

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (formerly the Homeowner Housing Panel) issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 in an application under section 17 of the Property Factors (Scotland) Act 2011 ('The Act').

Chamber Ref: FTS/HPC/PF/17/0190

20C Inchinnan Court, Inchinnan Road, Paisley, PA3 2RA ('the Property')

The Parties:

Ms Linda Teh Swee Lian Steiner ('the Homeowner')

Apex Property Factor limited, 46 Eastside, Kirkintilloch, East Dunbartonshire, G66 1QH ('the Factor')

Committee members:

Jacqui Taylor (Chairperson) and Elaine Munroe (Ordinary Member).

Decision of the Tribunal

The Tribunal determines that the Factor has not failed to comply with to comply with the property factor's duties.

The decision is unanimous.

Background

1. The Factor's date of registration as a property factor is 1st November 2012.
2. The Homeowner has owned her Property 20C Inchinnan Court, Inchinnan Road, Paisley, PA3 2RA for approximately two years. The title of the Property is registered in the Land Register of Scotland under Title Number REN122958. The Property is part of a development of 45 flats, 15 garages and 1 storage area comprising 14,16,18,20,22,24 and 26 Inchinnan Road, Paisley. Apex Property Factor Limited have factored the Property since May 2012. A Residents Association was formed early in 2017.
2. By application dated 12th May 2017 the Homeowner applied to the First- tier Tribunal (Housing and Property Chamber) for a determination that the Factor had failed to comply with the following sections of the Property Factor Code of Conduct ('The Code') and also failing to carry out the Property Factor's duties.

- Section1: Written Statement of Services.
Section 1.1a (F)
- Section 2: Communications and Consultation.
Sections 2.2

3. The application had been notified to the Factor.

4. By Minute of Decision by Sarah O'Neill, Convener of the First- tier Tribunal (Housing and Property Chamber), dated 29th June 2017, she intimated that she had decided to refer the application (which application paperwork comprises documents received in the period 16th May 2017 to 21st June 2017) to a Tribunal.

5. An oral hearing took place in respect of the application on 20th September 2017 at Wellington House, 134-136 Wellington Street, Glasgow, G2 2XL.

The Homeowner did not attend the hearing but was represented by her solicitor, Lewis Kemp of Harper MacLeod, Solicitors. The Factor was represented by Christine Winning Davidson- Bakshadee, Director; Neil Cowan, Legal Manager and Saira Ali, Property Manager.

As a preliminary matter the Tribunal determined that they would hear the Homeowner's application number 17/0190 together with application number 17/0238, in terms of section 16 The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016.

Lewis Kemp advised the Tribunal that notwithstanding the terms of the Homeowner's application his client was no longer insisting on the alleged breaches of the Code of Conduct and her application was now only in respect of the alleged breaches of the property factors' duties.

The homeowner had produced a copy of the deed of conditions for the development being the deed of conditions by Countsonic Limited registered 9th May 1990 and a copy of the Factor's Written Statement of Services.

Clause Eight of the Deed of Conditions contains the following provisions:-

- The proprietors of any one of the flats, garages and storage area has power to call an owners meeting.
- At least seven days prior notice in writing must be given stating the place and time of the meeting and the subject or subjects for discussion.
- A copy of the Notice of the meeting must be delivered to all relevant proprietors.
- At any meeting any relevant proprietor may be represented by a mandatory.

- The quorum for an owners meeting is 23 (ie one half of those proprietors entitled to attend, 45 in total).
- A majority vote can instruct the matters detailed in the clause.
- Harvey and Donaldson were appointed as the first factors and their appointment would continue until terminated at an owners meeting.
- Written Statement of Services.

The section of the Statement that relates to terminating the Factor is as follows:

'Changing Property Factor.'

If homeowners wish to consider terminating our management service, a meeting of homeowners must be convened. All homeowners within the development must be advised of the proposed termination. In the event that the homeowners entitled to vote to reach an agreement to terminate our service they must notify us, in writing, confirming details of all homeowners in attendance and providing at least three months' notice of termination. They should provide signed mandates from those voting in favour of terminating our management service.'

The details of the application, in respect of the alleged breaches of the Property Factors' duties, and the parties' written and oral representations are as follows:

The Homeowner's complaint:

A letter dated 23rd February 2017 was sent to the Property Factor advising that an owners meeting was held on 8th February 2017 and it resolved to terminate their appointment as property factor in terms of the title deeds. It stated that the decision is effective forthwith and the letter is formal notice to terminate their appointment as property factor on 23rd May 2017 in accordance with their terms of business.

