Housing and Property Chamber
First-tier Tribunal for Scotland

First-tier Tribunal for Scotland (Housing and Property Chamber)

Decision Property Factors (Scotland) Act 2011: Section 19, The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017: Rules 16 and 44

Chamber Ref: FTS/HPC/PF/19/2269

78 Braehead, Methven Walk, Dundee, DD2 3JF ("The Property")

The Parties:-

Miss Camilla Johnston, 78 Braehead, Methven Walk, Dundee, DD2 3JF ("the Homeowner")

Ross and Liddell Ltd, Unit 19, City Quay, Camperdown Street, Dundee, DD1 3JA ("the Property Factor")

Tribunal Members:
Martin J. McAllister, Solicitor, (Legal Member)
Michael Scott, Chartered Surveyor, (Ordinary Member)
(the "tribunal")

Background

This is an application by the Homeowner regarding alleged failures of the Property Factor to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors and the property factor's duties. The application was accepted for determination on 5th September 2019 and subsequently passed to members of the tribunal. A Hearing was fixed for 5th November 2019. Mr Michael Ritchie, solicitor, submitted written representations on behalf of the Property Factor on 2ND October 2019.

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 is referred to as "the Code"; the First-tier Tribunal for Scotland Housing and Property

Chamber (Procedure) Regulations 2017 are referred to as "the Regulations," the First-tier Tribunal for Scotland (Housing and Property Chamber) is referred to as "the Tribunal," Ross and Liddell Ltd are referred to as Ross and Liddell and the development in which the Property is situated is referred to as " the development."

A Hearing was held in Dundee Carers Centre on 5th November 2019.

The Homeowner was present and gave evidence.
The Property Factor was represented by Mr Michael Ritchie, Solicitor. Gavin Baird, an employee of the Property Factor, was present and gave evidence.

Preliminary Matters

The Homeowner had lodged an undated letter from Ms Miriam Rennett, solicitor addressed to "To Whom It May Concern", a few days prior to the Hearing and Mr Ritchie confirmed that he had no objection to it being before the tribunal. The day before the Hearing Mr Ritchie had lodged a letter from Ross and Liddell to Messrs RSB Lindsays, solicitors, dated 19th August 2019 together with a copy of email exchanges between Ms Rennett and Mr Alan Baillie of Baillies Law, solicitors. Mr Ritchie helpfully provided copies at the Hearing. The Homeowner confirmed that she had no objection to these documents being before the tribunal.

Matters of Agreement

Parties helpfully spent some time advising the tribunal of matters on which there was agreement:

The Property is situated in a development of 78 flats. It is a converted mill. The Homeowner has lived in the Property since 2003 when she took up a tenancy and in 2005 she bought the Property from her landlord.

There were originally 74 residential units in the development and a Deed of Conditions was put in place to deal with the responsibility of common charges. This Deed of Conditions was registered in the General register of Sasines on 15th June 1994. It seemed to be the intention that there would be commercial units in the development but at some point it was decided that four more residential units would be created. As a consequence of this, a Supplementary Deed of Conditions was recorded in the General Register of Sasines on 15th August 2019.
The Supplementary Deed of Conditions set out the proportion of common repairs to be met by each residential unit and contains a list of addresses numbered 1-74 and there are four additional flats referred to as GF Extra, FF Extra, SF Extra and AF Extra. Against each flat there is a floor area allocated and also a percentage allocated to each flat in respect of its share of common charges/maintenance. The Homeowner lives in a ground floor flat which has a postal address of 78 Braehead and is one of the additional flats. Parties agreed that the four additional flats are situated over four floors and that the ground floor flat is numbered 78, the first floor flat is numbered 77, the second floor flat is numbered 76 and the top floor flat is numbered 75. Parties agreed that the flat on the top floor has hitherto never been completed. It is useful to

set out the floor areas and proportionate share of common charges allocated to the additional flats as detailed in the Supplementary Deed of Conditions:

	Gross Internal Area of Dwellinghouse	Percentage for Maintenance
GF Extra	100.75	1.52
FF Extra	48.35	0.73
SF Extra	48.35	0.73
AF Extra	121.60	1.83

Written Representations by the Property Factor.

