Housing and Property Chamber
First-tier Tribunal for Scotland

Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 ("the Act") and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016, in an application made to the Tribunal under Section 17 of the Act

Chamber reference: FTS/HPC/PF/18/0233

The Property: 17E Glenhove Road, Cumbernauld G67 2LG ('the property")

The Parties:

Norrie Moane, residing at 17E Glenhove Road, Cumbernauld G67 2LG ("the homeowner")

Sanctuary Scotland Housing Association Limited, a charity registered in Scotland under the Companies Acts (SCO24549) and having its registered office at 7 Freeland Drive, Glasgow G53 6PG ("the property factors")

Tribunal Members – George Clark (Legal Member/Chair) and Elizabeth Dickson (Ordinary Member)

Decision by the Housing and Property Chamber of the First-tier Tribunal for Scotland in an application under section 17 of the Property Factors (Scotland) Act 2011('the Act')

The Tribunal has jurisdiction to deal with the application.

The property factors have not failed to comply with their duties under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act") and have not failed to comply with the Property Factor's duties.

The Decision is unanimous.

Introduction

In this decision, the Property Factors (Scotland) Act 2011 is referred to as "the Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code of Conduct" or "the Code"; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "the 2017 Regulations"; and the Housing and Property Chamber of the First-tier Tribunal for Scotland as "the Tribunal".

The property factors became a Registered Property Factor on 7 December 2012 and their duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Tribunal had available to it and gave consideration to the application by the homeowner dated 9 October 2017, with supporting documentation, namely a letter from the property factors to the homeowner dated 30 May 2017, an extract from the homeowner's Land Register Title Sheet, a copy of the property factors' written Statement of Services, copies of e-mails between the parties dated 14 June and 14 September 2017 and 30 January 2018, a letter from the property factors to the homeowner dated 9 October 2017, being their response at Stage 2 of their internal complaints procedure, and a letter from the homeowner to the property factors dated 29 January 2018, specifying the Sections of the Code of Conduct under which he was making his application to the Tribunal; and written submissions from the property factors dated 23 April 2018, with supporting documentation, which included a number of documents also provided to the Tribunal by the homeowner, but also a letter to the homeowner dated 20 June 2017, to which was attached an excerpt from the Deed of Conditions for the block regarding notification timescales, letters to the homeowner dated 31 August 2017 and 14 September 2017 and their response dated 8 February 2018 to the homeowner's letter of 29 January 2018.

Summary of Written Representations

(a) By the homeowner

The following is a summary of the content of the homeowner's application to the Tribunal:-

The homeowner had received a letter from the property factors about the commencement of a £60,000 roof renewal, of which £10,000 would be his responsibility. The letter had arrived out of the blue and by post. It was dated 30 May 2017, but the homeowner had not received in until 2 June 2017. The letter stated that the work would be beginning on 12 June and that there was a public meeting on 8 June to discuss the works. The homeowner would like to have attended that meeting to offer his professional opinion on the roof design, as there were well-documented problems with seagulls nesting on roofs in the locale. The homeowner had telephoned the property factors on 5 June and was told that this was the only public meeting

available. He had made it clear that this was not acceptable, as he had not been afforded the 7 days' notice as per his title deeds and as such the property factor had failed to carry out its duties.

It had become apparent to the homeowner that the property factors' written Statement of Services was lacking the clarity expected by the Scottish Government's Code of Conduct for Property Factors. The written Statement of Services discusses various types of works and distinguishes reactive and reinvestment works. In the section on reinvestment works, however, there is a sentence "we do not need a majority of owners in the block to agree to these reactive works". The homeowner's view was that this was not simple or transparent, as he could not tell whether it was a reference to reinvestment works, reactive works or reactive repairs. This was misleading and the property factors had, therefore, failed to comply with Section 2.1 of the Code.

Section 2.4 of the Code also provided that property factors must have a procedure to consult with the group of homeowners before providing work or services which will incur charges or fees in addition to those relating to the core service. The homeowner's written approval had never been sought for the roof renewal works.

