Housing and Property Chamber
First-tier Tribunal for Scotland

Decision on homeowner's application:

Property Factors (Scotland) Act 2011 Section 19(1)(a)

Of

the Housing and Property Chamber of the First-tier Tribunal for Scotland

(Hereinafter referred to as "the Tribunal")

Case reference : FTS/HPC/LM/18/3216

Re: Property at –

4 The Rookery, Grantshouse, Duns, Berwickshire TD11 3RP ("the Property")

The Parties :

Marie Murray, 2 The Rookery, Grantshouse, Duns, Berwickshire TD11 3RP ("Applicant")

Viewpoint Management Limited, Berwick Workspace, Boarding Shed School Yard, 90 Marygate, Berwick upon Tweed TD15 1BN ("Respondents")

Tribunal Members:-

David Bartos - Chairperson, Legal member
Helen Barclay - Ordinary member

DECISION

1. The Tribunal having no jurisdiction to deal with the Applicant's complaints of the Respondents' failure to comply with section 14(5) of the Property Factors (Scotland) Act 2011 dismisses the application.

Introduction

2. In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Code of Conduct for Property Factors is referred to as "the Code"; and the rules in schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules".

3. On 28 November 2018, an application was received by the Housing and Property Chamber of the First-tier Tribunal for Scotland ("the Tribunal") from the Applicant seeking a decision that the Respondents had failed to comply with the Code. The application alleged breaches of section 1.1 A and 1.1 F of the Code. Following an a request to amend the application was amended on 27 May 2019 to include sections 1.1a p, 2.5, 3.3, 5.2, 6.3, 6.4, 6.7 and 6.8 of the Code, also.

Findings of Fact

4. Having considered all the evidence, the Tribunal found the following facts to be established:-

   (a) The Property is a detached house within a development of 4 houses numbered 1 to 4 The Rookery, Grantshouse, Berwickshire. The development is situated east of the village of Grantshouse, Berwickshire on the north-west side of the former A1 road. It was formerly part of Harelawside Farm.

   (b) The development is from the 2000s. The Property is owned by Mr Philip Allinson in his own name. As at 2017 a private waste water and sewage treatment plant and reed bed had been constructed on the Property. As at that date it served all 4 houses in the development.

(c) To the west of the Property are two semi-detached houses numbered 3 and 2 The Rookery. Number 3 The Rookery is owned by Mr McMurdo and Mrs Turnbull. Number 2 The Rookery is owned by the Applicant and Mr Scott S. Murray. Adjoining and to the west of 2 The Rookery is 1 The Rookery. It is a detached house with garden. It is also owned by Mr Allinson in his own name.

(d) Mr Allinson is the sole director of the Respondents. The Respondents' administrator is Miss Estelle Dodd. The Respondents became a registered property factor in terms of the Property Factors (Scotland) Act 2011 on 13 June 2017.

(e) Mr Allinson is owner of the Property under title number BER4613. The Applicant is a co-owner of 2 The Rookery under title number BER5856.

(f) The four properties within the development are all subject to a deed of declaration of conditions registered in the Land Register of Scotland on 12 February 2007 ("the Deed of Conditions").

(g) Clause (Fourth) of Part II of the Deed of Conditions imposed a duty on all owners of plots with houses in the development to maintain, and repair such surface water drainage schemes, sewage treatment plant, reed beds, sewers, drains, pipes, cables and other transmitters and connections in so far as they were not adopted by any public authority. It also imposed a duty on the owner or owners of dwellinghouses "served by" any such scheme, plant, bed, sewer, drain, pipe etc to bear equally the expense of their maintenance and repair.

(h) Up to 2017 Mr Allinson had performed the duty of maintenance of the plant and reed bed. From time to time and up to 2019 Mr Allinson obtained payments from the Applicant and the other owners of numbers 2 and 3 The Rookery towards their share of the expenses of maintenance of the plant and reed bed. Mr Allinson was the holder in his own name of the licence from SEPA in respect of the plant.

(i) At the beginning of 2017 there were no factors in place for the development. Mr Allinson did not wish to continue to have the burden of having the SEPA licence solely in his own name. He did not wish to continue with personal maintenance of the plant. An

attempt by the Applicant and other owners to set up a residents' association was unsuccessful. Mr Allinson and the other owners could not agree on who should maintain the plant and reed bed and what the maintenance should involve.

