

Housing and Property Chamber First-tier Tribunal for Scotland



Determination made under section 19 of the Property Factors Act 2011 and Rule 31 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016

Chamber Ref: Im/16/0141

The Property: 22 Portree Avenue, Glenview Estate, Southcraigs,
Kilmarnock, KA3 2GB

The Parties: –

Mr Gary Gardiner, residing at the property (“the homeowner”)

and

Greenbelt Group Ltd, registered under the Companies Acts under Company Number SC192378 and having their Registered Office at Mccafferty House, 99 Firhill Road, Glasgow G20 7BE, per their agents BTO Solicitors, 48 St Vincent Street, Glasgow G2 5HS. (“the factors”)

Tribunal Members:

David Preston (Chairman) and Mike Links, Surveyor (Ordinary Member) (the tribunal”).

Decision:

The tribunal does not have jurisdiction to deal with this application which is accordingly dismissed.

Background:

1. By application dated 30 September 2016 the homeowner applied to the Homeowner Housing Panel, which became the First-tier Tribunal for Scotland (Housing and Property Chamber) on 1st December 2016, for a

determination of whether the factors had failed to comply with the property factor's duties imposed by Section 17 of the 2011 Act, and failed to comply with the duty to comply with the Code of Conduct ('the Code') imposed by s.14 of the 2011 Act.

2. The application by the homeowner stated that he considered that the factors had failed to comply with sections: 1.1b; 2.1; 2.2; 2.4; 2.5; 3.1; 4.1; 4.6; 4.7; 4.8; 4.9; 5.2; 5.3; 5.6; 5.7; 5.9; 6.1; 6.3; 6.4; 6.6; 6.7; 6.8; 6.9; 7.1; and 7.2 of the Code, and had failed to comply with the property factor's duties in a number of respects as detailed in the Report 'Dispute against Greenbelt Group Limited, Glenview Estate, Southcraigs, Kilmarnock' submitted by him.
3. The President of the Housing and Property Chamber of the Tribunal intimated a decision to refer the application this tribunal. The tribunal served a Notice of Referral on the parties.
4. Following service of the Notice of Referral both parties made further written representations to the tribunal.
5. In line with a Direction dated 22 March 2017 the tribunal held a site inspection on the morning of 3 May 2017 followed by a preliminary hearing in North West Kilmarnock Area Centre, KA3 1NQ.
6. Following the hearing the tribunal issued a Direction dated 5 May 2017, a copy of which is annexed hereto as Schedule 1, and is referred to for its terms.
7. By letter dated 31 May 2017 from their agents, the factors indicated that they no longer sought to insist upon the jurisdiction point and were agreeable to the tribunal dealing with the application.
8. The tribunal considered that position and issued a further Direction dated 4 June 2017 requiring the parties to submit representations and submissions on the question of jurisdiction by 30 June 2017. The tribunal reached a

preliminary position that it did not have jurisdiction to deal with the application, however in view of the fact that the homeowner did not have legal advice it considered that in fairness he should have an opportunity to obtain such advice before concluding its determination. A copy of the Direction dated 4 June 2017 is annexed hereto as Schedule 2, and is referred to for its terms.

9. By letter dated 30 June 2017 the factors' agent advised that they had nothing further to add.
10. By email dated 2 July 2017 the homeowner responded to the Direction and asked for clarification in relation to the factors' ability to: continue to charge the owners in the development for what he regarded as a poor service; and pursue him in the courts.
11. He referred to a letter from the factors to the owners in the development dated 26 April 2017 which said that they were considering the best way to address the Keeper's stance which they considered to be prejudicial to the community. The factors recommended owners to continue to pay their shares of the costs to upkeep the open spaces.
12. In addition, the homeowner submitted copies of papers relative to the Small Claim action by the factors against him, namely: Incidental Application by the factors; Interlocutor dated 13 June 2017; Answers to Counterclaim; and Minute of Amendment for the Pursuers. The tribunal has not been provided with other papers relative to that action.
13. The Incidental Application on behalf of the factors sought to have the Small Claims action sisted pending determination of a) the Keeper's decision to rectify the homeowner's title and b) the present application, failing which to allow the Minute of Amendment and Answers to the Defender's Counterclaim.
14. Insofar as these documents apply to the present application, the Incidental application states that the homeowner's defence to the action against him relates to his complaints about the quality of works undertaken by the

factors and the cost of same and that these mirror the matters raised in this application. The factors therefore sought to sist the action pending the determination of this application.