The property factors had failed to resolve the homeowner's complaint as they appeared to disagree with his assertions. He wished an apology and to be compensated for the persistent mistreatment, abuse and failure to adhere to the Code. The property factors' continued flouting of the legislation and their subsequent denials had cost the homeowner countless hours and untold exasperation in attempting to sort out repeated disputes.

(b) By the property factors

The following is a summary of the written representations made by the property factors in their letter of 7 February 2018:-

The reference, in the homeowner's application, to the written Statement of Services had not been part of the homeowner's complaint to the property factors, so had not been through their internal complaints procedure. It had been part of the homeowner's letter of 29 January 2018 and they had provided clarification in their letter of 8 February, but it should not be considered by the Tribunal as it had not been through their internal complaints procedure.

In accordance with the Deed of Conditions, written permission was not required from owners in relation to any communal block maintenance works. This included repairing, maintaining and renewing. In addition, the property factors were the majority owners, as they owned 4 of the 6 flats in the block.

Following their letter of 30 May 2017, the homeowner had contacted the property factors' office on 5 June to advise he could not attend the owners meeting and that he wanted another meeting to be arranged. The property factors had advised him that that was not possible and that they were only required to give 7 days' notice in

accordance with the Deed of Conditions. They had also written to the homeowner on 20 June 2017, providing him with an excerpt from the Deed of Conditions. They had, however, offered the homeowner an individual meeting to discuss his concerns and he had taken up that offer.

The letter had been issued to homeowners on 30 May 2017 and the owners meeting was due to take place on 8 June. This was more than the 7 days' notice and was, therefore, in accordance with the Deed of Conditions. It was clearly evident that sufficient notice had been provided.

A meeting with the homeowner had taken place on 28 June 2017 and had been attended by the property factors' Asset Manager and a representative from their consultants Graham and Sibbald. The homeowner had left the meeting satisfied in relation to all his queries about why the roofs were being renewed as flat roofs, details of the tender process and the short timescales for the project.

A further opportunity to meet with staff, to address any further queries the homeowner had, had been offered in the property factors' letter of 8 February 2018, but had been rejected.

THE HEARING

A hearing took place at Glasgow Tribunals Centre, 20 York Street, Glasgow G2 8GT on the morning of 21 May 2018. The homeowner was present at the hearing. The property factors were represented at the hearing by Heather Elder, their Factoring Manager, and Clare Morrison, their Housing Manager .

Summary of Oral Evidence

The chairman told the parties that they could assume that the Tribunal members had read and were completely familiar with all of the written submissions and the documents which accompanied them. He then invited the homeowner to address the Tribunal with reference to his complaints under each Section of the Code of Conduct. The wording of the relevant portions of each Section of the Code included in the application is set out below, followed by a summary of the oral evidence given by the parties in respect of that Section.

Section 1.1a.B.d "The written statement should set out the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges...."

The homeowner expressed the view that the section of the written Statement of Services headed "Other Possible Works" was limited in scope and could be clearer.

The response of the property factors was that the written Statement of Services could not anticipate every possible eventuality but, in their view, the section was clearly laid out.

Section 2.1. "You must not provide information that is misleading or false"

The homeowner referred the Tribunal to the section of the written Statement of Services relating to "Reinvestment Works". He contended that it was misleading in that it talked of reactive works in the same part as reinvestment works. The property factors' response was that the use of the word "reactive" was a reference to what would happen if reinvestment work proposals were not accepted by a majority of owners. Reinvestment works would still require a majority, but the wording made it clear that, in the absence of a majority in favour of the reinvestment work, the property factors did not need to seek a majority vote prior to carrying out any repair works that might be necessary.

The homeowner stated that there should be a caveat in the written Statement of Services stating whether or not the property factors needed majority approval where they had majority ownership.

Section 2.4. "You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur additional charges or fees in addition to those relating to the core service..."

