Housing and Property Chamber
First-tier Tribunal for Scotland

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

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 (Rules of Procedure) Amendment Regulations 2017 ("the Rules") in an application made under Section 17 of the Act.

Chamber Ref: FTS/HPC/PF/18/2205

19 Strachan Mill Court, Leadside Road, Aberdeen, AB25 1TX ("The Property")

The Parties:-

Mr Hugh Falconer, 19 Strachan Mill Court, Leadside Road, Aberdeen, AB25 1TX ("the Homeowner")

Hanover (Scotland) Housing Association Limited, 95 McDonald Road, Edinburgh, EH7 4NS ("the Property Factor")

Tribunal Members:-

Helen Forbes (Legal Member)
Helen Barclay (Ordinary Member)

Decision

The Tribunal determined that the Factor has not failed to comply with the Section 14 duty in terms of the Act in respect of compliance with Sections 2.1, 7 and 7.1 of the Property Factor Code of Conduct ("the Code"). The Tribunal determined that the Factor has not failed in carrying out its property factor's duties.

The decision is unanimous.

Background

1. By application received in the period from 27th August to 6th September 2018 ("the Application") the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") for a determination that the Factor had failed to comply with Sections 2.1, 7 and 7.1 of the Code, and that the Factor had failed in carrying out its property factor's duties. Details of the alleged failure were outlined in the Homeowner's application. Associated

documents were lodged, including the Factor's Management Agreement; job description and person specification for a sheltered housing manager; correspondence between the parties, including correspondence in relation to the Homeowner's complaint; the Factor's complaint policy; and a title deed for the Property registered on 11th August 1986. The complaint concerned a ballot of the homeowners at Strachan Mill Court carried out by the Factor to determine whether to reduce the hours of the warden service to remove weekend cover. The Homeowner alleged that the Factor had changed the voting criteria after the ballot was carried out, overruling and ignoring the majority vote of the homeowners.

2. By Minute of Decision dated 12th September 2018, a Convenor of the Housing and Property Chamber referred the Application to a Tribunal.

3. On 10th October 2018, Notice of Referral and Hearing was sent to the Parties. A hearing was set down for 5th December 2018.

4. On 31st October 2018, the Factor lodged written representations and productions comprising Deed of Conditions by Heritage Housing Ltd. registered 10th October 1985, and two letters from the Factor to the homeowners dated 23rd May and 20th June 2018.

5. On 28th November 2018, the Factor lodged a second inventory of productions and copy productions comprising the Title Sheet for the Property, supplementary Deed of Conditions, the Factor's Written Statement of Services, and the Factor's complaints procedure.

Hearing

6. A hearing took place at 10.00 on 5th December 2018 at The Credo Centre, 14-20 John Street, Aberdeen. The Homeowner was present and was accompanied by a supporter, Mr Jim Birse. The Factor was represented by Ms Claire Mullen, Solicitor, TC Young, and she was accompanied by the Factor's Factoring Manager, Mr Edward Johnston.

Preliminary Matters

7. There was some discussion about the specific sections of the Code to which the Homeowner had referred in his application. Initially, he had ticked section 7 with no further clarification; however, on 4th September 2018, in the period before the application was accepted by the Tribunal, he clarified matters by email, stating that he believed the Factor had breached sections 2.1, 7.1, and paragraph 2 of the preamble to section 7. It was Ms Mullen's position that there can be no breach of the preamble to a section. The Tribunal agreed to consider the Homeowner's case, reserving judgement on whether or not there can be a breach of the preamble to a specific section.

Evidence and Representations

Failure to comply with section 2.1 of the Code

8. Section 2.1 of the Code states: *You must not provide information that is misleading or false.*

Submissions on behalf of the Homeowner

The Homeowner said that there had been several meetings between the Factor and the homeowners to discuss the situation with the warden service. There was a residential manager on duty Monday to Friday and a non-residential manager at the weekends with cover from 8.30am to 12.30pm and 1.30pm to 4.00pm. It was agreed in December 2017 that the homeowners would be balloted to determine whether to reduce the hours of the warden service to remove the weekend cover. The Homeowner said that the hours of the warden are set by the Factor, and not by the Deed of Conditions. This was simply a budget issue relating to how much was spent on warden hours. It was his understanding that a decision would be reached by a simple majority of homeowners, in line with the Deed of Conditions. This was the procedure that had been used previously for decisions relating to the development, specifically two decisions made on 28th August 2014 (conversion of guest room to a warden's office) and 8th May 2015 (retention of a resident warden).

