Housing and Property Chamber
First-tier Tribunal for Scotland

Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 19(1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").

Chamber Ref: FTS/HPC/PF/19/0935

The Property:

Flat 2/6, 17 Stewartville Street, Partick, Glasgow G11 5HR

The Parties: –

Mr Gary Glen, residing at 2 Oak Park, Bishopbriggs, Glasgow G64 1UB. ("the homeowner")

and

Hacking & Paterson Management Services, 1 Newton Terrace, Glasgow G3 7PL ("the factors")

Tribunal Members:

David Preston (Legal Member) and Elizabeth Dickson (Ordinary Member).

Decision:

1. **The tribunal rejects the preliminary point raised by the factors and determines that the application is not premature and that the requirements of section 17(3) have been satisfied;**
2. **The factors are in breach of Section 2.4 of the Code of Conduct for Property Factors ("the Code");**
3. **The factors are not in breach of section 2.5 of the Code.**

Background:

1. By application dated 20 March 2019, as amended by email dated 25 April 2019, the homeowner sought a determination that the factors were in breach of Sections 2.4 and 2.5 of the Code. In the pro forma letter of notification dated 25 April 2019 he asserted that the factors had been almost exclusively dealing with a small group of unelected owners regarding work to be carried out at the property. He complained that the factors had been arranging meetings with these owners and not making any communication to other owners regarding, for example, car park resurfacing, barrier control, etc. all in contravention of section 2.4 of the Code. He further asserted that the factors were in contravention of section 2.5 of the Code by avoiding giving responses until after consultation with the favoured owners and frequently taking the maximum length of time to respond on a single ongoing issue.

2. In support of the application the homeowner lodged a significant number of emails between November 2018 and March 2019; factors' Written Statement of Services dated 12 February 2019. He subsequently lodged further email chains covering periods between July and August 2017 and February and March 2019.

3. By Notice of Acceptance dated 16 May 2019 member of the Tribunal with delegated powers so to do referred the application to this tribunal for determination. A Notice of Referral and Hearing was sent to the factors on 22 May 2019 advising that a hearing would take place on 11 July 2019 at 10.00 AM and requiring that any written representations on the application be submitted by 12 June 2019.

4. By letter dated 31 May 2019 the factors submitted their response and representations. They sought a review of the decision of the legal member to refer the application to this tribunal and requested that the matter of the Tribunal's jurisdiction to deal with the application should be dealt with as a preliminary issue.

5. By a Direction dated 12 June 2019 the tribunal confirmed that it would consider the factors' representations as a preliminary matter at the hearing on 11 July 2019 and thereafter, if appropriate, would proceed to consider the merits of the application.

6. By email dated 13 June 2019 the homeowner made representations about our Direction to which the factors responded by letter of 21 June 2019. The Direction made it clear that these matters would be dealt with at the hearing.

Hearing:

7. A hearing took place at the Glasgow Tribunal Centre on 11 July 2019 at 10.00 am. The applicant, who had indicated that he was unable to attend due to work commitments, was represented by his sister, Ms Gayle Glen. There was no appearance by or on behalf of the factors who had indicated in their written representations of 31 May 2019 that they did not intend to attend any hearing. Since the factors had voluntarily waived their right to be present or make further representations, the tribunal was content to proceed in accordance with the Direction dated 12 June 2019.

Preliminary Matters:

8. The tribunal considered the representations in the factors' letter of 31 May 2019, along with the homeowner's email of 13 June 2019 and the further representations from the factors of 21 June 2017. The factors contended that the decision to accept the application of 16 May 2019 was without merit. They asserted that section 7 of the Code required homeowners to notify the factors in writing of the reasons why they consider the factor had failed to carry out the duties or to comply with the Code and that the factors must have refused to resolve the homeowner's concerns or unreasonably delayed attempting to resolve them.

9. In their letter of 31 May 2019, the factors pointed out that the applicant had applied to the Tribunal on 20 March 2019. They stated that the applicant's

first intimation to them of the complaint and belief of failure to comply with the Code was received by them on 25 April 2019. They said that the applicant's email of 25 April 2019 clearly indicated an intention to have the matter dealt with by the Tribunal as opposed to the factors' complaints handling procedure. They acknowledged the complaint on 1 May 2019 and confirmed that the homeowner would receive a response by 10 May 2019, which was done. They pointed out that in their view, in all circumstances the application dated 20 March 2019 was premature and consequently, without the factors internal complaints procedure having been concluded was without merit.

10. The factors referred us to three previous decisions of the First-tier Tribunal for Scotland (FTT) (pf/18/2565, pf/18/1855 and pf/18/2074), although we were unable to trace case number pf/18/2074.

