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 2017, in an application made to the Tribunal under Section 17 of the Act

Chamber reference: FTS/HPC/PF/19/2034

The Parties:

Mr Adrian Lo Negro Christensen, 14 Edgar Street, Dunfermline, Fife KY12 7EY ("the homeowner")

And

Newton Property Management Limited, incorporated in Scotland under the Companies Acts (SC224378) and having their registered office at 87 Port Dundas Street, Glasgow G4 0HF ("the property factors")

Tribunal Members – George Clark (Legal Member/Chairman) and Helen Barclay (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.

Decision

The property factors have not failed to comply with their duties in terms of the Code of Conduct made under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act"). The property factors have not failed to carry out the Property Factor's duties.

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

The Decision is unanimous.

Introduction

In this decision, the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code of Conduct" or "the Code"; 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 1 November 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 received on 1 July 2019, with supporting documentation, namely a copy of the Written Statement of Services and copies of e-mails between the Parties between August 2018 and March 2019, and written representations from the property factors, received by e-mail on 15 August 2019.

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 Written Statement of Services was written in jargon, with confusing terminology and was unintelligible to a normal well-deducated person. He did not understand what additional charges he might be responsible for, including drawing of parking lines on the development communal car park (he had his own parking spaces), or the fence, bordering the communal car park, on the side of his house. He said that the property factors had not provided details of any other possible costs which might be incurred, as they had said that these were *ad hoc* and had not happened yet. The e-mails he had received from the property factors had not answered his questions. The Written Statement of Services was not clear and transparent The fact that invoices had not contained any additional charges was not satisfactory in exemplifying the possible additional charges which might be incurred, as evidenced by the "power washing" charge. If the property factors were able to charge for this, there were any number of things that they might be able to charge for and they were refusing to acknowledge what these might be. He felt that the correspondence from the property factors had been condescending and they had failed to respond within prompt time scales and he was seeking an apology for this. The homeowner also wanted to be compensated for the time that he had to spend on bringing forward his complaint and the emotional frustration caused by the property factors, and to leave

the management arrangement with the property factors, as they had failed to provide the management services for which he had been charged in their Management Fee.

The homeowner's complaint was that the property factors had failed to comply with Sections 1A, B and F, 2.4 and 2.5 of the Code of Conduct and had failed to carry out the property factor's duties.

(b) By the property factors

The following is a summary of the written representations made by the property factors and received by the Tribunal on 15 August 2019:

They had provided the homeowner with a written Statement setting out in a simple and transparent way the terms and service delivery standards. Core services were set out in Section B of the Written Statement of Services. The Deed of Conditions detailed the communal parts of the development to be maintained and the title plan attached to it set out the boundaries of the communal development area. The common charge apportionment schedule set out the areas of the development which were serviced and maintained and gave the fractional shares payable by each homeowner. In the present case it was a 1/87th share, as the homeowner owned a townhouse not an apartment, of the cost of maintenance of all common development parts located in the communal grounds as per the Deed of Conditions. Such parts would include the site boundary fence and walls but would exclude any private property such as fencing incorporated within the private gardens of the townhouses. The homeowner's title deed would state the boundary of his private property and any private items included therein.

The majority of the maintenance works to the common development parts were effected through the standard Ground Maintenance Specification which had been supplied to the homeowner. On the rare occasion that works to the hardstanding areas such as power washing were instructed, they were jobbing repairs to a nominal value. Works of a substantial nature, or which would incur a more significant cost, would be notified to the homeowners concerned in advance, except in the case of emergency repairs. The Deed of Conditions did not contain a financial threshold for communal repairs above which specific consents were required.

The process by which the factoring arrangement could be ended was detailed clearly in Section F of the Written Statement of Services, including signposting to the relevant legislation and the burdens within the title deeds.

In relation to the complaint under Section 2.4 of the Code of Conduct, the property factors did not instruct any works or services in addition to maintenance of the common parts facilitated by their core administrative services. The homeowner had referred to jet washing of the communal lanes which access the rear of the townhouses. This had involved the cleaning of a development common part in terms

of the Deed of Conditions and, as such, was facilitated by their core service and accordingly, had been divided by 87 owners.

As regards Section 2.5 of the Code of Conduct, the property factors tried to get back to customers by e-mail within a working week and it should be apparent from the detailed copy correspondence submitted by the homeownere that at no time were they neglectful of his attention and indeed their most senior employee had taken on the matter from the property manager and had offered to meet with the homeowner.

