms of Section 17 of the Act.

Tribunal Members

Karen Moore (Legal Member)

Andrew Taylor (Ordinary Member)

Background

1. By application received by the First-tier Tribunal for Scotland (Housing and Property Chamber) between 9 July 2019 and 10 October 2019 ("the Application") the Applicant and that Applicant's Representative on behalf of the Applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Respondents had failed to comply with Sections 2.1, 2.2, 6.3, 6.4, 6.9 and 7.1 of the Code and had failed to comply with its Property Factor duties in terms of Section 17 of the Act.

2. The Application comprised Application form, copy correspondence (emails and letters) between the Applicant, the Applicant's Representative and the Respondents, copy invoices relative to the matters complained of as breaches of the Code and the Property Factor duties, the Respondents' Written Statement of Services and a print of part of title sheet REN121485, being the title sheet for the parent title of which the title to the Property forms part.

3. The Tribunal issued the following Direction:-

"The tribunal, on the application of the Respondents give the following Direction to the Applicant as to the conduct and progress of this Application in terms of Section 16 of Schedule 1 to The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017:-

The Applicant is required to set out his complaints by clear referencing to the relevant Section of the Code or Duties and with cross referencing to the productions lodged by the Applicant and is required to set out for each an explanation of the reasons why the Applicant believes the Respondents have breached the Code or Duties;

The tribunal, on its own initiative and for the purpose of making inquiries, give the following Direction to the Applicant as to the conduct and progress of this Application in terms of Section 16 of Schedule 1 to The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017:

The Applicant is required to provide:

1.1 A copy of the title deeds or a land register print of the Land Certificate for the Property showing the following in full:-

- i) Deed of Conditions registered 13 December 2006;*
- ii) Deed of Conditions registered 23 July 2004;*
- iii) Deed of Conditions registered 9 June 2005 and*
- iv) Section 75 Agreement by Renfrewshire Council,*

all of which are referred to in the Applicant's application and productions, together with all plans referred to in these documents.

1.2 An explanation of the relevance to the Application of the following third parties all of which are referred to in the Applicant's application and productions:

- i) BE International;*
- ii) Clydeport;*
- iii) 4th Property;*
- iv) Miller Homes;*
- v) Park Lane and*
- vi) Mulberry Residents Association.*

1.3 A plan or plans showing the location of the Quay Wall or Walls, the Park Lane Site and the Braehead Site, unless these are shown on the plans to be provided under item 2.1 of this Direction."

4. The Parties complied with the Direction and each lodged substantial

productions comprising email and other correspondence between them, copy invoices, copies of legal opinions obtained by each of them and copy title deeds relating to common ownership. The productions refer to the common ownership in which the Applicant has an interest by reference to "the Miller Site", "the Park Lane Site", "the Braehead Site" and "the Clydeport Site" (together referred to as "the Whole Site") and referred to commercial parties with an ownership interest in these common parts as "Miller", "Park Lane", "Sovereign" and "Clydeport". For the sake of consistency, the Tribunal adopts this terminology where appropriate.

Hearing

5. A hearing took place at 10.00 a.m. on Thursday 5 December 2019 at the Glasgow Tribunal Centre, 20 York Street, Glasgow, G2 8GT. The Applicant, Mr. Roberts, and the Applicant's Representative, Mrs. Roberts, were present. The Respondents were represented by Mr. Gordon Buchanan, its Property Manager. Neither Party had additional witnesses.

Preliminary plea on behalf of the Respondents.

6. Mr. Buchanan made a preliminary plea that Mrs. Roberts had not been properly appointed as a representative in terms of the Rules. The Tribunal had regard to Rules and took the view that, whilst no formal intimation had been made, it was evident from the Application and subsequent correspondence that Mrs. Roberts represented her son. Further, the productions lodged by both Parties showed that the Respondents had corresponded with Mrs. Roberts on behalf of the Applicant. Accordingly, the Tribunal, having regard to the overriding objective as set out in the Rules, took the view that Mrs. Roberts had been appointed as a representative for the Applicant.

Introduction by Tribunal

7. The Tribunal explained its role in the proceedings and advised the Parties that it had had the benefit of reading all of the paperwork lodged with the Application and in response to the Direction and so was familiar with the substance of the complaints, being the Respondents' management of the various common parts in which the Applicant has an interest, the common charges levied by the Respondents and way in which the Respondents wrote to the Applicant's Representative on one occasion.

General matters clarified and agreed at the Hearing.