The representations set out the history of development of the flats which coincides with the foregoing matters agreed by the parties.
It is stated that the Property Factor took over the management of the development on or around August 2005.

The representations state that the allocation of postal numbers for the development is as follows:

GF Extra -75
FF Extra- 76
SF Extra - 77
AF Extra - 78

The representations state that the Homeowner's flat was allocated a share of common charges at 1.83% and that common charges accounts were sent by the Property Factor to the Applicant in the period from 2005 and that these were paid. It is stated that no issue was raised in relation to allocation of common charges prior to the Property Factor receiving a letter from Messrs Campbell Boath, the Homeowner's solicitors, on 6th March 2019. This letter (Production 2) stated:
"Having perused the Title Deeds, we are of the view that there is a questionable liability to contribute towards the maintenance of the common parts.....Be that as it may, we consider the flat to be of the type "GF Extra" as described in the deed of Conditions."

The representations stated that the Property Factor and Homeowner corresponded on the matter between March and July 2019 and that the Property Factor's position is as set out in the letters to the Homeowner from Mr Andrew Cunninghame, director and Mrs Irene Devenney, managing director dated respectively 8th May and 5th July both 2019. These letters stated that it was not possible for the Property Factor to swap the liability between flats 75 and 78, that advance agreement from co- proprietors would be needed, that a change could only be considered if it is clearly demonstrated that there is a manifest error in apportionment. The latter later states that the Homeowner has not supplied sufficient evidence to support her position that the apportionment should be changed.

The representations state that the Property Factor's position is that there is no evidence on which it could conclude that there is an error in the percentage allocation of common charges. Mr Ritchie's representations state that the minimum that the Property Factor would require to do is undertake a measurement of both flat 75 and 78 to establish a clear correlation between any differences in floor area. The representations make reference to a proposal of the Property Factor to instruct an independent building surveyor to measure the four flats referred to in the Supplementary Deed of Conditions and that a determination could then be made as to whether or not there is a possible misallocation of common charges. The representations state that, for this to happen, agreement would require to be obtained from all affected owners and that the cost of the survey would require to be met. The representations state that the Homeowner has not provided a detailed response to the proposal made by the Property Factor.

The representations state that the Property Factor does not accept that it has communicated with the Homeowner in such a manner as to be in breach of the terms of Section 2.2 of the Code, that it has lodged all relevant correspondence with the Tribunal and that this demonstrates that there is nothing which could be considered to be abusive, intimidating or offensive.

The representations state that the application before the tribunal only states that the Property Factor has refused to resolve or unreasonably delayed in attempting to resolve the homeowner's concerns and that it does not make reference to any specific property factor's duty which the Property Factor has breached.

In summary, the representations state that the Homeowner has made a complaint and that the Property Factor has advised that it is prepared to investigate it and has put forward a proposal to the Homeowner in an attempt to try and resolve matters.

Evidence

Mr Baird thought that it would be helpful for the tribunal to know the current position about number 75. He said that this top floor flat which he referred to as the attic flat had never been completed. He said that he had heard "through the grapevine" that the flat had recently been sold and he referred to the letter from Ross and Liddell to RSB Lindsays dated 19TH August 2019 (Production 9) which he said was sent in response to a request from them enquiring about the factoring position. He said that the Property Factor had not been formally advised of a sale.

It is useful here to set out the terms of that letter:
"We thank you for your letter dated 5th August, 2019 and confirm that we shall arrange to apportion the Common Charges once we have been advised of the date of sale. Your client will incur an apportionment fee of £80 and vat on the final account which we will endeavour to issue within three months of the date of sale, subject to all supplier invoices being received.
We confirm that common charges apportioned against Flat 75 is 1.52%." The letter went on to deal with the common insurance policy.