The property factors stated that their Written Statement of Services set out that their services were given through the management contract as detailed in the Deed of Conditions. It was for homeowners to familiarise themselves with the burdens placed on them through their ownership. These were burdens placed on each proprietor, not the property factor, who acted as an agent for the co-owners.

The property factors believed that the root of the issue in this case was clearly a misunderstanding concerning the definition of core services. They were the professional administrative services that they provided to help co-owners maintain their common property, or specifically the "land" as defined in the Code of Conduct. Core services led on to maintenance which was derived and facilitated by the core services. The Deed of Conditions stated what was a common development part and what was to be maintained, and empowered the factor to instruct repairs on behalf of the co-owners and recover costs.

Finally, the homeowner had expressed his desire to leave the factoring agreement. This option would be available to be exercised via a meeting of the co-owners, convened in terms of the Deed of Conditions.

The Hearing

A hearing took place at Fife Voluntary Action, Kirkcaldy on the morning of 13 September 2019. The homeowner was present at the hearing. The property factors were represented by two of their Directors, Mr Martin Henderson (an Executive Director) and Mr Derek Macdonald.

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.

The homeowner told the Tribunal that he could not understand the arrangements set out in the Written Statement of Services. It was unintelligible to him and was certainly not clear with regard to "core services". The phrase "core services" was not actually used in the document and when he had asked about it, the property factors had sent

him the Ground Maintenance Specification. The property factors responded that the core services were the maintenance of the common parts of the development.

The homeowner then said that there had been a few questions that he had had which had not been answered and he gave the example of the fence at his property which backed on to the parking area. This could easily have been answered at an earlier stage within a reasonable response to his enquiries.

The property factors stated that they would always make every effort to answer any point. The last thing they wanted was for a homeowner to feel he had to come to the Tribunal. Their role, as they had tried to explain, was limited in relation to the homeowner's property, as it was a townhouse and not a flat. They were happy to arrange a further meeting after the Hearing, if that was required to further explain the situation to the homeowner.

The homeowner said that four e-mails had not been responded to within the 5 day period set out in the Written Statement of Services. His e-mail of 30 August 2018 had been answered on 11 January 2019, he had had no substantive response to his e-mail of 18 December 2018. His e-mail of 1 January 2019 had not been answered until 26 February 2019 and he had had no response to his e-mail of 29 March 2019.

The property factors' response was that there had been a period over Christmas and New Year that holidays had got in the way and the homeowner accepted that. The property factors had also regarded the e-mail of 29 March 2019 as being rhetorical and not requiring any response, but they accepted there had been a delay in responding to the e-mail of 30 August 2018.

The homeowner said that, as the property factors were not complying with the Code of Conduct, he needed to get out of his contract with them.

In their closing remarks, the property factors repeated that they never wanted to be at odds with anyone and they were happy to sit down with the homeowner to explain to him his obligations in relation to the maintenance of common parts

The homeowner stated that when he had been given a copy of the Ground Maintenace Specification, he had assumed it was comprehensive. There had been no mention previously that he might find some of the answers in the Deed of Conditions. Had it been referred to last year when he raised the issues, the matter would never have gone as far as a Tribunal Hearing. He contended that the Written Statement of Services should at least have given instances of things that might require to be done over and above the core service. He referred to delineation marking in the car park area, but the property factors responded that this had not been done and was not planned. They had carried out some additional planting after a bin lorry collided with a wall, but that had been completely unforeseeable and it was not possible for the Written Statement of Services to predict every possible scenario in which work might be required.

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

Findings of Fact

The Tribunal makes the following findings of fact:

- The homeowner is a homeowner within the Nethertown Broad Street, Dunfermline development.
- The property factors, in the course of their business, manage the common parts of the development. 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 1 November 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") received on 1 July 2019 under Section 17(1) of the Act.
- The concerns set out in the application have not been addressed to the homeowner's satisfaction.
- On 29 July 2019, 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

Section 1A of the Code of Conduct states that the written Statement of Services should set out, where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation.

The Tribunal did not uphold this ground of complaint, as there is no level of delegated authority set out in the Deed of Conditions.