8. The Tribunal was aware from the Application and the paperwork lodged by the Parties that the Property forms part of a mixed-use masterplan site at Braehead, Renfrew and was aware of the complex nature of the titles to and ownership of that masterplan site. The masterplan site appears to be part of the Whole Site.

9. In addition to the Application and the paperwork lodged by the Parties, at the Hearing, the Tribunal had the benefit of the title sheet for the Property, title number REN137198, and the title plan of the Whole Site.

10. The Tribunal then clarified the common ownership relevant to the Property with the Parties in order that there could be consensus in this respect. The Tribunal sets out these factual elements in the following paragraphs 11 to 26 inclusive.

11. From the title sheet REN137198, the Property is a flat unit within the block numbered 3 and 5 Mulberry Road and 10 and 12 Fingal Road, Renfrew, which block comprises 48 flat units ("the Block").

12. The Property has an equal share being 1/48 of the common parts of the Block with the owners of the other 47 flat units in the Block.

13. The common parts of the Block include a water pump, a door entry system and carpeting. There is a cyclical maintenance fund for routine and wear and tear repairs.

14. The Block is part of a residential development constructed by Miller Homes ("the Miller Site"). The Miller Site is also known as and is referred to from time to time as Kings Wharf in the Parties' productions. The Miller Site, in turn, forms part of a larger site for which planning consent for residential developments had been obtained. This larger site comprises the Braehead Site and the Park Lane Site and is referred to herein as "the Larger Site". The Larger Site sits within the Whole Site.

15. The common parts of the Larger Site and the Whole Site include part of a quay wall which is the south bank retaining structure of the River Clyde ("the Quay Wall") and a walkway which runs through the Whole Site and continues into the neighbouring Braehead Shopping Centre. This walkway is landscaped and has street lighting. There are other common areas of landscaping within the Miller Site.

16. Park Lane are owners of a residual and undeveloped part of the Larger Site, part of which ownership is part of the River Clyde ("the Park Lane Site").

17. Miller no longer have an ownership interest, having developed residential units on the Miller Site and having sold these units to individual homeowners.

18. Sovereign no longer have an ownership interest, having gone into administration. Barratt Homes have developed or are developing part of the land previously owned by Sovereign and the residual land which had been owned by Sovereign is possibly in private ownership.

19. Clydeport, although having had an ownership interest in the Whole Site, disposed of this interest before residential development began, and so, have no bearing on the Application.

20. There is a residents' association for flatted properties, constructed by Barratt Homes, in Mulberry Road which is known as Mulberry Residents Association.

21. There is no residents' association for the Block.

22. The Respondents are property managers for the Larger Site and so are property managers for the Property and the Block. In that role, the Respondents interface with the property managers for the Whole Site and administer the Applicant's liability for common charges relating to the Whole Site. Accordingly, the Respondents manage all of the common property in which the Applicant as owner of the Property has an interest.

23. From the title sheet REN137198, the Tribunal noted that there are several Deeds of Conditions and title conditions applicable to the Property.

24. There are 283 residential units in the Larger Site, one of which is the Property. The Property sits within Miller Site which in turns sits within the Braehead Site, part of the Larger Site. From the Deeds of Conditions, the proportion of the Larger Site common charges which apply to the Braehead Site is 86%. Therefore, the Applicant's share of these common charges is 1/283 of 86%. These Larger Site common charges relate generally to landscaped areas, walkways, roadways, paths and services used in common by all 283 residential unit owners.

25. With regard to the Whole Site, the proportion of the Whole Site common charges attributed to the Miller Site is 35.71% of the Larger Site liability. Therefore, the proportion of the Whole Site common charges attributable to the Miller Site is 35.71% of 86%. Accordingly, the Applicant's share of the Whole Site common charges is 1/283 of 35.71% of 86%. These Whole Site common charges relate generally to landscaped areas and walkways.

26. Therefore, the Applicant's liability for and the common parts is:

Whole Site: 1/283 of 35.71% of 86% of the cost;

Larger Site: 1/283 of 86% of the cost and

Block: 1/48 share of the cost.

27. For the sake of completeness, the Tribunal notes the Applicant's position that the apportionments might be inaccurate as the initial calculation of the acreage of the Whole Site could have been measured in a different way. The Tribunal's view is that this is not relevant to the substance of the Application, and, in any event, the possible difference in the calculations is de minimus.