15. The tribunal has not been provided with a copy of the Sheriff's decision in relation to the Incidental Application, but the homeowner advised in his email of 2 July 2017 that the action has been sisted until the conclusion of a Land Tribunal application by the factors.

16. The homeowner asked that if the tribunal did not change its opinion on jurisdiction, presumably as outlined in the Direction dated 4 June 2017, the present application should be paused to reflect the Court's status and the conclusion of the Lands Tribunal case.

Reasons for Decision:

17. No representations were received from the parties to provide any legal basis for the tribunal to alter its provisional position as expressed in the Direction of 4 June 2017.

18. The tribunal agrees that the situation which has arisen through the Keeper's Note on the title is one which is undesirable and complex however the tribunal is restricted in its jurisdiction by statute as outlined in the Direction of 4 June 2017 which, also for the reasons stated therein, cannot be extended.

19. The tribunal considered whether the recently reported decision of the Upper Tribunal in the case of *Sheilds & Blackley v HPC* could provide assistance to the jurisdiction problem in this application. In that case, the appeal was against a decision of the Tribunal to reject an application because, on the Tribunal's interpretation of section 17 of the Act, it was not validly made because when the applications were made the applicants were not owners of the property in question. The Upper Tribunal took the view that the Tribunal must construe the Act purposively in such a way as to give effect to the objectives and policy that underlie the provision.

20. The tribunal concluded that this could not be applied to the present application. In *Shields* the issue related to the definition of 'homeowner' in section 17 of the Act, which the Tribunal interpreted strictly as requiring the homeowner to own the property at the time of the application, while the Upper Tribunal took the view that a wider interpretation should be given to give effect to the provisions of the Act.
21. In the present case, however, this tribunal is of the view that the restriction on jurisdiction arises from a specific provision of section 2 that the owners of a development under the 'land management' model of factoring must be required by the terms of their title deeds to pay for the cost of the management or maintenance of the common areas within the development. The effect of the Keeper's Note was to remove that requirement, notwithstanding the fact that at the time of the application the requirement appeared to exist. The removal of the real burden must, in the opinion of the tribunal, have a retrospective effect with the result that it had never been a requirement in terms of the title deeds.
22. The tribunal acknowledges that the result is unfortunate for the homeowner and is also a complex issue. The tribunal has no power to make any decision in relation to the application, however once the factors' application to the Lands Tribunal has been determined, it would be open to the homeowner, if so advised, to submit a further application, there being no time limit on the making of an application.
23. In view of the complexity of the issues raised by the circumstances, the parties may wish to appeal this decision for a determination by the Upper Tribunal.

Right of Appeal:

In terms of section 46 of the Tribunals (Scotland) Act 2014, a homeowner or 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.

D Preston

.... Chairman

20 July 2017

Oban 20 July 2017

This is Schedule 1 referred to
in the foregoing Determination
D Preston

..... Chairman

Housing and Property Chamber First-tier Tribunal for Scotland



**Direction made under Rule 20 of the First-tier Tribunal for Scotland
Housing and Property Chamber (Procedure) Regulations 2016**

Chamber Ref: PF/16/0141

**The Property: 22 Portree Avenue, Glenview Estate, Southcraigs,
Kilmarnock, KA3 2GB**

The Parties: –

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Company Number SC192378 and having their Registered Office at
Mccafferty House, 99 Firhill Road, Glasgow G20 7BE, per their agents
BTO Solicitors, 48 St Vincent Street, Glasgow G2 5HS. (“the factors”)**

Tribunal Members:

David Preston (Chairman) and Mike Links, Surveyor (Ordinary Member): (the
tribunal”)

1. In line with the Direction dated 22 March 2017 the tribunal held a site inspection on the morning of 3 May 2017 followed by a preliminary hearing.
2. Present at the hearing were: the homeowner; Mr Fergus Cumming, on behalf of the factors, represented by Mr David Young, Solicitor.
3. At the outset the convener of the tribunal outlined the procedure which it was intended should be followed at the hearing.