A letter was sent to homeowners by the Factor on 23rd May 2018 (Factor's production 2), enclosing a ballot paper. Within the letter, the Factor stated 'Prior to any change in the level of manager cover a formal vote is required in accordance with the Deed of Conditions.'

A letter was sent to homeowners by the Factor on 20th June 2018 (Factor's production 3). The Factor stated that the ballot closed on 18th June 2018 and that the result was 19 in favour of no change to the warden service and 30 in favour of an amendment to the service. In this letter, the Factor introduced, for the first time, the notion that the vote was to be carried out in line with the Title Conditions (Scotland) Act 2003 ("the 2003 Act"). As the decision was in relation to changing a 'core burden', a larger majority was required, and, in this case a 2/3 majority of homeowners was required to carry the vote. The required number of votes to change the hours of the warden service would be 42 votes; therefore, the staffing hours at the development would remain at their current level.

The Homeowner said there was no mention at the meetings held prior to the ballot that the 2003 Act would be used to determine the vote. It had been expected that the vote would be carried by a simple majority. In order for a vote to be carried out in line with the 2003 Act, it would require 100% of owners to vote, and this was not achievable. There had been a past vote on selling the assistant warden's flat and that had required 100% of homeowners to vote. That was the only time a decision had been made whereby 100% of homeowners had to vote.

The Homeowner said he was disappointed that the core burden issue was not introduced at previous meetings. It came as a surprise to everyone when this was introduced after the vote. It was not clear why the decision relating to the guest room was not also a core burden requiring a 2/3 majority.

In summary, the Homeowner said that the information contained in the Factor's letter of 23rd May 2018 was false and misleading, as it said the vote would be carried out in line with the Deed of Conditions and did not mention the 2003 Act.

Submissions on behalf of the Factor

Ms Mullen referred the Tribunal to the Deed of Conditions contained within the Title Sheet for the Property, and to clause FIFTEENTH (b) which states 'The remuneration of the Warden and of the Assistant Warden and the terms and conditions of their employment shall be determined from time to time by the Superiors.' It was clear that the power to vary working hours lies with the Superior. The reference to the Superior is now redundant as there is no Superior. The Deed of Conditions does not provide a way in which owners can take decisions particularly in relation to the warden's employment. Because the Deed of Conditions is silent on this matter, the 2003 Act must be looked at. Ms Mullen provided copies of section 54 of the 2003 Act. This section pertains to Sheltered Housing. Section 54(3) defines sheltered housing, and section 54(4) states that any real burden regulating the use, maintenance, reinstatement or management of a facility or service pertaining to sheltered or retirement housing is a core burden. Ms Mullen's submission was that the warden service is vital in retirement/sheltered housing and thus a core burden. Section 54(5)(b)(i) and (ii) provide for a 2/3 majority for making changes to a core burden.

Responding to questions from the Tribunal as to the Homeowner's contention that 100% of owners must vote for a decision to be carried, Ms Mullen said that is not the case. There must be a ballot of all the owners, and the result can only be carried by 2/3 of those entitled to vote.

Ms Mullen said that the Factor's letter of 23rd May 2018 referred to the Deed of Conditions as that is where one must look as a starting point. Responding to questions from the Tribunal as to why the Factor had not spelled out the correct procedure in that letter, Ms Mullen said it was just the way it was phrased, and it was not false or misleading. When asked by the Tribunal why there had been no advance discussion with homeowners about the voting system at the meetings, Mr Johnston, the writer of the letter, said that the matter had not come up. When asked when it was that he had discovered that the vote would be interpreted in line with the 2003 Act, he said he thought it would have been at the time of the first letter going out.

Responding to questions from the Tribunal, Ms Mullen confirmed that the two previous votes taken on 28th August 2014 and 8th May 2015 were carried out under different sections of the Deed of Conditions.

Further discussion

In response, the Homeowner said that the homeowners at the development were mostly pensioners who have little knowledge of the 2003 Act. He said that the matter should have been clarified at the start, and that the Factor should have ensured a response from all the homeowners or their agents. There were a number of deceased homeowners and some vacant properties at the time of the ballot. To get the majority required by the 2003 Act would have required the ballot to be conducted in an entirely different fashion.

He pointed out that the warden service only provides a simple maintenance service, and that is crucial to interpretation of the 2003 Act. He said that the Factor has reduced the warden service in several other developments. There are no support services provided. There is no warden cover currently at weekends as the assistant warden has moved on.