The property factors referred to the Deed of Conditions which, they said, was quite clear. The property factors, as owners, had an obligation to maintain repair and, where necessary, renew the common parts of the block. They had planned to do the work on the block of which the property forms part in the following year, but there were major water ingress problems in another block, so the programme was moved forward by a year. They already had a tender for another contract, so asked the contractors if they could add Phase 1 of Glenhove Road to it. It had been to an extent opportunistic. Phase 1 was a group of 5 blocks and the property factors had majority ownership.

Normally, they would have had consultation at an earlier stage, but they were having to act quickly in these particular circumstances. Ideally they would have liked a longer lead-in time, but the key block was suffering very significant water penetration and the property factors were, in any event, planning to re-roof the homeowner's block the following year. The property factors felt that the process they had gone through was reasonable in the circumstances.

The homeowner told the Tribunal that he could not see the logic of replacing a flat roof with another flat roof. The consultation process had not been meaningful and he had, in any event, not been given the necessary 7 days' notice of the meeting of 8 June 2017. An emergency in another block had impacted on meaningful consultation. Much as he had disagreed with the meeting of 8 June 2017, he accepted that it was not

possible to change a decision that had already been made, but some measures, such as installing mesh netting, to resolve the problem of seagulls could have been taken and the owners would have been prepared to pay more to see that work done.

The property factors responded that there was no precedent in the area for replacing flat roofs with pitched roofs and to do so would have created delay in obtaining local authority approval and would have entailed additional cost. They accepted that there were issues with nesting seagulls.

Failure to carry out the Property Factor's duties

No further evidence specifically relating to this aspect of the application was led at the hearing.

Closing Remarks

The parties had no closing remarks to add to the evidence they had already given.

The parties then left the hearing and the Tribunal members considered the evidence that they had heard, along with the written representations and other documentation before them.

The Tribunal makes the following findings of fact:

- The homeowner is the owner of the property.
- The property forms part of a block of 6 flats, 4 of which remain in the ownership of Sanctuary Scotland Housing Association Limited.
- The property factors, in the course of their business, manage the common parts of the development of which the Property forms part. The property factors, therefore, fall within the definition of "property factor" set out in Section 2 (1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").
- The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- The date of Registration of the property factors was 12 December 2012.
- The homeowner has notified the property factors in writing as to why he considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
- The homeowner made an application to the Housing and Property Chamber of the First-tier Tribunal for Scotland ("the Tribunal") dated 30 January 2018 under Section 17(1) of the Act.
- The concerns set out in the application have not been addressed to the homeowner's satisfaction.

- On 9 April 2018, the Housing and Property Chamber intimated to the parties a decision by the President of the Chamber to refer the application to a tribunal for determination.

Reasons for the Decision

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 1.1a.B.d of the Code of Conduct. The Tribunal looked closely at the section of the written Statement of Services headed "Other Possible Works". This section related to all works that were not of a reactive maintenance nature, which had been covered in an earlier section. The section in question dealt separately with Cyclical Works, Reinvestment Works and Improvement Works. The Tribunal found that there was a clear definition of each type of work, including possible examples of each and that the process for each was clearly set out. Cyclical Works did not require a majority to agree. For Reinvestment Works, the example given being the complete renewal of a block roof, the property factors would generally seek the prior approval of a majority of owners, failing which they might need to carry out some reactive repairs to preserve the structure of the building and such repairs did not require a majority. Improvement Works could only go ahead with majority agreement.

The Tribunal determined that the written Statement of Services did set out the types of services and works that might be required in the overall maintenance of the block in addition to the core service and, accordingly, held that the property factors had not failed to comply with Section 1.1a.B.d of the Code of Conduct.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 2.1 of the Code of Conduct. The Tribunal noted that the "Reinvestment Works" section of the written Statement of Services states:

"For larger works, an example being the complete renewal of a block roof, we will hold block meetings in advance to comprehensively set out our plans, the indicative costs and what options are available to you for repayment. We will generally seek a majority of owners in the block to confirm their agreement to proceed with these works. However, should we not achieve this, we may need to carry out some reactive repairs to preserve the structure of the building.