Mr Baird said that the Property Factor had unsuccessfully tried to recover common charges from the owner of the attic flat and had got to the point of raising court action

which had then been abandoned because of uncertainties of liability and chances of recovery. He said that the proprietors had been advised of this at a meeting and that the debt of the attic flat had been spread amongst all the co-proprietors. He said that the issue had been around whether or not the flat constituted a dwelling house because it had not been completed and was an empty shell. Mr Baird said that Ross and Liddell had been provided with the Homeowner's Home Report and that the Homeowner had raised an issue about the allocation of common charges to her property.

The Homeowner explained that she had obtained a Home Report for the Property and the tribunal was referred to an excerpt from the Home Report dated 1st October 2019 which gave the area of the Property as 94 square metres. Miss Johnston said that the allocation for common charges for her flat was based on a floor area of 121 square metres. She said that she believed that the charges which she was being asked to pay were calculated in error. Miss Johnston directed the tribunal to the Supplementary Deed of Conditions and she said that she believed that her flat, number 78, was being charged on the basis that it was the flat AF Extra with a share of the common charges which she said was 1.83% whereas it should be charged in accordance with the percentage allocated to the flat described in the Supplementary Deed of Conditions as GF Extra which is 1.52%. She said that the figure stated in the Home Report of 94 square metres was closer to 100.75 square metres than 121.6 square metres.

Miss Johnston said that she believed that her flat was the flat described in the Supplementary Deed of Conditions as GF Extra i.e. Ground Floor Extra and that her flat was not AF Extra i.e. Attic Flat Extra. Miss Johnston said that she wanted matters rectified and for her to receive reimbursement for all the common charges payments which she had made over the years.

Miss Johnstone accepted that the Property Factor had proposed a way forward which was to have the four flats in question measured but she said that she was not enthusiastic about accepting the proposal because it included the requirement of going to all the proprietors in the development to get authority. She said that the matter could be blocked if proprietors voted against the proposal. Miss Johnstone said that she considered that she had provided sufficient information for the Property Factor to take the steps necessary to reallocate the percentages being used for the calculation of common charges accounts.

Miss Johnston referred the tribunal to a plan which she had lodged and which she had obtained from Dundee City Council. The plan is titled "Proposed fitting out of vacant unit at No. 75 High Mill, Braehead, Methven Walk, Dundee to form 3 apartment flat." Miss Johnston said that this plan was in respect of the attic flat. Miss Johnston said that she would have no difficulty in her flat being measured.

Mr Baird conceded that he had seen this plan and that a copy was in his office.
Mr Baird was asked if this plan could be used to obtain a measurement to determine the floor area. His response was that he did not know and that any work would have to be done by a surveyor and that this would cost money. He said that no work had been to ascertain the floor area by using the plan referred to.

Miss Johnston turned to the alleged breach of the code:

2.2 You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action).

Miss Johnston referred to a letter of Ross and Liddell dated 25th March 2019 which had been written to Messrs Campbell Boath, her solicitors (Production 4). The penultimate paragraph stated:
"Finally, we note from your letter that your Client is in the process of selling. With this information, and given the current unpaid common charges on this account, it will be our duty as Property Manager to disclose any legal dispute as part of any pending sale process, so that the Purchasers can be made aware of any pertinent issues."

Miss Johnston said that she was extremely distressed at the reference to her having unpaid charges. She said that she is a longstanding customer of the Property Factor and that she pays by monthly direct debit. She said that she also thought that the reference in the letter to any queries from solicitors with regard to the factoring position being told that there was a legal dispute was intimidating.

Mr Baird said that Ross and Liddell took over from the original factors in 2005 and followed the apportionments and allocations used by its predecessors. He said that Ross and Liddell did not depart from what had been done by the previous factor and that it was entitled to accept that the information which they had been given was correct. He said that Ross and Liddell got a full list of proprietors and a full breakdown of apportionments. He said that this method of allocation had been in place for around twenty five years.
Mr Baird said that the issue of apportionment had not been raised until March 2019.