The letter was signed by ten Homeowners and also by Etimon Limited on behalf of the Homeowner and the owners of thirteen other properties.

The Homeowner's complaint is that the Factor has failed to stand down as property factor and consequently they are in breach of their property factors' duties.

Lewis Kemp advised the Tribunal of the background.

He explained that Etimon Limited, on behalf of the Residents Association, wrote to the owners on 17th January 2017 advising them that a residents meeting was being held on 27th January 2017. A copy of the letter was included in the Homeowner's productions. He advised that the letter had been hand delivered to the owners but he was unable to confirm if it had been sent to all of the owners.

Thereafter an owners meeting took place on 27th January 2017. A motion was made and discussed to remove Apex Property Factor Limited as factors of the development but the motion failed.

An email was sent to the owners dated 7th February 2017 attaching Minutes of the meeting which took place on 27th January 2017. The Minutes recorded that the motion had been made to remove Apex Property Factors as factors of the development but the motion had failed as those present at the meeting wanted the matter to be discussed further. The owners were advised that the next meeting was scheduled for 8th February at 6pm at Trident House, 175 Renfrew Road, Paisley.

Following the owners meeting on 8th February 2017 the letter dated 23rd February 2017 was sent to the Factors intimating termination of their appointment. A copy of the recorded delivery slip evidencing delivery of the letter was produced.

Lewis Kemp explained that the letter dated 23rd February 2017 had given the Factor the required period of three months' notice.

Thereafter the Factor wrote to Etimon Limited on 27th February 2017 explaining that the owners' meeting had not been held in accordance with the title deeds and any decision taken at that meeting is invalid and the termination is not effective.

Lewis Kemp advised the Tribunal that he was not sure if a mandate had been signed by the owners that Etimon represented, in terms of their letter dated 23rd February 2017. He submitted that the letter of 23rd February 2017 was sent on behalf of 24 out of 45 owners and consequently it is a majority decision. As such it complies with both the requirements of the Deed of Conditions and the Written Statement of services.

He explained that the Factor has failed to comply with their Property Factor's duties by failing to agree to termination of their appointment as factors.

He asked the Tribunal to uphold the Homeowner's application and make an order of compensation to represent the inconvenience she has suffered as a result of the delay to appoint a new factor.

He advised the Tribunal that he was not aware of there being a constitution of the residents association.

He also advised that there are three ways for the owners to remove the factor.

1. To comply with the provisions detailed for the removal of the factor in the Written Statement of Services
2. To comply with the provisions of the title deeds.
3. By majority vote of the owners or by the overarching vote of two thirds of the owners, in terms of the provisions of the Titles Conditions (Scotland) Act.

He submitted that all of these requirements had been met.

The Factor's response:

Neil Cowan, on behalf of the Factor advised that no evidence had been produced to demonstrate that the letter from Etimon limited dated 17th January 2017 was sent to every owner. If the letter was hand delivered it would not have been effectively intimated to the 26 non resident owners.

Also the email of 7th February 2017 only gave the owners 24 hours notice of the owners meeting taking place on 8th February. Consequently insufficient notice had been given.

Further, the letter from Etimon Limited dated 23rd February 2017 only refers to the termination of the property factor in terms of their title deeds.

The owners meetings held on 27th January 2017 and 8th February 2017 were not held in accordance with the title deeds and were not legitimate as proper intimation had not been made.

The Tribunal's Decision:

The Tribunal acknowledge that the procedure for terminating the Factor's appointment is contained in the Deed of Conditions, the Factor's Written Statement of Services and the Title Conditions (Scotland) Act 2003 and to some extent these provisions overlap.

The Deed of Conditions for the development does not specifically state the procedure to be followed to terminate factors other than the initial factor, Harvey and Donaldson.

The Written Statement of Services sets out the procedure to be followed to terminate the factor:

(a) '*A meeting of Homeowners must be convened.*'

The Written Statement of Services does not explain the procedure to be followed when calling a meeting of homeowners. Accordingly reference must be made to the Deed of Conditions which sets out at clause Eighth the procedure to be followed to call an owners meeting. The requirements for a validly called owners meeting are:

(i) *It must be called by an owner.*

The meeting held on 8th February 2017 had not been called by an owner. It had been called by Sarah Watters of Etimon Limited in terms of her email dated 7th February 2017. The Tribunal understands that Sarah Waters was not an owner of a property

within the development but she represents the company Etimon Limited which lead the residents association.

