



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

Chamber Ref: FTS/HPC/PF/23/0337

Re: Property at Flat 5E, Balgray Court, 33 Cleveden Drive, Glasgow, G12 0SD ("the Property")

Parties:

Alastair Baird, residing at Flat 5E, Balgray Court, 33 Cleveden Drive, Glasgow, G12 0SD ("the Applicant")

Newton Property Management Limited, 87 Port Dundas Road, Glasgow G4 0HF ("the Respondent")

Tribunal Members:

Jim Bauld (Legal Member)

Andrew McFarlane (Ordinary (Surveyor) Member)

Introduction

1. By application dated 31 January 2023 the Applicant applied to the Tribunal alleging breaches of certain sections of the Code of Conduct for Property Factors issued in terms of the Property Factors (Scotland) Act 2011 ("the 2011 Act")

2. The applications were accepted and referred to a Tribunal for determination and a Case Management Discussion was set to take place on 4 October 2023 via telephone case conference.

Case Management Discussion

3. The Case Management Discussion (“CMD”) took place on 4 October 2023 telephone case conference. The applicant was in attendance along with his wife, Mrs Lesley Baird, who is the co-owner of the property. The property factor was not in attendance nor represented. They had lodged written representations prior to the CMD.
4. After the CMD, the tribunal issued a note to the parties setting out the issues which had been raised at the CMD, deciding that a hearing should be held and directing that certain documents should be lodged.

The hearing

5. The hearing proceeded on 15 January 2024 in the absence of the respondent.
6. Subsequent to the hearing the tribunal issued a further note indicating it was not in a position to make a final decision and requesting that the respondent provide additional written submissions.
7. By email dated 14 March 2024, the respondent provided further written submissions. These submissions were forwarded to the applicant. No additional response has been received from the applicant.

The issues raised by the applicant

8. As set out in the note which followed the CMD, the applicant’s complaint was noted as being based on alleged breaches based on two sections of the Code, namely sections 6.3 and 6.6. The tribunal had proceeded on the assumption that application had been raised based on alleged breaches of the current revised version of the Code, effective from 16 August 2021. Those sections in the current version of the Code are in the following terms.....

6.3 A property factor must have in place procedures to allow homeowners to notify them of matters requiring repair, maintenance or attention.

6.9 If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) must be made available if requested by a homeowner.

9. After the CMD and at the hearing it became clear that the sections of the Code that the applicant believed were being breached were sections 6.3 and 6.9 as set out in the original 2012 Code.

10. The sections in the original 2012 Code are in the following terms.....

6.3 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.

6.9 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.

11. The tribunal notes that the relevant provisions of sections 6.3 and 6.9 of the 2012 Code now appear to be incorporated within sections 6.6 and 6.12 of the 2021 Code. Those sections in the current version of the Code are in the following terms.....

6.6 A property factor must have arrangements in place to ensure that a range of options on repair are considered and, where appropriate, recommending the input of professional advice. The cost of the repair or maintenance must be balanced with other factors such as likely quality and longevity and the property factor must be able to demonstrate how and why they appointed contractors, including cases where they have decided not to carry out a competitive tendering exercise or use in-house staff. This information must be made available if requested by a homeowner.

6.12 If requested by homeowners, a property factor must continue to liaise with third parties i.e. contractors, within the limits of their 'authority to act' (see section 1.5A or 1.6A) in order to remedy the defects in any inadequate work or service that they have organised on behalf of homeowners. If appropriate to the works concerned, the property factor must advise the property owners if a collateral warranty is available from any third party agent or contractor, which can be instructed by the property factor on behalf of homeowners if they agree to this. A copy of the warranty must be made available if requested by a homeowner.

12. The tribunal accordingly notes that the complaints raised in this application are correctly to be noted as alleged breaches of sections 6.6 and 6.12 of the 2021 Code and proposes to allow the application to be amended to reflect the correct position.

Discussions at the hearing

13. At the hearing, which proceeded on 15 January 2024, both Mr and Mrs Baird were present. The property factors were neither present nor represented.