Deeds of Conditions

28. The Tribunal considered the Deeds of Conditions in respect of the common parts relevant to the Property and the obligations in respect of the common parts with regard to the matters complained of in the Application which can be summarised as follows:-

- a) Two Deeds of Conditions by Braehead Park Estates Ltd, Clydeport Properties Ltd and Park Lane Land Ltd registered on 23 July 2004, both of which affect the Park Lane Site, the Braehead Site and the Clydeport Site. These deeds set out common property regulation and liability for a substantial residential development, to be known as Ferry Village, proposed at that time. These Deeds of Conditions propose that the landscaping, access roads and infrastructure and frontage of the River Clyde are common with the residential development and also Braehead Shopping Centre. The Deeds of Conditions make arrangements for factoring and property management of these common parts and associated apparatus and equipment and apportion costs and services charges as 86% to the Braehead Site and 14% to the Park Lane Site. There is provision for passing shares of these apportioned costs and service charges to the future owners of any self-contained residential or commercial units as allocated by the factor.
- b) Deed of Conditions by George Wimpey West Scotland limited and Park Lane Land Limited registered on 9 June 2005 sets out common areas regulation and liability for the Park Lane Site and a site named "the Wimpey Site" and makes arrangements for factoring and property management of these common areas. There is provision for passing shares of these apportioned costs and service charges to the future owners of any self-contained residential or commercial units as allocated by the factor.
- c) Disposition by Park Lane Land Limited to Miller Homes Limited registered on 9 June 2005 splits off part of the Park Lane Site, which split off part forms the Miller Site and apportions property rights and liabilities between these two sites.
- d) Deed of Conditions by Sovereign House, Fairbriar Homes Limited and Miller Homes Limited registered 13 December 2006 sets out further common areas and common parts regulation and liability for the Miller Site Lane in the anticipation of Miller and Sovereign each developing part of the Miller Site for residential units. This Deed of Conditions makes arrangements and provision for the individual residential units of which the Property and the Block form part, and, in particular, for the purposes of the Application, sets out the property factor arrangements. It is this Deed of Conditions which sets out the provisions for the contractual relationship and terms and conditions between the Applicant and Respondent.

Tribunals Findings and Decisions with Reasons

29. For ease of reading, the Tribunal sets out its findings and reasons under each heading. For the sake of completeness, the Tribunal, in reaching its determinations took into account all of the information before it, whether specifically referenced or not, and, made its determinations following the close of the Hearing.

Breach of Code 2.1 which states: You must not provide information which is misleading or false.

30. Mrs. Roberts advised the Tribunal that the mainstay of the complaint was lack of communication and transparency in the invoicing for all common charges including costs for the Quay Wall, cost of roof anchors, maintenance and servicing of the water pump, grass cutting and electricity charges.

31. With regard to the Quay Wall, the complaint was set out in the Application as the Respondents failing to ascertain all of the ownerships and so failing to apply apportioned costs correctly. In addition, the Applicant asserted that the Respondents deliberately delayed instructing surveys and repair work to the Quay Wall until Miller no longer had an ownership in the Quay Wall and did not attempt to pursue Miller for costs which occurred during Miller's ownership.

32. Mr. Buchanan's position was that the Deeds of Condition address the ownerships and the liabilities and refuted that the Respondents had acted in favour of Miller.

33. With regard to the Quay Wall, the Tribunal considered the terms of the Deeds of Conditions. The Deeds of Conditions by Braehead Park Estates Ltd, Clydeport Properties Ltd and Park Lane Land Ltd registered on 23 July 2004 relate to the Quay Wall as part of the Common Parts of the Whole Site and refer to a separate area as "the River Frontage". These Deeds oblige the initial owners and developers to set out the River Frontage landscaping and lighting to a specific standard before handing responsibility over to future owners but do not contain a similar obligation for the Quay Wall. From the information before it, it appears to the Tribunal that the River Frontage obligation is complied with. The Deed of Conditions by Sovereign House, Fairbriar Homes Limited and Miller Homes Limited registered 13 December 2006 set out the common liabilities of each individual residential unit in respect of common parts. This Deed of Conditions does not make specific reference to the Quay Wall. This Deed of Conditions passes liability for common parts to the individual residential units and does not reserve ownership to the developers of whom Miller is one, nor does it place an obligation on the developers of whom Miller is one to maintain or bring any common parts up to a particular standard before ownership transfers. Accordingly, there does not appear to the Tribunal to be anything before it to suggest that the Respondents provided false or misleading information in respect of the Applicant's liability for the Quay Wall or that the Respondents should pursue Miller for this liability.