Mr Baird said that Ross and Liddell required to have additional evidence before it could consider instituting any changes and that it could not arbitrarily alter the apportionments. Mr Baird said that his company would require to have authority of the proprietors before any exercise of measurement could be undertaken.

Mr Baird referred to the letter which he had sent to the Homeowner's solicitors on 25th March 2019 (Production 4).

Mr Baird said that property factors nowadays had to be aware of duty of disclosure in respect of responding to any queries. He said that what he had stated in his letter of 25th March was accurate and he said that, because of timing of payments, it was an accurate answer. He accepted that the Homeowner had never been in arrears in respect of common charges invoices but insisted that the statement was correct and that on the date of the letter there would technically have been unpaid charges. Mr Baird accepted that he could see that Miss Johnston had been upset at the statement that there were outstanding common charges and that he regretted that she was upset.
Mr Baird was referred to the letter of 19th August 2019 (Production 9) which Ross and Liddell had sent to Ms Remitt of RSB Lindsays and he was asked to provide an explanation as to why this did not include any reference to unpaid common charges especially in respect of Flat no. 75 where there had been arrears for many years and

did not refer to the dispute over the allocation of common charges to flats number 75 and 78. Mr Baird could offer no explanation other than that the later letter was for a different purpose. The letter stated that the share of common charges due in respect of flat 75 was 1.52%. Mr Baird could offer no explanation as to why it had not been disclosed that, in respect of the allocation for common charges, there was an ongoing dispute and he accepted that there were omissions from the letter to RBS Lindsays. He said that, in August 2019, when the letter was sent there had been no intimation to the Property Factor of a specific sale and that the letter had not been issued in connection with a sale. Mr Baird said that, in such circumstances, the duty of disclosure was less.

Mr Baird said that the terms of the title were not clear in relation to identifying the four flats. It was put to him that GF, FF, SF and AF as stated in the Deed could possibly mean Ground Floor, First Floor, Second Floor and Attic Floor. Mr Baird said that this was not certain and that this was not necessarily the case. He said that the area disclosed in the Home Report was 94 square metres and that if the Homeowner's position was that her property was the one referred to in the Supplementary Deed of Conditions as being 100.75 square metres then there was no consistency. Miss Johnston said that the figures were so close that she would be content that her property be considered to be the one referred to in the Supplementary Deed of Conditions as being 100.75 square metres.
Mr Baird said that any re-measurement would impact on other proprietors and he said that he had obtained quotations from building surveyors to carry out measurements of the four flats in question. He said that such an instruction would require to be authorised by all the proprietors in the Development.

Miss Johnston said that she pays £189 pre month for her common charges liability which is bases on an apportionment of 1.83% and she said that, in rough terms, she would save around £30 per month if the apportionment was based on 1.52%. Miss Johnston accepted that the Property Factor did not have knowledge of the issue of the possible misapplication of apportionment of common charges until March 2019.

Submissions

Miss Johnston said that the information in connection with the possible discrepancy in relation to the allocation of common charges was known to the Property Factor in March 2019.
Miss Johnston said that the Property Factor has a duty to render invoices for common charges in accordance with the title deeds and that it was obliged to follow the allocation set out there. She said that, to do otherwise, would be improper and that the allocation emanates from the titles. Miss Johnston submitted that she had been falsely charged and that she had provided sufficient evidence for the Property Factor to rectify matters. She said that the Property Factor had failed in its duties as property factor. She said that the error must have occurred at some time in the past.

Miss Johnston asked the tribunal to find that the Property Factor had breached the Code in relation to the letter which had been sent to her solicitors.

Mr Ritchie said that his client's position is set out in its letter of 8th May 2019. He directed the tribunal to the written representations which he had submitted. He invited the tribunal to find that there has been no breach of the property factor's duties

Mr Ritchie said that the Property Factor had proposed a solution and that it had not received a substantive response to the proposal. He confirmed that his clients accept that it is a matter requiring investigation but that it has implications for all owners not just the owners of number 75 and 78. He said that, if the matter was not dealt with properly there might be significant implications for the whole development and he said that the Property Factor would require to obtain authority from the owners in the development before any changes were made.