14. The tribunal proceeded with the hearing in the absence of the respondents.
15. The tribunal asked various questions of Mr and Mrs Baird.
16. It was noted that the title deed to the property which had now been produced to the tribunal clearly indicated that the Balgray Court proprietors association (“BPCA”) was not formed in accordance with any requirement of the title deeds and has no apparent standing in terms of the title deeds to instruct or authorise works.
17. The provisions of the title deeds make it clear that any single owner can call a meeting of proprietors and that at such a meeting, any required works of repair or maintenance to the common parts of the development can be instructed by a majority of proprietors present at such a meeting. The title deeds indicate that the quorum for such a meeting is 5 proprietors.
18. It was noted that the parties had not lodged copies of the minutes of all and any meeting of the BPCA which would have allowed the tribunal to consider whether such gathering constituted a “meeting of owners” in terms of the title deeds and whether any decision at such a meeting could be regarded as having been taken in accordance with the deeds.
19. In the absence of the property factor, it was not possible for the tribunal to make full and detailed enquiries into the decisions made at the BPCA meetings and whether or not the factor had been properly and correctly instructed.
20. Shortly after the hearing had concluded Mr and Mrs Baird submitted a further e-mail to the tribunal with additional documents which have since been passed to the property factor.
21. Prior to receiving these documents, the tribunal had not yet come to a final determination on the issues before it in this application.

22. Having reviewed the additional documents received, the tribunal determined that it was not in a position to decide whether the property factor had breached any relevant aspect of the code as alleged by the applicant without allowing the property factor an opportunity to respond to the information contained in the additional documents.
23. Taking into account the tribunal's overriding objective "to deal with proceedings justly", the tribunal was willing to allow the property factor a further opportunity to provide written submissions in response to the matters raised by the applicant in his additional written submissions and in the discussions at the hearing.

Decision and Note issued after the hearing

24. The tribunal therefore requested that the respondent provided any appropriate response to the matters raised in the additional documents. The tribunal allowed a period of approximately four weeks for any response to be made and directed that any response should be lodged no later than 15 March 2024.
25. The property factor was also requested to provide submissions on whether the meetings of the BPCA should be treated as meetings of the owners of Balgray Court as allowed by the title deeds and if so, whether any decision were made at such meetings which can be properly regarded as binding on all owners in terms of the provisions of the title deeds. It was indicated that it would be helpful if relevant evidence of such decisions, possibly from minutes of appropriate meetings were produced, setting out the manner in which the issue was debated and decided.

Further representations from the respondent.

26. The respondent has indicated in response to the question at paragraph 16 above in the following terms.... *"there is no specific clause contained within the Title Deeds citing the requirement that a Committee be formed. This, however, does not prevent the collective ownership from forming a Residents Association and Committee, as long as agreement for the same is obtained in line with the Title Deeds, which is the case for Balgray Court. We presume that in terms of clause fifth of the Deed of Conditions dated 17/09/1981, that a quorate meeting was previously held and a regulation was made which was binding on all proprietors, which constituted that the Proprietors Association Committee laid down the rules for the community and said rules are reinforced on an annual basis via quorate"*

attendance at the co-proprietors AGM, as is quite normal in these circumstances. We are aware through the Balgray Court Proprietors Association Committee that the Balgray Court Proprietors Association is a bona fide voluntary organisation of proprietors founded in 1981. It has a legitimate Constitution and Code of Conduct and works in association with, and through the Title Deeds. It is inclusive to Balgray Court and welcomes all owners. The BCPA Committee is elected on an annual basis, in line with the decision making process set out within the Title Deeds”..

27. The respondent has indicated in response to the question at paragraph 17 above saying that should a meeting of owners be called, as long as the meeting is quorate, then decisions can be made by way of a majority vote.
28. The respondent has indicated in response to the question at paragraph 18 above in the following terms..... “*Newton Property Management Ltd have only been in place as the Factor for the development since December 2020. As part of our previous submission to the Tribunal, we provided minutes of the AGMs which have taken place since our appointment. For the avoidance of doubt, please find these enclosed as Submission 2 and 3. Within these minutes you will note that the Proprietors Association Committee were voted back into place, by the majority of those owners present at these meetings. We also previously provided you with ballot papers from owners who were unable to attend the 2021 AGM, for the re-election of the Balgray Court Proprietors Association Committee in 2021. Please find these ballot papers enclosed again as Submission 4. These ballot papers, alongside the owners who attended the 2021 AGM voted the Proprietors Association back into power by way of a majority vote. The AGM is called by the chair of the Proprietors Association Committee each year, who is an owner. All owners are then invited to the same by Newton Property Management Ltd (postal mail or email depending on owner preference) and if the meetings are quorate, as all AGMs since our appointment have been, decisions are taken on matters by way of a majority vote. As such, each AGM has been convened in line with the Title Deeds”*
29. The respondent has indicated in response to the question at paragraph 19 above in the following terms..... “*We specifically requested that the Committee rely on our comprehensive and detailed written submission. We previously provided minutes from each of the AGMs held during our period as Factor, noting the owners present and the proxy votes received, showing that the meetings were quorate on each occasion. These minutes also note agreement by the owners to re-elect the Proprietors Association Committee. In our view, this documentation*

shows clearly that the Proprietors Association Committee has been elected in the correct manner, in line with the Title Deeds. We previously provided the Tribunal with a letter from Ferguson Whyte Solicitors, as well as ballot papers from owners for electing Newton Property Management Ltd as the Property Factor from 2020. The letter from the solicitor notes that 27 proprietors voted in favour of appointing Newton Property Management Ltd as the Factor. This is a majority of the 45 owners within the development and as such, shows that we were appointed correctly.”