The Tribunal accept that under the general law of agency there would be no difficulty with an agent of an owner of a property within the development calling a residents' meeting if it is clearly stated that the agent is acting on behalf of a named owner or owners. However the email from Sarah Watters, did not clarify that she was acting as agent and calling the meeting on behalf of a named owner. Further the Tribunal had not been provided with evidence to the effect that Sarah Watters and Etimon Limited were authorised to act on behalf of an owner or owners in calling the meeting. They had not been provided with a copy of the constitution of the residents association, which may have clarified the position.

Accordingly the Tribunal determine that the requirement that the meeting is called by an owner, or a demonstrable authorised agent of the owner, have not been met.

(ii) *A minimum of seven days proper notice in writing must be given.*

The email of 7th February 2017 stated that the residents meeting was taking place on 8th February 2017. The Tribunal determine that the required 7 days notice had not been given.

(iii) *A copy of the notice must be delivered to all relevant proprietors.*

In connection with the email from Sarah Watters of Etimon Property dated 7th February 2017. The Tribunal noted that the email was addressed to info@etimon.co.uk and copied to Sonia@etimon.co.uk. In his submissions Lewis Kemp explained that this email was sent to the owners giving them notice of the residents meeting on 8th February. However, no evidence was produced to the Tribunal to support this. The Tribunal determine that the requirement that the notice must be delivered to all relevant proprietors had not been met.

(b) *'All homeowners within the Development must be advised of the proposed termination.'*

As explained above the email from Sarah Watters of Etimon Property dated 7th February 2017 was addressed to info@etimon.co.uk and copied to Sonia@etimon.co.uk. No evidence was produced to the Tribunal demonstrating that the email had been sent to all of the owners.

Accordingly the Tribunal determined that the requirement that all homeowners within the development must be notified of the proposed termination have not been met.

(c) *'In the event that the homeowners entitled to vote to reach an agreement to terminate the service of the Factors they must notify them, in writing, confirming details of all homeowners in attendance and providing at least three months' notice*

of termination. They should provide signed mandates from those voting in favour of terminating the factor's management services.'

Lewis Kemp advised the Tribunal that the letter dated 23rd February 2017 (production number 4) addressed to Apex Property Factor Limited met this requirement as it had been signed by ten owners and also by Etimon Limited on behalf of fourteen owners and the letter gave Apex Property Factors Limited the required three months' notice. The recorded delivery slip confirming delivery to the Factor on 23rd February 2017 had been produced (production number 5).

However, the Tribunal had not been provided with either a Minute of the meeting which took place on 8th February 2017, a sign in sheet for the meeting, an Agenda for the meeting or signed mandates by the owners authorising Etimon Limited to sign on their behalf.

Consequently no evidence had been produced evidencing the homeowners who attended the meeting on 8th February 2017. Also no evidence had been produced evidencing that Etimon Limited had authority to sign the letter dated 23rd February 2017, on behalf of the fourteen named owners.

For the reasons stated the Tribunal determine that the terms of the letter to the Factor dated 23rd February 2017 does not effectively terminate the appointment of the Factor.

The Tribunal acknowledge that separately, the Title Conditions (Scotland) Act provides that the rules for terminating the appointment of a property factor are contained in the title deeds, failing which the decision is made by a simple majority (Section 28(1)). As explained above, the Deed of Conditions does not set out the rules to be followed to terminate the Factor. Consequently in terms of the Title Conditions (Scotland) Act a simple majority may terminate the appointment of the Factor. However, as stated the Tribunal does not find the letter to Factor dated 23rd February 2017 to be evidence of a majority decision as the signed mandates by the owners authorising Etimon Limited to sign on their behalf have not been produced.

As the homeowners have failed to comply with the provisions in the Written Statement of Services for the termination of the Factor, the terms of clause Eighth of the Deed of Conditions in respect of calling the proprietors meeting and no evidence having been produced to the effect that Etimon have authority to sign the letter terminating the Factor's appointment on behalf of the specified proprietors the Tribunal determine that the Factor has not breached their property factor's duties.

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.

J Taylor

Signed ...

Date 7th October 2017

Chairperson