4. The homeowner raised the issue of the amendment to his title following upon his application to the Keeper. He questioned whether this would have any effect on the application.
5. In response Mr Young outlined the factors' position. He explained that the factors did not accept the Keeper's determination in respect of the homeowner's title.
6. Mr Young said that as matters stand at the present time, in his submission the application was invalid. He said that section 2(1)(c) of the Property Factors Act 2011 ("the Act") defines a property factor, in relation to a land management company such as his clients as:

"a person who, in the course of that person's business, manages or maintains land which is available for use by the owners of any two or more adjoining or neighbouring residential properties (but only where the owners of those properties are required by the terms of the title deeds relating to the properties to pay for the cost of the management or maintenance of that land)"

Section 10(5)(b) defines a homeowner as:

"an owner of residential property adjoining or neighbouring land which is –

- (i) managed or maintained by a property factor, and*
- (ii) available for use by the owner."*

Section 17(1) provides that:

"homeowner may apply to the homeowner housing panel (now the First-tier For Scotland, Housing And Property Chamber) for determination of whether a property factor has failed –

- (a) to carry out the property factors duties,*
- (b) to ensure compliance with the property factor could conduct as required by sections 14(5) (the "section 14" duties.*

7. Accordingly, for a homeowner to be able to apply to the Tribunal, the land must be managed by a property factor and the homeowners must be

obliged, in terms of the titles to pay for that maintenance. Therefore if the Keeper's determination was to stand and the obligation of the owners of the properties in the development to pay for the cost of the management or maintenance of the land was held to be invalid then the Act could not apply to the relationship between the parties and the homeowners would be unable to make an application to the Tribunal.

8. Mr Young suggested that this was a most unusual situation which had not been envisaged in the drafting of the Act. He explained that this situation had occurred throughout the country in a number of developments for which his clients were responsible and in order to clarify the situation one of the Deeds of Conditions with a similar determination by the Keeper is to be challenged. He said that in an effort to clarify the situation an application to the Lands Tribunal is in the course of preparation and is to be submitted shortly. He said that the situation in his submission was further complicated by the fact that there could be said to be a contractual arrangement between his clients and the first owners of properties but unless the obligation transferred as a real burden, second and subsequent owners may not be so obliged.
9. It was suggested that as at the date of the application during 2016, the homeowner's title had not been amended and the real burden had not been declared invalid. However Mr Young submitted that if the invalidity of the burden is upheld then that would be retrospective.
10. Mr Young explained that there was currently a small claim action against the homeowner in respect of unpaid charges which was proceeding on the basis of the real burden and the situation in that action may have to be reviewed. It was explained that the action had been set down for proof on 4 April 2017 but due to lack of court time it had been adjourned further until 29 June 2017.
11. The tribunal accepted that the situation was indeed complex and that there could be a problem of jurisdiction if the Keeper's determination were to be upheld. Nonetheless the tribunal determined that, in order to make

progress with the application in the event that the matter was resolved satisfactorily and the application can proceed, any further preliminary points should be discussed at this hearing. Insofar as the question of the Tribunal's jurisdiction is concerned, the tribunal considered that it would be appropriate for the factors to lodge their legal arguments and submissions in respect of which the homeowner should have an opportunity to respond in writing.

12. Tribunal noted that the homeowner had included in his application historical matters which related to the factors' involvement with the development. Some of these predated the Act coming into force and some predated the homeowner's ownership of the property.
13. The homeowner said that he was happy that matters should be considered from 2013 being the date he took entry to the property to date.
14. The homeowner confirmed that he wished consideration to be given to the Report which he had produced in full and not just to part 3 which dealt with the factors' duties. He referred to his letter of 6 March 2017 which he said had been an attempt to summarise his complaints.
15. The homeowner agreed that he would submit a list of his intended witnesses with a summary of what they would speak to as well as a revised Inventory of productions in order to provide evidence to substantiate the allegations contained within the application and papers. He intended to revise his Report to concentrate on maintenance and management of the areas of ground over the past three years.

