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

Decision: Rule 39 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the 2017 Rules"); Property Factors (Scotland) Act 2011 ("the 2011 Act") Tribunals (Scotland) Act 2014 ("the 2014 Act")

Chamber Ref: FTS/HPC/PF/19/0834

47 Jubilee Park, Peebles EH45 9BF
("the Property")

The Parties:-

Mr Jerry Rimmer, 47 Jubilee Park, Peebles EH45 9BF
("the Homeowner")

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh EH12 5HD
("the Factor")

Tribunal Members:
Graham Harding (Legal Member)
Elizabeth Dickson (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the Tribunal') in exercise of its jurisdiction in terms of rule 39(1) of the 2017 Rules considers that the application for review by the Homeowner should be partially upheld and the Tribunal's decision dated 17 September amended accordingly.

Background

1. A hearing on the above application was held on 4 September 2019. The Tribunal found that the Factor had failed to carry out its property factors duties and had failed to comply with its duties under section 14(5) of the Code of Conduct for Property Factors in that it did not comply with sections 2.1, 2.5 and 6.9 of the Code. The Tribunal therefore issued a proposed Property Factors Enforcement Order.

2. By letter dated 26 September 2019 the Homeowner sought a review of the Tribunal's decision. The application was timeous.

Grounds for Review

3. The Homeowner submitted that: -
   i. the Tribunal had wrongly concluded that it could not quantify the cost to the Homeowner of the failure on the part of the contractor to carry out the maintenance in the woodland area;
   ii. the Tribunal had wrongly concluded that the Factor had the right in terms of Clause 20.6 of the Deed of Conditions burdening the property to carry out a postal ballot of owners;
   iii. that the Tribunal had wrongly concluded that the Factor could increase costs or vary its written statement of services without first consulting with homeowners;
   iv. that in the event of the Factor's services being terminated by the homeowners an administration fee charged to each owner would be in breach of the Code;
   v. that the Tribunal had been mistaken when it had narrated that the Homeowner had said that the behaviour of some owners at the meeting on in February 2019 was unacceptable when in fact he had said the behaviour of one owner had been unacceptable;
   vi. that the Tribunal ought to have taken account of the failure on the part of the Factor to notify the Homeowner of an increase in fees in April 2018;
   vii. that the Tribunal ought to take account of the fact that it was acknowledged by the contractor that no other maintenance was carried out in the woodland area other than the one metre wide strip along the boundary and around the whips until they were established;
   viii. that the Tribunal clarify its position on whether the Factor can charge a termination fee if they are dismissed by a quorate vote by the owners;
   ix. that paragraph 63 of the decision should be amended to state that there was a single occurrence;
   x. that paragraph 78 should be amended to reflect that the maintenance and gardening schedule had not been followed in the communal woodland.

The Relevant Legislation

4. Applications for review may be made in terms of the above noted legislation by either party. The terms of Rule 39 of the Rules of Procedure provide in relevant part as follows:

39.—(1) The First-tier Tribunal may either at its own instance or at the request of a party review a decision made by it except in relation to applications listed in rule 37(3)(b) to (j)(7), where it is necessary in the interests of justice to do so.

(2) An application for review under section 43(2)(b) of the Tribunals Act must—

(a)be made in writing and copied to the other parties;

(b)be made within 14 days of the date on which the decision is made or within 14 days of the date that the written reasons (if any) were sent to the parties; and

(c)set out why a review of the decision is necessary.

(3) If the First-tier Tribunal considers that the application is wholly without merit, the First-tier Tribunal must refuse the application and inform the parties of the reasons for refusal.

(4) Except where paragraph (3) applies, the First-tier Tribunal must notify the parties in writing—

(a)setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing; and

(b)may at the discretion of the First-tier Tribunal, set out the First-tier Tribunal's provisional views on the application.

(5) In accordance with rule 18, the decision may be reviewed without a hearing.

5. Having considered that the Homeowner's application for review was not wholly without merit the Tribunal sought the views of the parties on whether a further hearing was necessary and having taken account of the replies received from the parties concluded that it would be appropriate to fix a hearing.

The Hearing

6. A hearing was held at George House Edinburgh on 10 December 2019. The Homeowner attended personally. The Factor was represented by its Managing Director, David Hutton.

7. With regards to the calculation of the cost of the garden maintenance that could be said to have been wrongly charged to the Homeowner the Tribunal was referred to the Homeowner's written submissions which he said produced a figure of £549.99 for the period from 2012 to the present day. Following some discussion with regards to the areas involved and the time spent grass cutting the Homeowner was of the view that two thirds of the cost was in respect of work not done in the common woodland area.

8. The Homeowner referred the Tribunal to the terms of the Deed of Conditions and re-iterated his position that the only method of voting provided for in the Deed was as stated in Rule 19.

9. The Homeowner submitted that if a postal vote was permissible then it would be open to owners to use such a system to conduct a vote to dismiss the Factor without the need for a quorate number of responses. He submitted that such a process would be legally challenged by the Factor. The Homeowner's position was that if the Factor had the power to make decisions under Rule 20.6 then by definition the homeowners would be automatically so empowered. For the Factor Mr Hutton confirmed that the terms of Rule 20.6 were not unusual and were found in other developments. It would allow the

Factor to make decisions such as carrying out a postal ballot. Mr Hutton went on to say that although the ballot had been carried out no action had been taken as a result.