Mr Ritchie said the Property Factor may or may not have dealt properly with the matter but that this was irrelevant for the tribunal which was limited to examining whether or not the Property Factor had breached the Code and had complied with the property factor's duties. He submitted that the Property Factor had acted reasonably and, having been made aware of a possible issue, had made an appropriate proposal to the Homeowner.

Mr Ritchie said that, in relation to the Code, the Property Factor had not been abusive, intimidating or threatening and he referred to his client's letter of 25th March 2019 which had been sent to the Homeowner's solicitor (Production 4). He said that the letter was factually correct.
Mr Ritchie said that the Property Factor had a duty to disclose to any prospective purchaser's solicitor, that there is a legal dispute and that the letter of should be read in that context.

Findings in Fact

1. **The Homeowner is an owner of the Property which is situated in a development which is factored by the Property Factor.**

2. **The Homeowner has provided information to the Property Factor which should have led it to carry out further investigations with regard to current allocation of common charges for the flats at 75 and 78 Braehead, Dundee.**

3. **The Property Factor sent a letter to the Homeowner's solicitors on 25th March 2019 which was intimidating in its terms.**

Reasons

The tribunal considered that the issue leading to the dispute between the Homeowner and the Property Factor was straightforward. The Homeowner suspected that she had and is being wrongly charged for common charges as a result of a mistake made sometime in the past in identifying particular flats in the development. There was no

suggestion that the Property Factor had knowledge of the particular issue prior to March 2019. The issue for the tribunal is whether or not the Property Factor, having been apprised of the issue, should have taken steps to investigate further and make enquiries. The tribunal accepted that it was not for it to consider whether something could have been done better and it accepted Mr Ritchie's position that it was restricted to considering whether or not the Code had been breached and/ or the Property Factor had complied or not complied with the property factor's duties.

The tribunal considered that, prior to March 2019, it was perfectly reasonable for the Property Factor to continue to charge the Homeowner on the basis of the historical calculation. This is what it had inherited from the previous property factor and no issue had been raised by the Homeowner. Having had a copy of the extract from the Home Report showing a measurement of the flat, the Property Factor's approach was to propose that all of the additional flats would require to be measured and that the authority of all the proprietors in the development would require to be obtained. An alternative approach would have been for the Property Factor to consider the information in the Home Report and then check the Title Sheet to ascertain whether or not there might be an explanation for the measurement being less. The tribunal considered that Mr Baird's position that it was not clear from such an examination what the title position was is disingenuous. Whilst it accepted that the postal numbering was confusing, nevertheless any reasonably competent property factor would have considered that the descriptions GF Extra, FF Extra, SF Extra and AF Extra might possibly refer to flats on the ground, first, second and attic floors when also faced with information that a measurement for the ground floor flat was markedly different from that which was being charged for and that it was entirely possible, in all the circumstances, that there had been confusion between the attic and ground floor flats. The tribunal considered that all that would have been required to do was for a measurement to be taken of the attic or top floor flat. Mr Baird accepted that there was a plan of the attic flat in the office and the Ordinary Member, as someone with the specialist knowledge of a Chartered Surveyor, considered that it would have been straightforward for a calculation of the floor area to be taken from the plan which was a scaled drawing. It would then have been straightforward to reverse the liability had such a measurement shown that there had been an error. The tribunal recognised that such an exercise may have shown there not to have been an error and, in those circumstances, it would have been entirely reasonable for the Property Factor to have taken a more robust position with the homeowner.