11. In response to the homeowner's representations on this issue they asserted in their email of 21 June 2019 that "a Director communicating with a customer on general day to day Factoring questions and issues does not mean that said customer has requested to start or is progressing through our Formal Complains Handling Process (FCHP)". They referred to a number of emails from the homeowner and contend that at no point has the homeowner specifically requested that his complaints be dealt with under their FCHP.

12. The homeowner's email of 13 June 2019 referred to emails between himself and Mr Leitch between 17 December 2018 and 4 March 2019. He pointed out that the factors had not pointed him to an alternative complaints procedure from that which he was following.

13. On behalf of the applicant, Ms Glen stated that the applicant had escalated his ongoing complaint to director level within the factors on two occasions and, despite requests, he had not been advised of the internal complaints procedure until he had been sent a link to the internal complaints procedure by email on 26 February 2019. His position is that since 2017 his

correspondence had taken the form of complaints and the correspondence was clear in this regard. The factors had not directed him to, nor specifically advised him of the need to invoke the FCHP and did not see that it was for him to do so.

14. The tribunal rejected the factors' contention that the Decision of 16 May 2019 was without merit. Such a Decision requires to be made by the President or another member of the Tribunal on the basis of the considerations contained in Rule 8 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ("the Rules"). Since the application as presented by the homeowner complied with the provisions of Rule 8, the legal member was entitled to make the decision reached.

15. In relation to notification of reasons why the homeowner considered that the factors had failed to comply with the Code the tribunal noted that the email from the homeowner dated 17 August 2017 specifically referred the factors to the homeowner's understanding that they had failed to comply with section 2.4 of the Code. That email also pointed out the homeowner's understanding that if the matter could not be resolved then it should be taken to senior management and if still not resolved, should be referred to the [homeowner housing panel]. The factors' response to that email dated 18 August 2017, whilst dealing with certain issues raised by the homeowner made no reference to the complaints procedure and made no attempt to explain the process.

16. The tribunal also considered the email dated 4 March 2019 to Mr Leitch in which the homeowner acknowledged receipt of details of the FTT and advised that he was now going to contact it to try to resolve the matter. In response, Mr Leitch simply acknowledged receipt and made no effort to advise the homeowner the factors' view that the complaints procedure had not been exhausted and that any reference to the tribunal would be premature. Similarly, the factors' acknowledgement of the pro forma notification made no reference to their contention that any application would be premature.

17. The tribunal considered the factors' email of 21 June 2019 and the references therein to the homeowner's emails. The tribunal notes that the factors acknowledge references made by the homeowner to the HHP. The factors did nothing to correct the homeowner about the erroneous reference to the HHP whose functions had been transferred to the Tribunal. At no point did they attempt to clarify the correct process to the homeowner. They did not advise the homeowner that, in their opinion, he had not invoked their FCHP.

18. The tribunal concludes that the actions of the factors in not providing advice and guidance to the homeowner on the correct process was simply an effort by them to seek to have any application rejected by the tribunal, as they have continued to attempt to do, which would, in any event, only have delayed any conclusion of the issues at best.

19. The tribunal determined that the factors' complaints procedure is a matter for them, and it is not for homeowners to specifically initiate the formal process. The correspondence between the parties over a prolonged period clearly takes the form of complaints about the factors' handling of the issues and it was a matter for the factors to deal with such correspondence as a formal complaint rather than for the homeowner to have to take steps to invoke the FCHP. The homeowner reasonably expected that by escalating matters to director level within the factors' organisation matters were being dealt with as a formal complaint.

20. The purpose of the introduction of the Code was to improve communications between factors and homeowners. Ms Glen likened the situation to that of banks who almost invariably treat any inquiry made of them as formal complaints. Customers are not required to invoke the process.

21. We therefore find that: sufficient detailed notification of the homeowner's belief that the factors had failed to comply with section 2.4 of the Code was given on 17 August 2017; it was for the factors to invoke their FCHP and not the homeowner; and by failing to advise the homeowner of the need to

invoke the FCHP as long ago as August 2017, they unreasonably delayed in attempting to resolve the homeowner's concerns.

22. The tribunal considered the cases referred to by the factors. In case pf/18/2565 the section 17(3) test was considered by the tribunal as a preliminary matter at a hearing on 24 April 2019. The homeowner and her representative accepted that the factors had not been given notification under section 17(3). In pf/18/1855 the question was whether the factors had refused to resolve or unreasonably delayed in attempting to resolve the complaint.