30. The respondent has indicated in response to the question at paragraph 25 above in the following terms... “*As noted above, each AGM is called by the chair of the Proprietors Association Committee, who is an owner. All owners are then invited to the same and if the meetings are quorate, decisions are taken on matters by way of a majority vote. We can confirm that any decisions made during these Annual General Meetings are done so through discussion among the parties present. A vote is then called, and those who are in agreement are asked to indicate this via a show of hands, as is usual at these types of meeting. As the outcome of the claimant’s complaint appears to rely on the Tribunal determining if the Balgray Court Proprietors Association Committee has been appropriately formed, the claimant Mr Baird, given that he was previously the Chairman of the BCPA Committee prior to our appointment as Factor, may be better placed to provide the information which you seek. We understand from previous Tribunal cases that it is within the powers of the Tribunal to authoritatively cite a member of the current BCPA Committee to appear as a witness to substantiate our response, and as all of these matters, including the apparent breakdown in community relations which is at the heart of this matter is central to this discussion, it appears to us not only desirable but necessary for the Tribunal to have the claimant, a member of the BCPA Committee and our office all appear, to bring this matter to a swift resolution. In closing, we find it perplexing that the complainant, who is a former Chair of the BCPA Committee now believes that said Committee has no standing, despite previously being complicit within the governance process of which he himself was party to and complied with”*

Discussion and decision

31. The tribunal have carefully considered the additional written submissions received from the respondent together with the written representations received prior to the hearing.

32. Having considered the entirety of the evidence contained both in the written documentation provided by both parties, and from the oral evidence presented by the applicants at the hearing, the tribunal has decided that it cannot find that the respondents have breached any element of the Code of Conduct for property factors.
33. The property factor appears to have been appropriately appointed by a decisions made at a meeting of owners which was held in conformity with the terms of the title deeds to the property. A meeting of owners has the power to appoint a factor and to instruct that factor to undertake the various duties and responsibilities regarding the organisation of repairs and ongoing maintenance to the development. The evidence which has been presented indicates that the meetings of the BPCA is a “meeting of owners” in accordance with the title deeds. Whether BPCA as an owners association is properly constituted and empowered as an association to instruct the respondent is not a matter for this tribunal to determine. The deeds allow a meeting of owners to take and make decisions regarding issues of common repairs and maintenance of the development. That has seemingly been done appropriately. Minutes of the AGMs of BPCA are effectively minutes of meetings of owners. They have been properly called and are quorate in terms of the title deeds. As pointed out by the respondent, the applicant himself had no issue with being part of the BPCA committee and had no problems with such meetings making decisions at that time. The decisions made at the meetings are within the competence of the owners of Balgray Court as a whole and they have properly instructed the respondent to act as factor.
34. The tribunal does not accept that the respondents have breached the code of conduct. The complaints made by the applicant relate to the instruction of works to replace the water pump in the basement plant room of the block and the removal and replacement of a partition wall.
35. The tribunal accepts that in arranging these works the respondent did take steps to ensure that a range of options for the repairs were considered and that appropriate professional advice was taken. There is no evidence to suggest that any of the work undertaken is defective and accordingly there is no requirement on the part of the respondent to liaise with contractors to remedy any defects.
36. The situation where the applicant believes the works should have been done differently or other contractors should have been instructed does not mean that the respondents have failed to comply with the code. They have acted in

accordance with instructions from the owners of the block, carrying out decisions made by those owners at appropriately constituted meetings in accordance with the title deeds. This title deeds have conditions which bind the various owners and create obligations between the owners in respect of the common upkeep and maintenance of the block.

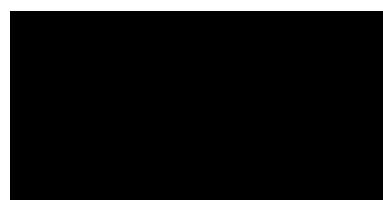
37. Accordingly, the tribunal has determined that there are no breaches of the current Code of Conduct, and the tribunal will make no further order in respect of this application.

Decision

The tribunal has therefore decided to make no further order in respect of this application and the application is dismissed.

Right of Appeal

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.



02 May 2024

Legal Member

Date