(j) On or about 29 October 2017 Mr Allinson, as owner of two of the four properties, purported to appoint the Respondents to act as factors for the development. There was no meeting of the homeowners in the development appointing the Respondents as factors for the development. There was no vote of a majority of the homeowners in the development appointing the Respondents as factors for the development.

(k) In about November 2017 the Respondents issued a "Property Factor Statement of Service" to homeowners of the development including the Applicant. Its core services were stated to include the holding of the licence for the plant.

(l) On or about 21 November 2017 the Respondents issued invoices to the homeowners in the development (including the Applicant) seeking payment for an initial float (or sinking fund) for the costs of services to be provided by the Respondents.

(m) By letter dated 28 November 2017 the Applicant, her husband and the owners of 3 The Rookery wrote to the Respondents refusing to recognise the Respondents as factors of the development and purporting to cancel any appointment of the Respondents.

(n) By e-mail dated 1 May 2018 to Mr Allinson, the Applicant, writing on behalf of the owners of 2 and 3 The Rookery threatened to make an application to the Tribunal should she and those other owners receive any further invoices from the Respondents.

(o) By December 2018 the SEPA licence for the plant had been transferred into the name of the Respondents.

(p) By e-mail dated 28 December 2018 the Applicant wrote to the Respondents complaining of breaches of sections 1.1b Aa and 1.1b Fo of the Code.

(q) By letter to the Applicant dated 20 January 2019 the Respondents rejected the claimed breaches of the Code.

Procedure

5. The application to the Tribunal sought in the first place an order striking the Respondents off the Register of Property Factors. By the time of the hearing this was not longer insisted on. Secondly the Applicant sought an order prohibiting the Respondents from issuing further invoices to her as her factor. Essentially she sought to have the Tribunal make a legally binding declaration that the Respondents were not her factor and were therefore not entitled to invoice her. Thirdly her application sought an order of compensation for stress caused by the Respondents.

6. On or about 12 April 2019 a Convener with delegated power of the President of the Tribunal referred the application to the present Tribunal for its determination. This was notified to the parties by letters from the Tribunal's casework officer dated 18 April 2019 which also invited the parties to make written representations to the Tribunal and to lodge supporting documents known as productions. The Tribunal issued directions to the parties dated 2 and 27 May 2019.

7. Both parties lodged representations with the Tribunal together with voluminous productions. In her representations the Applicant confirmed that she no longer wished the Tribunal to strike the Respondents off the register of property factors. That was something that the Tribunal had no jurisdiction to do in any event.

8. A hearing was fixed to take place at Dunbar Town House, 126 High Street, Dunbar, East Lothian EH42 1JJ on 3 June 2019 at 10.00 a.m. The date and times were intimated to the Applicant and the

Respondents by letters from the Tribunal's casework officer dated 18 April 2019.

9. The hearing took place on 3 June 2019 at 10 a.m. at the venue fixed for it. The Applicant appeared on her own behalf and gave evidence. She was supported by Miss Louise Speirs . Miss Dodd appeared for the Respondents. She was accompanied by Mr Allinson who also gave evidence.

Jurisdiction – General

10. In its direction dated 2 May 2019 the Tribunal raised with the parties the issue of whether it had jurisdiction (power) to decide the breaches of the Code complained of and to make the orders sought if it found the breaches to have taken place. The Tribunal's concern was based on the Applicant's challenge to the entire appointment of the Respondents as property factors for the development including her as a homeowner. The direction referred the parties to the case FTS/HPC/PF/18/2937 (*Walker*) and the observations made in that case. In its further direction dated 27 May 2019 the Tribunal also referred the parties to FTS/HPC/PF/18/2087 (*Glavin*) and in particular paragraphs 49 and 50 of the decision in that case. In both the *Walker* and *Glavin* cases the tribunal had found that in the absence of an accepted or valid appointment of respondents as property factor it had no jurisdiction (power) to decide complaints of breach of the Code made against such respondents.

Jurisdiction - Issue of Existence of Factoring Contract/Appointment

11. In her written representations the Applicant invited the Tribunal to follow the *McNaught* case as referred to in the *Walker* and *Glavin* cases rather than the reasoning in the *Walker* and *Glavin* cases themselves. However at the hearing the Applicant had nothing to add to the reasoning in the

McNaught case that had been rejected in *Walker* and *Glavin*. Nor did she criticise the reasoning in the *Walker* and *Glavin* cases.