The tribunal therefore DIRECTS:

1. The factors will lodge, before close of business on 31 May 2017 written arguments and submissions in relation to the question of the Tribunal's jurisdiction. Thereafter the homeowner, if so advised, will lodge answers thereto within a further 14 days.

2. The homeowner will lodge a list of witnesses a summary of their evidence as well as a fresh Inventory of Productions and will restrict his complaints to issues arising after the date of his entry to the property.

D Preston

... Chairman

5 May 2017

Oban, 20 July 2017

This is Schedule 2 referred to
in the foregoing Determination
D Preston

... Chairman

Housing and Property Chamber First-tier Tribunal for Scotland



**Direction made under Rule 20 of the First-tier Tribunal for Scotland
Housing and Property Chamber (Procedure) Regulations 2016**

Chamber Ref: PF/16/0141

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Tribunal Members:

**David Preston (Chairman) and Mike Links, Surveyor (Ordinary Member): (the
tribunal”).**

Direction:

**The parties will submit written representations and submissions as to
whether the tribunal has jurisdiction to consider the matters at issue in
the application no later than 5.00 pm on 30 June 2017.**

Reasons:

1. Following on the Direction issued by the tribunal dated 5 May 2017 the factor's agents sent a letter dated 31 May 2017 in which they indicated that their clients no longer sought to insist upon the jurisdiction point raised by them at the preliminary hearing on 3 May 2017.
2. They submitted that whilst there was currently an issue concerning the applicant's title and the maintenance burden in favour of the factors, that issue may be resolved if the factors are successful in a challenge to the Keeper's determination that the purported title condition by which all proprietors are bound to contribute pro rata to the whole costs of the management and maintenance of the Open Ground and Woodland, is not a valid real burden.
3. On the basis that the position might be resolved as a result of the challenge, the factors are now agreeable to the tribunal dealing with the substantive matters as was the stated preference of the homeowner at the preliminary hearing.
4. The parties accordingly appear to be willing to consent to the matters at issue being submitted to the determination of the tribunal.
5. The powers of the tribunal are limited to those set out in the Property Factors Act 2011 ("the Act"). Section 17 of the Act provides that a homeowner may apply to the tribunal for a determination of whether a property factor has failed to either: carry out the property factor's duties; or to ensure compliance with the Code of Conduct. Section 2(1)(c) of the Act defines a property factor, in relation to a land management company as:
"a person who, in the course of that person's business, manages or maintains land which is available for use by the owners of any two or more adjoining or neighbouring residential properties (but only where the owners of those properties are required by the terms of the title

deeds relating to the properties to pay for the cost of the management or maintenance of that land)". (tribunal's highlighting)

6. As things currently stand, in view of the Keeper's Note at page D22 of the Land Certificate, there is no such requirement on the owner in terms of his title deeds. Accordingly without the requirement in the title deeds required by section 2 of the Act, the factors do not fall within the scope of the definition of property factors.
7. As things stand, in order for the tribunal to be able to make a determination of the matters at issue between the parties, the provisions of section 17 would require to be construed as including the circumstances prevailing in this case. That would, in effect, expand the scope of the tribunal's jurisdiction.
8. The tribunal is of the view that the scope of its jurisdiction cannot be expanded either: of its own accord to remedy any apparently obvious omission from its jurisdiction; or with consent of the parties. The law on this point and was considered by Lords Reid and Hodson in the case of *Essex County Council v Essex Incorporated Congregational Church Union [1963] AC 808* at 820-821 and 828.
9. The tribunal was mindful of the fact that the homeowner was aware that the Keeper's determination could have implications for his situation, as questioned by him in his representations of 6 March 2017, although this particular consequence was not necessarily apparent to him.
10. Accordingly the tribunal's provisional position is that it is unable to accede to the parties wishes and proceed to consider the matters at issue.
11. In view of: the fact that the homeowner was unrepresented at the hearing; and the stated position of the factors, the tribunal considers that the parties should have an opportunity to make further written representations on this point. After submissions are received the tribunal will consider its final

position on the matter and will determine the procedure to be followed thereafter.

D Preston

..... Chairman

4 June 2017