23. The first point to make is that previous decisions of the FTT are not binding on us (UTS/AP/0020 at paragraph 9) but can be taken into account in our deliberations. In pf/18/2565 the application had not been rejected and had been referred to a tribunal for a hearing, as in this case and the issue had been dealt with as a preliminary matter at the hearing. Accordingly, the decision of the legal member in this case to refer it to a hearing was not misconceived. As pointed out above, notice of the factors' failure to comply with section 2.4 was given by the homeowner on 17 August 2017 in compliance with section 17(3). Insofar as pf/18/1855 is concerned, we find that the factors, having been notified of the homeowner's complaint in August 2017, and by failing to regard the ongoing correspondence under their complaints process had unreasonably delayed in attempting to resolve the homeowner's concern.

Merits:

24. The tribunal then turned its attention to the merits of the application itself and had regard to: the supporting documents submitted by the homeowner; the representations made by Ms Glen; and, insofar as relevant, the representations by the factors. The supporting documentation, which mainly took the form of email chains, contained the factors' responses to the homeowner and the tribunal was content that it had sufficient information to reach a determination of the application.

25. The homeowner complained that the factors had adopted a process of consultation with a small group of owners out of the total number (46) of homeowners ("the group"). The number in the group was not confirmed to us but Ms Glen said that it could be as low as four. The factors were happy to confirm that they did consult with the group. They explained that the group had been formed following a serious fire in the building in 2016 and the factors had continued to discuss matters regarding the building with this group. Ms Glen said that the homeowner did not object to this in principle, but he was concerned that the factors at least appeared to be acting upon instructions from this group to the exclusion of the opinions of others.

26. It would be useful to set out the background to the issues giving rise to the homeowner's complaint:

    a) Ms Glen explained that, following changes to parking regulations in the nearby streets in about mid-2017, a suggestion had been made that the private parking areas serving the property would require to be protected. She said that the homeowner had made such a suggestion to the factors who had proceeded to consult with the group. The factors explained in their email to the homeowner dated 26 July 2017 that they had been liaising with the group and it was agreed that a chain across the entrance to the car park would be in the interest of all owners. They then advised in their email of 8 August 2017 that without further consultation they, as factors acting under their delegated authority, had issued instructions for that to proceed. The homeowner objected to this for the reasons set out in his email of 26 July 2017, after the chain had been installed. He said that he did not think that this solution would be satisfactory on the basis that it would be inadequate to serve the purpose as it would require residents to get in and out of cars to open and close the chain, so was unlikely to be used. Residents had only been given 2 days' notice of the installation.

    b) In the event, the chain proved to be ineffective and in late 2018 the factors, following further discussions with the group, instructed a survey

at a cost of just under £1000 to investigate alternative solutions. Despite numerous requests for sight of the report, and despite it having been seen by the group, the factors delayed sending a copy out until after it had been discussed with the group. The homeowner pointed out that all residents were equally entitled to see the report. The factors acknowledged that the proposals for installation of a barrier would exceed the necessary threshold and consent would be sought. However, the factors appeared to be proceeding to arrange the installation of one barrier although there were two car parks.

27. The tribunal was not provided with any information as to the level of the threshold above which consent was required. The factors' email of 10 August 2017 states that the titles are silent on the delegated authority and they therefore refer to their Terms of Service and Delivery Standards issued in November 2012, which states: that such authority is derived through established custom and practice; and it is only where the factors consider that consultation is necessary or that written approval is appropriate that they will consult with all homeowners to seek their views and/or instructions. Neither the titles nor the factors' Terms of Service and Delivery Standards actually specified any level for such a threshold.

28. Although the tribunal makes no formal finding in this regard, it suggests that the factors should review their Terms of Service and Delivery Standards to ensure that they reflect the terms of the titles and the requirement of the Code that the threshold should be specified.

29. Throughout the correspondence the factors explained that they found it helpful to discuss issues with a small group of owners, although they did not act on their instructions alone and consulted with other owners to get consent when necessary, ie when the cost of any proposals exceeded the threshold. However, the homeowner felt that he and his opinions were excluded. Ms Glen was unable to say whether the homeowner knew the identity of the members of the group, although the correspondence indicated that the factors were willing to put the homeowner in touch with it. Ms Glen

suggested that the factors could have used email to correspond with all owners and canvas the views of those who bothered to respond.

30. The homeowner referred his concerns about the way matters were being handled to Mr Alan Gifford, one of the Directors, by email on 6 December 2018 and received a response from Mr Alastair Leitch, another Director, on 14 December 2018. In his email of 17 December 2019, he made it clear that he felt that he was not being treated equally with those in the group, by not being given sight of the survey report.