34. Mrs. Roberts explained to the Tribunal that a further element of this part of the complaint relates to invoices for work carried out to the door entry system of the Block. She explained that there had been invoices from two companies, WSS and HFL, for the same work and so considered that the work had been overcharged or double charged.

35. Mr. Buchanan explained that both companies had, in fact, carried out the work, that the work had been quoted for and the lower quote from HFL had been accepted and HFL had been instructed. HFL had then been unable to complete the work and so WSS completed it at the cost quoted by HFL. Mr. Buchanan explained that appeared that HFL had not included the cost of parts and so it appeared that WSS had charged extra when the cost of the parts appeared on their invoice.

36. The Tribunal considered the Respondents' invoicing for the Quay Wall, the cost of roof anchors, the maintenance and servicing of the water pump, grass cutting and electricity charges. and found no reason to support the Applicant's position that it

was false or misleading as the invoicing appeared to be accurate in respect of common charges apportionment and reflected the common costs incurred in respect of common parts. The Tribunal was satisfied that the common costs appeared to be reasonable in respect of the work carried out. Accordingly, the Tribunal finds that the Respondents did not breach the Code in this respect.

Breach of Code 2.2 which states: You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action).

37. Mrs Roberts complained that this complaint relates to an email sent to her by the Respondents which she found to be intimidating and the language of which she found to be inappropriate. She explained that the email was received in response to an email chain which she had sent to the Respondents and which contained a chain of emails expressing negative views of the Respondents. She explained that she had not intended to send the email chain to the Respondents but accepted that the views expressed therein were unsubstantiated allegations. She was, she said, nonetheless shocked that the Respondents replied in formal terms calling on her to substantiate the comments or withdraw them.

38. Mr. Buchanan pointed out that Mrs Roberts is not a homeowner and so this part of the Code does not apply and in any event his response was not a breach of the Code.

39. The Tribunal agreed that the Respondents' response had not been sent to the applicant as homeowner. The Tribunal also took the view that, regardless of this fact, the response by the Respondents was fair comment in light of the allegations made and that it was entirely appropriate that the Respondents should formally call on the Applicant's Representative to substantiate the comments or withdraw them. Accordingly, the Tribunal finds that the Respondents did not breach the Code in this respect.

Breach of Code 6.3 which states: On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff.

40. The Applicant's complaint in this respect related to the way in which the Respondent selected contractors for routine common repairs and the fact that the same contractor, Ken Jack, was instructed. The Applicant advised the Tribunal that the landscaping contractors, Mundell, were reappointed annually regardless of cost. The Applicant maintained that the costs charged by Ken Jack and Mundell were excessive and not subject to competitive tendering.

41. The Applicant further maintained that the common electricity charges were excessive, were not subject to tendering and that no meter readings had been taken by the Respondents to assist with accurate invoicing.

42. Mr. Buchanan explained to the Tribunal that the Respondents have a framework of contractors from which they select contractors for routine repairs and that it makes commercial sense that contractors familiar with and local to the development are selected. With regard to Mundell, Mr. Buchanan explained that it is usual practice to renew landscape maintenance contracts where there is no substantial negative customer feedback.

43. With regard to the common electricity charges, Mr. Buchanan explained that the Respondents instructed a utility broker to source the best price and tariffs and that a re-calculation of the common charges was in process with the previous and current energy suppliers.

44. The Tribunal considered the Respondents' approach to routine repairs and the landscape contract and found it to be reasonable and proportionate and to follow accepted commercial practice. Therefore, the Tribunal found no reason to support the Applicant's position that the Respondents did not have a process in place. Accordingly, the Tribunal finds that the Respondents did not breach the Code in this respect.

Breach of Code 6.4 which states: If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.

45. The Applicant's complaint in this respect was that the Respondents did not have a programme in place for common close painting and carpet cleaning which corresponded to the programme set out in the title deeds for cyclical maintenance.

46. Mr. Buchanan explained to the Tribunal that the Respondents hold a cyclical maintenance fund and are in the process of carrying out a tendering process for decoration.

47. Mrs. Roberts agreed that this is the case but expressed the view that the tendered cost of £10,000.00 for four new build blocks is excessive.

48. The Tribunal considered the Parties' positions under this heading and found no reason to support the Applicant's position that the Respondents had not prepared a programme of works. Accordingly, the Tribunal finds that the Respondents did not breach the Code in this respect.

Breach of Code 6.9 which states: You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.