10. It was the Homeowner's position that the Tribunal was incorrect in holding that there was no need for the Factor to consult with homeowners prior to increasing charges or varying the terms of the Written Statement of services. The homeowner referred the Tribunal to the terms of Section 2.4 of the Code that required a Factor to consult with owners and seek their written approval before providing work or services that will incur charges or fees not covered by the core services. The Homeowners position was that whilst an administration fee was allowed under the deeds a "termination fee" in the event of the Factors services being discontinued would be outwith the core services and would be a breach of the Code. For the Factor Mr Hutton submitted that the administration fee of £40.00 plus VAT was already in place prior to the Property Factors Act coming into force and was there to cover the costs involved in transferring management of the Development to a new Factor.

11. It was accepted that the Homeowner had said that the behaviour of one owner at the February meeting was unacceptable and that there had been no unacceptable behaviour at the March meeting and therefore the original decision should be amended to reflect this.

12. It was the Homeowner's submission that as the Factor had failed to notify him of an increase in fees in April 2018 and had sought recompense but had not received a substantive response the Tribunal should express a view in this regard. For the Factor Mr Hutton said the increase in the charge levied by the garden contractor from £6500 to £6825 was outwith the Factor's control but there had been a failure to advise owners of the increase due to an oversight on their part due to a change in personnel. There had been an apology issued for this oversight.

13. The Homeowner submitted that paragraph 56 of the decision should be reviewed in light of the acknowledgement by the contractor as to the limitations of the work carried out in the woodland area.

14. The Homeowner also requested that Paragraph 60 of the decision be reviewed.

15. The Homeowner submitted that whilst Paragraph 61 of the decision dealt with the administration charge it did not deal with the fee to be charged in the event of the Factor's services being terminated by the owners and he requested that the Tribunal address this issue.

16. The Homeowner requested that Paragraph 63 be amended to state that he did not follow the Factor's complaints procedure on only one occasion.

17. The Homeowner requested that Paragraph 78 should be amended to reflect the other element of the maintenance and gardening schedule that had not

been followed by the contractor in the woodland area. He also submitted that the Factor could have pursued the contractor to have the work rectified or for recompense on behalf of the owner but had done neither

The Tribunal Decision

18. The Tribunal remains of the view that it is difficult to quantify the cost to the Homeowner of the work that ought to have been included in the maintenance of the common woodland area as against that which was actually undertaken. The Tribunal was not persuaded by the Homeowner that the figure of £549.99 per household represented the actual cost nor indeed that even 60% of that figure would be representative as there were too many unknown factors to be taken into account. There would have been costs involved in maintaining the whips initially and in keeping the 1 metre strip along the boundary weed free. The Tribunal was however satisfied that it was appropriate to make an award to the Homeowner to take account of the cost and determined to increase the monetary award in the proposed PFEO by £150.00 to reflect this part of the Homeowners claim.

19. Whilst the Homeowner submitted that the Factor required to be instructed by the homeowners at a properly convened meeting before being able to act under Rule 20.6 of the Deed of Conditions the Tribunal remains of the view that in the absence of any restriction being placed on the Factor by the homeowners Rule 20.6 gives the Factor the power to do anything which may competently be exercised at or by a meeting of owners. It has never been suggested that the Factor's powers in terms of this Rule have been restricted. Rule 19 .1 provides that one vote is allocated to each plot and Rule 19.3 provides that a decision is made by a majority of votes cast. The Rule is otherwise silent on how the vote should be taken either by a show of hands or by secret ballot or indeed by post. The Tribunal is therefore of the view that it would be open to the homeowners to decide how any vote should be carried out. That being the case as it would have been open to the owners at a properly convened meeting to have decided to hold a postal ballot the Factor was not acting outwith its powers. The Tribunal did not accept the Homeowner's argument that a Deed of Variation would be necessary or that a postal ballot would be challengeable by the Factor if conducted by the homeowners.

20. The Tribunal does not accept the Homeowners argument that Section 2.4 of the Code would apply to a variation of the written statement of services or to an increase in charges. The Section of the Code the Homeowner referred to was in respect of services out with the scope of the Factor's core services. Charging an administration fee on the termination of the contract is not something which in the Tribunal's view would require the Factor to consult with owners. The Tribunal accepts that if the majority of owners determine to dispense with the Factor's services and appoint a new factor the existing factor may well incur additional administrative costs and it would therefore be reasonable to charge owners a fee. The situation could be different if the Factor chose to terminate the contract with the owners.

21. The Tribunal accepted that the last sentence of paragraph 35 of the decision should be amended to reflect that the Homeowner had said that one owner's behaviour at the February meeting was unacceptable and that no owner's behaviour had been unacceptable at the March meeting.

22. The Tribunal will amend Paragraph 54 of the decision by adding the words: - "but this increase was not intimated to the Homeowner." The Tribunal considers that the oversight on the part of the Factor to notify the Homeowner of the increase in the contractor's charges was a failure to carry out its property factors duties.

23. The Tribunal will amend Paragraph 55 of the decision to include a reference to the maintenance and gardening schedule in addition to litter picking.

24. Paragraph 63 will be amended to reflect that the Homeowner failed to follow the complaints procedure on one occasion.

25. Paragraph 78 will be amended to include a reference to the maintenance and gardening schedule in addition to litter picking.

Outcome

26. The Tribunal's decision of 4 September will be amended to reflect this decision

27. The proposed PFEO will be amended to reflect this decision.

28. It should be noted that in terms of section 43(4) of the Tribunals (Scotland) Act 2016, the exercise of the Tribunal's discretion whether a decision should be reviewed may not itself be reviewed or subject to appeal. The availability of an appeal otherwise remains unaffected.

Graham Harding
Legal Chairman

30 December 2019