Section 1B of the Code of Conduct requires that the Written Statement of Services should set out the core services that the property factors will provide, including 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 Tribunal did not uphold this ground of complaint. The view of the Tribunal was that the Ground Maintenance Schedule was simple and transparent. The Written Statement of Services covered the entire development, which was a mixture of flats and townhouses and, as it was a contract which had to comply with legislation, it was more complicated than a lay person might expect, but it was clear that it delegates to the property factors maintenance of the common parts. Given that the development includes blocks of flats, it was inevitable that it extends beyond the Ground Maintenance Specification, as it would have to cover the common parts of those buildings, such as the roof, common passages and stairs and stair lighting. The view of the Tribunal was that the Written Statement of Services in this case was not untypically complex.

The view of the Tribunal was that power-washing of pathways was part of the core service, as that is designed to include the obligation to maintain common parts under the Deed of Conditions and it is reasonable to assume that power-washing might be required from time to time, but even if the Tribunal's view had been that it was not part of the core service, the Tribunal would have regarded it as falling within the ambit of emergency work, as it had been necessary to reduce the risk of homeowners slipping and falling.

Section 1F of the Code of Conduct requires that the Written Statement of Services should include clear information on how to change or terminate the service arrangement.

The Tribunal did not uphold this ground of complaint. There is a section of the Written Statement of Services entitled "How to End the Arrangement" which sets out clearly the ability of the homeowners to terminate the agreement and the steps they must take in order to do so. The information includes signposting to the applicable legislation. The contention of the homeowner was that he should be permitted to end the agreement as regarded his own property, but the Tribunal completely disagreed with that view. The title deeds (Deed of Conditions) will often set out the basis on which a group of homeowners may dispense with the services of a property factor and, if the title deeds are silent, the position is covered by legislation, but such decisions can only be made by whatever majority is set out in the Deed of Conditions or the relevant legislation. Individual homeowners cannot unilaterally opt out of a factoring agreement.

Section 2.4 of the Code of Conduct states that property factors must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where the

property factors can show that they have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold.

The Tribunal did not uphold this ground of complaint. The Tribunal understood that the essence of the homeowner's argument was that the property factors would not provide him with a list of possible items that might fall outwith the core service. The view of the Tribunal was that this was an impossible task to impose on property factors. In this case, they provided a detailed Ground Maintenance Specification, but the role of the property factors was to organise, instruct and carry out repairs and maintenance of the common parts of the development, as defined in the Deed of Conditions, and it would not be reasonable or indeed possible for property factors to predict all additional matters that might arise during the contract. The reassurance that the homeowner sought was to be found in Section 2.4 of the Code of Conduct, namely that where such a matter did arise, the property factors must have a procedure to consult with the group of homeowners and seek their approval in advance of such work being carried out. Clause xiv of the Written Statement of Services contains the necessary information as to the property factors' procedure for obtaining consent for extraordinary works.

Section 2.5 of the Code of Conduct provides that property factors must respond to enquiries and complaints received by letter or email within prompt timescales. Overall their aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if they require additional time to respond.

The Tribunal did not uphold this ground of complaint. The property factors had accepted that there had been a delay in responding to the homeowner's e-mail of 11 August 2018 and the homeowner had accepted that the delay in replying to his e-mail of 18 December 2018 had been attributable to the Christmas holiday period. The Tribunal noted that there had been extensive e-mail correspondence between the Parties, almost all of which had been dealt with timeously. The one failure identified had been acknowledged by the property factors, who had confirmed that they had since addressed the matter with their staff. In all the circumstances, the Tribunal was not prepared to deal with a one-off failure in communication as constituting a failure to comply with the Code of Conduct

Failure to comply with the property factor's duties

The homeowner had also complained that the property factors had failed to comply with the property factor's duties. The homeowner did not provide any evidence specific to this element of the complaint, but the Tribunal was satisfied that all the matters complained of had been dealt with under the various Sections of the Code of Conduct.

Having determined that the property factors had not failed to comply with the Code of Conduct or with the property factor's duties, the Tribunal did not propose to make a Property Factor Enforcement Order.

The Tribunal felt that the homeowner did not understand the interaction between the Written Statement of Services, the title deeds, Deed of Conditions and legislative requirements and expressed the hope that his concerns could be allayed by a meeting which had, at the Hearing, been offered by the property factors.

Decision

The property factors have not failed to comply with their duties in terms of the Code of Conduct made under Section 14 of the Property Factors (Scotland) Act 2011. The property factors have not failed to carry out the Property Factor's duties. 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 Chair . George Clark ..... Date 13 September 2019