49. The Applicant's complaint in this respect was that the Respondents did not follow up complaints of poor workmanship with Ken Jack and a repair carried out to a handrail, in particular.

50. Mr. Buchanan refuted that the Respondents failed in this respect and advised the Tribunal that contractors are instructed to return and remedy defects when

reported by homeowners. He submitted that it was not realistic that warranties are obtained for routine works.

51. The Tribunal considered the Parties' positions under this heading and found no reason to support the Applicant's position that the Respondents did not follow up with contractors and accepted that it is not commercial practice for contractors to provide warranties for routine works. Accordingly, the Tribunal finds that the Respondents did not breach the Code in this respect.

Breach of Code 7.1 which states: You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.

52. The Applicant's complaint in this respect was that the Respondents did not resolve his complaints to his satisfaction.

53. The Tribunal was satisfied from the productions lodged that the Respondents have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement and which it followed. Accordingly, the Tribunal finds that the Respondents did not breach the Code in this respect.

Property Factor Duties.

54. The Applicant's complaint in this respect was the Respondents general approach in its dealings and its handling of the common charges apportionment, in particular in respect of the Quay Wall and the lack of transparency and communication on the part of the Respondents.

55. The Applicant, Mrs. Roberts and Mr. Buchanan all explained to the Tribunal that there appeared to be an ambiguity and conflict in the terms of the Deeds of Conditions.

56. Until May 2018, the Whole Site and the Larger Site common charges had been apportioned on a different basis. Mr. Buchanan explained that this had arisen due to the ambiguities in and conflicting terms of the various Deeds of Conditions.

57. Both Parties lodged legal opinions on the ambiguous and conflicting terms of the Deeds of Conditions. The Tribunal noted that the two opinions, whilst expressing different views on the extent of the common liability of the individual residential unit owners, of which the Applicant is one, nonetheless agree that there is common liability for common property within the whole site.

58. The legal opinion commissioned by the Respondent and on which Respondent relies is that, in the event of unclear title deeds, the Title Conditions

(Scotland) Act 2003 applies and apportions the liability jointly and severally between all owners. The legal opinion which the Applicant lodged is not so unequivocal and advises further research which advice does not appear to have been followed. Therefore, there being no further legal or court challenge to its reliance on its legal opinion, the Respondent apportions the common charges on an equal basis of 1/283 of 86% of the whole site common charges as evidenced by the invoices lodged by the Respondent.

59. Mr. Buchanan agreed that communication was at the core of the issues and stressed to the Tribunal that the Respondent had offered to meet with the Applicant to explain the common charges face to face but that the Applicant had declined this offer.

60. Mr. Buchanan also advised the Tribunal that the Respondents had paid for the legal opinion obtained by the Applicant and his co-owners in order to resolve matters. This was accepted by the Applicant.

61. The Applicant drew that Tribunal's attention to the fact that there was a significant common cost in respect of the Quay Wall and that the Respondents had at one time offered to tender the works at no additional cost to the development owners but had since retracted this offer.

62. Mr. Buchanan agreed that this had been the case and that the offer had been made in respect of an earlier tender which had not been followed through.

63. Mrs. Roberts advised that Tribunal that, as far as she was aware, Barratt Homes had met costs for their development in respect of the Quay Wall but that Miller were refusing to do so. The Tribunal's view is that this is a matter for the Applicant as a homeowner in respect of his contract with Miller and, possibly, any collateral warranty arranged as part of that contract and is not part of the Respondent's remit.

64. The Tribunal considered the Parties' positions under this heading and, in particular, the Respondents actions in respect of dealing with the common charges apportionments. The Tribunal found that the Respondents had been proactive in trying to resolve and manage the conflicting terms of the various Deeds of Conditions and had done so at no cost to the Applicant and his co-owners. The Tribunal found that the situation with the cost involved in repairing and or maintaining the Quay Wall was not of either Parties' making and that the Respondents had acted in the spirit of the Code in carrying out the general property factor's duties. The Tribunal found that the Respondents were not under any duty or obligation to renew its offer to tender the works at no additional cost.

65. The Tribunal appreciates that position in which the Applicant finds himself regarding the range and cost of common parts and services for which he is liable but is of the view that this is not a fault by or due to any action or inaction on the part of The Respondents. Accordingly, the Tribunal finds that the Respondents did not breach the property factor duties.

66. This decision is unanimous.

Appeal

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them

Karen Moore

Chairperson

15 January 2020.