12. In their written representations the Respondents submitted that it was incongruous for an applicant to deny any affiliation or relationship with respondents but at the same time expect a tribunal to investigate complaints about services provided as part of such a relationship. The Respondents took no issue with the reasoning in the *Walker* and *Glavin* cases.

13. The Tribunal saw no reason to take issue with the reasoning in the *Walker* and *Glavin* cases where it was decided that if at the time of events giving rise to a complaint a respondent had not as a matter of law been a factor for a community of homeowners, a tribunal lacked jurisdiction (power) to decide the complaint and if upheld to propose a property factor enforcement order. The Tribunal therefore rejected the written submission of the Applicant on this point. It took the view that if the Respondents were not factors for the development in 2017 and 2018 it had no jurisdiction to decide the complaints of breach of the Code.

Factoring Contract/Appointment of Respondents as Property Factors

14. For the purpose of seeing whether it had jurisdiction to decide the current application the Tribunal proceeded to consider whether the Respondents had been validly appointed as factors for the development of four houses such that there was a factoring contract (i.e a contract of agency) in place between the Respondents and the owners of all four houses including the Applicant. It was agreed that there had been no factor in place at the beginning of 2017.

15. The Deed of Conditions did not set out any scheme for the appointment of a factor for the development. In that situation the parties

acknowledged that default rules for the appointment of a factor were set out in section 28 of the Title Conditions (Scotland) Act 2003 (2003 Act, s.31A). Section 28(1) provided that subject to certain other sections (which did not apply in the present case) the owners of a majority of the units in a community could:

(a) appoint a person to be the "manager" of the community on such terms as they may specify;
(b) confer on such manager the right to exercise such of the owners' powers as they may specify (including maintenance powers);
(c) revoke or alter the manager's rights to exercise those powers; or
(d) dismiss the manager.

It appeared to the Tribunal that the reason for the requisite of a majority vote was that the one of several homeowners in a factoring contract could be jointly and severally liable to reimburse the factor for the whole of the factor's proper charges and expenses, leaving him or her to seek relief from the other homeowners. That could be a very burdensome obligation and therefore in the absence of majority consent, the law would not impose such a potential duty.

16. Both in their written representations and in Miss Dodd's oral representations to the Tribunal at the hearing, the Respondents accepted that there had been no appointment by majority under the provisions of section 28 of the 2003 Act.

17. Rather they submitted that Mr Allinson had made the appointment based on an understanding that he had power to do so at common law. Miss Dodd relied on what she submitted was the common law as set out in *G.J. Bell's Principles of the Law of Scotland* in section 1075 and by Sheriff McGowan in the case *Garvie v. Wallace & Crossan* (Stirling sheriff court April 8, 2013 – unreported available on www.scotcourts.gov.uk) in paragraphs 164 and 166. Miss Dodd

submitted that at common law a necessary operation in repairing and maintaining a common service could not be prevented by other owners interested in the service. She added that “repair” and “maintenance” should not be interpreted too narrowly in this context. Applying this common law principle, she submitted that Mr Allinson’s appointment of the Respondents as factors and the transfer of the SEPA licence to them was a necessary operation in repair and maintenance of the plant and reed bed. It was therefore justified at common law.

18. Mr Allinson gave evidence while the SEPA licence had been taken out in his name personally he was not keen on continuing as the sole licence holder. He had required to take on what he described as a “significant liability” under the licence. In his opinion the tying of the licence to the Property could pose difficulties in selling the Property. Furthermore he did not wish to have to disclose an ongoing dispute with other homeowners in the event of any proposed sale of the Property.

19. The Applicant, giving evidence on her own behalf, accepted that despite attempts a residents or owners’ association had not been formed. She also said that in her opinion it was not necessary for there to be a factor such as the Respondents to maintain and repair the plant and reed bed. Therefore even if the common law applied (which she did not concede) it was not satisfied to allow appointment of the Respondents as factors for the development.

20. The evidence of the Applicant and Mr Allinson as to fact as set out in the findings of fact above was accepted by the Tribunal. The Tribunal expressed no view on the expressions of opinion by them in their evidence.

21. The Tribunal put to Miss Dodd whether the passage in Bell and the case of *Garvie* related to the entitlement of an individual owner to

reimbursement from other owners in respect of common services, something that was already provided for in the Deed of Conditions. It did not appear to allow one homeowner to appoint a factor for the whole development creating a contract of agency between the factor and all of the homeowners. Miss Dodd had nothing to add to her submission in that regard.