31. The homeowner also complained that the factors were in breach of section 2.5 of the Code. He asserted that the factors habitually delayed any response to any of his emails to the maximum period set out in the terms of Service of seven days. He complained that they applied this to each email in a chain of correspondence and asserted that the factor should respond to normal correspondence in less than the maximum period.

Reasons for Decision:

32. At the outset the tribunal noted from the titles that each of the proprietors of the flats has: a one forty-sixth pro indiviso right of property in common to the car park to the north of the property; and a one forty-seventh pro indiviso right of property in common to the car park to the south of the property, which includes the adjoining house at 15 Stewartville Street. There was no evidence presented to us of the exact number in the 'group' referred to, but the tribunal finds on the information before it that its numbers represented less than 20% of those entitled to the common parts. The tribunal is of the view that while the factors may find it useful to consult with such a group, they should not do so to the apparent exclusion of other interested residents, nor should it appear that the opinion of the group takes precedence over that of the other proprietors, as appeared to be the case in delaying the issue of the report when requested by the homeowner until after they had discussed it with the group. The tribunal does not fault the factors in consulting with the group but does fault them for doing so in a way which gives rise to a perception of differential treatment for residents.

33. By delaying the issuing of the survey report to any residents until it had been discussed with the group, they gave rise to a clear perception that they were favouring the views of the group over those of the homeowner. The tribunal gained the impression from the correspondence that there was almost a clandestine element of the factors' dealings with the group and the homeowner was entitled to feel aggrieved by apparently being excluded, notwithstanding the offers of the factors to put the homeowner in touch with the group. The titles make provision for a "Property Council" which the factors could have made efforts to establish. No evidence was presented to us of any such efforts.

34. The tribunal is of the view that the installation of chain or a barrier was not maintenance, repair or replacement of an existing installation and represented a new installation. Accordingly, this work was by way of an improvement to the common parts. The tribunal does not believe that the titles allow a factor to proceed, regardless of the cost, without specific authorisation of the proprietors. There is a distinction between "maintenance, repair or replacement" on the one hand and "improvements" on the other hand. Clause First of the Deed of Conditions specifies that "Common Charges" includes (a) the whole expenses incurred from time to time in respect of the repair, maintenance and renewal and any *authorised* improvement (our italics) of the Common Parts. The qualification of "improvements" means that they have to be dealt with differently from repair, maintenance and renewal. We find therefore that for improvements of the common parts of the property to proceed, some authorisation from the homeowners is required in every case, regardless of cost. The Deed of Conditions is not clear as to how such authorisation is to be obtained, but Clause Eleventh may be of assistance. It provides a mechanism for calling meetings of a Property Council, comprising one vote per property in respect of which a quorum is stated as representation by one-third of properties, and decisions to be made on a majority vote.

35. The tribunal had regard to the pre-amble in section 2 of the Code: “Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes”, in respect of which the sub-paragraphs provide examples of good or bad practice. This section of the Code is not intended to be followed to the letter to the exclusion of reasonable interpretation. In particular, the factors gave the impression at least, that they sought to consult with a minority group of homeowners to the initial exclusion of others before proceeding to seek approval where necessary for proposed improvements to the common parts.

36. The tribunal finds that the factors were not entitled to install a chain across the entrance to the car park whether on the instructions of, or after consultation with the group, or not and even if the total cost fell below the threshold of authorised actions for repair, maintenance or renewal. They were required to obtain authorisation for such work, which they did not do. The Terms of Service and Delivery Standards do not assist the factors in this regard. They do not supersede the titles which require authorisation for all improvements to the common parts, regardless of whether the factors consider that consultation is necessary or that written approval is appropriate.

37. In his email of 26 July 2017 the homeowner raised some perfectly valid observations on the proposals, which were entirely disregard by the factors.

38. The tribunal considered the email chains produced by the homeowner and did not find that in general there was any significant delay between emails from the homeowner and responses being provided. There may have been one or two delays due to changes in personnel within the factors or holidays.

Property Factor Enforcement Order (PFEO):

39. Having determined that the factors had failed to comply with the Code, the tribunal must determine whether to make a PFEO.

40. The tribunal finds no particular or specific action which the factors can usefully take to rectify the issue as these matters are now historic.

41. However, to reflect the fact that the homeowner was in correspondence with the factors over these matters from July 2017 without having been directed to the FCHP, or having his complaint dealt with as such, and without having been given advice on the correct procedure when referring to the Homeowner Housing Panel or Housing and Property Chamber, the tribunal considers that a reasonable payment to be made to the homeowner is £500.

Appeals

A homeowner or property factor 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.

David Preston

6 August 2019