"We do not need a majority of owners in the block to agree to these reactive works..."

The Tribunal was satisfied that there was no lack of clarity in this wording and that on close reading, there could be no doubting that the reference to "these reactive works" was to the reactive repairs that might be required if majority agreement was not achieved in relation to major works, such as a roof renewal. The wording was designed to cover the fallback position where a majority did not agree to proposals for such

Reinvestment Works and, although the words appeared in a new paragraph, they were clearly located in the section on Reinvestment Works and the use of the word "these" confirmed that this was a reference to the situation envisaged in the immediately preceding paragraph. There was a separate section on the previous page of the written Statement of Services dealing with Reactive Maintenance Obligations. The Tribunal accepted that the names in the headings of the various types of work might not at first glance seem completely clear, but they were immediately followed by a description and an example. Accordingly, the Tribunal determined that the wording of the written Statement of Services was not misleading and that the property factors had not failed to comply with Section 2.1 of the Code of Conduct.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with the Property Factor's duties. The Tribunal dealt with this element of the homeowner's complaint before determining the application under Section 2.4 of the Code, as the Tribunal's decision on Section 2.4 was dependent on the outcome of its deliberations in relation to the alleged failure to comply with the Property Factor's duties. The essence of the homeowner's complaint was that he had not been given 7 days' notice of the meeting which took place on 8 June 2017. There was no evidence given to contradict the fact that the letter intimating the meeting was despatched on 30 May. The Tribunal was of the view that the property factors were entitled to assume that the letter would be delivered on the next business day, namely Wednesday 31 May or, at worst, Thursday 1 June. The Tribunal held, therefore, that the requirement to give 7 days' notice had been met.

The Tribunal did not uphold the homeowner's complaint under Section 2.4 of the Code of Conduct. The homeowner's argument in relation to this section largely overlapped with his complaint under Section 2.1 of the Code, in that it related to the alleged lack of notice given to him of the meeting of 8 June 2017. He had been unable to attend that meeting and felt that the consultation had been inadequate. He would have suggested replacing the roof of the block with a pitched roof. The Tribunal accepted the evidence of the property factors that there was no precedent for doing this in the area and that local authority consent would have been required and might not have been granted and that there would have been additional expense on top of the delay. The Tribunal noted that the Deed of Conditions relative to the Property did not require written approval for such works, as it provided a mechanism whereby an owner's meeting could be called and, provided the meeting was quorate, it was competent at such meeting "to issue instructions to the Factor with regard to the repairs, renewals, painting or decoration of the common parts". The Tribunal determined that the property factors' written Statement of Services, under the Section headed "Reinvestment Works" complied with the requirements of Section 2.4 of the Code of Conduct, in stating that they would generally seek a majority of owners in the block to confirm their agreement to proceed with such works and, having determined that the necessary 7 days' notice of the meeting of 8 June 2017 had been given by the property factors, the Tribunal held that this meeting constituted the consultation

that is required. It was unfortunate that the homeowner had been unable to attend the meeting, but the property factors had taken the steps required of them under the Deed of Conditions, the written Statement of Services and Section 2.4 of the Code of Conduct. The Tribunal noted the point made by the property factors that they had accelerated the programme of roof replacement and that ideally there would have been a longer lead-in time but held that they did have a procedure for consultation and that they had complied with it.

While the decision of the Tribunal was that the property factors had complied with the Code and had carried out their duties, the tribunal felt that the property factors could have kept the homeowner better informed. They had relied on the fact that they had the majority ownership in the block and as such did not require the homeowner's written authority to proceed with the roof renewal. The Tribunal accepted that this work may have been brought forward due to water ingress elsewhere, but notification of this fact and that roof renewal was imminent could have been given to the owner while costs grant funding from the local authority was being sought.

The Tribunal does not propose to make a Property Factor Enforcement Order.

Appeals

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.

Signature of Legal Member/Chair ..... George Clark Date 8 June 2018