The proprietor of the attic flat at number 75 had not paid common charges for years and the debt had been redistributed amongst other owners. The tribunal accepted that reallocation of the common charges would have meant a small increase to other proprietors but it did not consider that, where there had been a genuine error, there would have been any other reasonable course of action for the Property Factor. The tribunal noted Mr Baird's position that property factors had to be aware of full disclosure and it found it inexplicable that, against such a background, the Property Factor had issued a letter to RSB Lindsays which not only did not disclose the arrears position for number 75 but did not disclose the fact that there was clearly a dispute with regard to allocation of common charges and stated the share attributable to that flat to be 1.52% when it knew that the matter was in dispute. That letter may give it problems in the future but that is a matter for it to resolve.

A property factor is required to manage a development of properties and to deal with the allocation of common charges in accordance with the title conditions. In the particular circumstances of this case, the Property Factor complied with this until March 2019 and the tribunal considered that, in not taking appropriate steps to investigate a possible discrepancy, the Property Factor had not complied with the property factor's duties in terms of the 2011 Act.

The tribunal considered the alleged breach of section 2.2 of the Code:

2.2 You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action).

The tribunal considered Mr Baird's evidence on the letter sent to the Homeowner's solicitors and on the letter sent to RSB Lindsays.
In relation to the letter sent to the Homeowner's solicitors Mr Baird stressed the importance of full disclosure and his position was that the homeowner was technically in arrears at that date. He did not challenge the Homeowner's assertion that she paid by monthly direct debit and that she had never been in arrears. He also said that it was necessary to state that, in any letter issued in connection with a sale, the Property Factor would need to disclose that there was a legal dispute. The Property Factor had helpfully lodged a copy of the letter which it had sent to RSB Lindsays and the Tribunal was able to contrast its terms with the letter which the Property Factor had sent to the Homeowner's solicitors. It did not consider that it was relevant that there was not a specific date for a sale. The letter to RSB Lindsays did not disclose that there were arrears, that there was a legal dispute and it stated the share of common charges to be 1.52% when the Property Factor knew that this was being challenged.

The tribunal required to consider whether or not the letter to the Homeowner's solicitor was abusive or intimidating, or which threatens the Homeowner. The first issue is whether or not a letter sent to a homeowner's solicitor could be considered to be abusive, intimidating or threatening to a homeowner. A solicitor is agent of his/her client and the tribunal considered it entirely possible for a letter sent to a solicitor falling under the relevant section of the Code.
The Homeowner said that she was upset by the terms of the letter and Mr Baird acknowledged that she was upset.
The tribunal did not consider the letter to be threatening or abusive. Given the terms of the RSB Lindsays letter, the tribunal could not understand why the letter to Campbell Boath contained the following:
"Finally, we note from your letter that your Client is in the process of selling. With this information, and given the current unpaid common charges on this account, it will be our duty as Property Manager to disclose any legal dispute as part of any pending sale process, so that the Purchasers can be made aware of any pertinent issues."
The tribunal did not accept as reasonable Mr Baird's position that there were unpaid common charges on the Homeowner's account and considered that the terms of the letter were intimidating. This was a homeowner who was hoping to sell her property and would have quite reasonably been intimidated by the terms of the letter.
The tribunal accepted that the Property Factor had breached the Code.

Disposal

The tribunal proposes that a property factor enforcement order be made in the following terms:

1. The Property Factor is to pay the total sum of £500 to the Homeowner as compensation for its breaches of the Code and for failing to comply with the property factor's duties. The payment is to be made within thirty days of service of the property factor enforcement order.

2. Within 30 days of service of the property factor enforcement order, the Property Factor is to take steps to establish the floor areas of the properties at 75 and 78 Braehead Methven Walk, Dundee by whatever methods appropriate and practical including inspection and reference to plans and, if it is established that the properties have had wrongly allocated common charges liabilities, to advise the owners of the properties in question and to correct such errors in future common charges accounts.

In determining the level of compensation to be paid, the tribunal took into account the inconvenience caused to the Homeowner and the possible cost to her since March 2019 because she may have paid more in common charges than she would have been obliged to.

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.

Martin J. McAllister, Legal Member
of the First-tier Tribunal for Scotland

25th November 2019