22. The Tribunal rejected the Respondents' submission on the common law enabling one homeowner to entering into a factoring contract binding the whole development. The common law referred to by the Respondents related to one homeowner seeking reimbursement from other homeowners in respect of necessary repair or maintenance of common services from which the other homeowners gained benefit. It did not regulate the appointment of a factor for the whole of a community (or development) of properties such as the present. Such appointment was governed by either the title deeds or as in this case by section 28 of the 2003 Act.

23. In these circumstances Tribunal accepted the Applicant's submission in relation to the invalidity of the Respondents' appointment. It was accepted by both parties that there had been no owners' meeting either called or taken place at which the Respondents had been appointed. Under section 28 a majority of the units in the development had to agree to appoint the Respondents as factors and to agree the powers that the Respondents would be entitled to exercise on the owners' behalf. There was no legal basis for Mr Allinson as owner of two units within the 4 unit community to appoint a factor. Two out of four units was not the majority of units required by section 28. That being the case no factoring contract of agency had been created between the Respondents and the homeowners of the community in the 4 units, including the Applicant.

24. While the Tribunal understood that Mr Allinson was anxious to have a factor or manager appointed to maintain the waste water treatment plant as a matter of law the appointment procedure had to follow the provisions of section 28 in order to create a contractual relationship between the would-be factor and the other homeowners. However objectively desirable or undesirable the appointment of the Respondents was, the Applicant and her husband could not be forced to enter into a contract with the Respondents against their will unless the statutory requirements of section 28 were satisfied.

25. Given the Respondents' lack of appointment as the Applicant's factors, it followed that the Tribunal lacked jurisdiction to decide the alleged breaches of the Code by the Respondents and to make the consequent property factor enforcement orders sought by her. In these circumstances the Tribunal required to dismiss her application.

26. Given the lack of power to decide them, the Tribunal did not require to consider the alleged breaches of the Code. It made no observation on whether had the Respondents been factors, the complaints would have been upheld or not.

27. The Tribunal noted that its decision on lack of jurisdiction would not solve the dispute over who, if anyone, should be the factor for the waste water treatment plant and reed bed. As at the date of the hearing there appeared to be a deadlock over appointment under section 28. In addition Mr Allinson was unwilling as owner of the Property to continue to undertake the maintenance and repair indefinitiely. Finally the Deed of Conditions (covering the whole development) made it clear that the duty of such repair and maintenance fell on all homeowners equally, including the Applicant as co-owner of 2 The Rookery.

28. In these circumstances it appeared to the Tribunal to be open to an owner in the development to apply to a suitable sheriff court as a last resort to appoint a suitable person to act as a judicial factor to manage the plant and its connections and to take on the SEPA licence. In the event of different owners suggesting different candidates for the role of judicial factor the court could make the choice on behalf of the owners. The Tribunal did note that a judicial factor would be more expensive than one appointed under section 28 owing to the judicial factor's responsibilities to the court.

29. The Tribunal also drew parties' attention to the arbitration agreement (a form of alternative dispute resolution) in Part II clause (Ninth) of the Deed of Conditions. The relationship between that provision and section 28 was not straightforward and was something on which the parties would be well advised to obtain legal advice before seeking the appointment of a judicial factor as a last resort.

Opportunity for Review, Representations and Rights of Appeal

30. The Applicant or Respondents may seek a review of and make representations to the First-tier Tribunal on this decision. Any request for a review or the making of such representations must be made in writing to the Tribunal by no later than 14 days after the day when this decision was sent to the parties. It must state why a review is necessary.

31. The opportunity to make representations and to seek a review is not an opportunity to present fresh evidence, such as additional documents. Bearing in mind that the parties have already had an oral hearing, should the parties wish a further oral hearing they should include with their request for a review and written representations a request for such a

hearing giving specific reasons as to why written representations would be inadequate.

32. **In the meantime and in any event, the Applicant or the Respondents may seek permission to appeal on a point of law against this decision to the Upper Tribunal by means of an application to the First-tier Tribunal made within 30 days beginning with the date when this decision was sent to the party seeking permission.**

33. **All rights of appeal are under section 46 of the Tribunals (Scotland) Act 2014 and the Scottish Tribunals (Time Limits) Regulations 2016. The seeking of a review and the making of representations does not suspend or otherwise affect this time limit.**

David Bartos

Signed ... .Legal Member and Chairperson

...............3 June 2019.............................. Date