Responding to questions from the Tribunal as to his contention that the Deed of Conditions stated that the procedure was a simple majority vote, the Homeowner referred to clause SIXTEENTH and the provisions in relation to the Property Council.

In response, Mr Johnston said that the service provided is not simply maintenance. Emergency care needs are met. The warden gives housing support and low-level advice where necessary. Homeowners are reminded or prompted about appointments and the warden has contact with a homeowner's family. As for deceased owners and vacant properties, the ballot paper was sent to executors and agents. Responding to questions from the Tribunal, Mr Johnston said it would be possible to carry out the vote again if required, with more information given to homeowners about the voting system.

The Homeowner pointed out that the job description for the warden does not mention personal care, and emergency support is provided only during working hours, with an overnight alarm service linked to a call centre. There is no weekend warden cover, though morning calls are still provided. Also, the homeowners must be capable of independent living, although they may become infirm at a later stage.

Ms Mullen informed the Tribunal that the reference to what happens in other developments is irrelevant as each development is regulated by a particular deed of conditions that may have different provisions. She submitted that the fact that the weekend warden post is vacant does not change the process required to make changes to the service.

Failure to comply with section 7 (paragraph 2 of the preamble) of the Code

9. The relevant words in paragraph 2 to which the Homeowner was referring were *The property factor must also have refused to resolve the homeowner's concerns, or have unreasonably delayed attempting to resolve them.*

Submissions on behalf of the Homeowner

The Homeowner said that he had suggested a face to face meeting with the Factor to discuss matters, by letter dated 24th August 2018. He did not receive a response. He also spoke to Mr Johnston on the phone and suggested a meeting. Responding to questions from the Tribunal as to whether the homeowners had taken legal advice on the matter, he said that this was not viable as they are pensioners. He said the homeowners wish to have an open and honest relationship with the Factor and that there was a lack of assistance in this matter.

Submissions on behalf of the Factor

In response, Ms Mullen stated that the preamble to the section is simply a narrative that cannot be breached. Furthermore, the Factor had not refused to resolve the Homeowner's concerns – they had simply disagreed. Ms Mullen submitted that, as no prior notice had been given of the Factor's failure to call a meeting on request, the Tribunal should not consider the matter. The Tribunal decided to hear evidence on this matter, reserving judgement on whether or not to take the evidence into account in making its decision. Mr Johnston said that he should have acknowledged the request for a meeting; however, there could be no change to the result of the vote.

Failure to comply with section 7.1 of the Code

10. Section 7.1 of the Code states: *You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.*

Submissions on behalf of the Homeowner

The Homeowner said that the complaint had proceeded through the Factor's complaints procedure, but the complaints procedure provided was not up to date, as it did not refer to the First-tier Tribunal for Scotland (Housing and Property Chamber). Instead, it referred to the Scottish Public Services Ombudsman ("the SPSO") and the Homeowner Housing Panel, which was the predecessor of the Tribunal.

Submissions on behalf of the Factor

Ms Mullen accepted that the complaints procedure had not been updated to reflect the change of name of the Homeowner Housing Panel and that it gave the incorrect address; however, the Factor's letter of 10th August 2018 gave the correct address for the Tribunal. The complaints procedure has since been updated. In any event, this was not a breach of section 7.1 as the procedure is set out correctly and was followed in this case.

Failure to carry out the property factor's duties

The Homeowner alleged the following: *You failed to conduct the ballot to reduce warden hours under the deed of Conditions for the development, and your assessment of the results under the Title Conditions Act. You overruled the clear majority of owners who voted in favour of reducing warden hours to reduce costs, and have failed to respect the rights of the owners.*

Submissions on behalf of the Homeowner

The Homeowner said that this had been covered sufficiently in the previous submissions and there was nothing further to add. Decisions had always been carried on a simple majority vote, and the way the ballot had been conducted in this case made it impossible to comply with, as there would never be a 100% return from homeowners.

Submissions on behalf of the Factor

Ms Mullen said there had been no breach of duties. The Factor had given effect to the votes of the homeowners and respected their decision. She said she could not comment on historical votes. She reiterated that the vote would not require 100% response, but a ballot of 100% of the homeowners.

Findings in Fact

11.

11.1 The Homeowner is the joint registered proprietor of the Property, which was registered in the Land Register under title number ABN118157 on 7th April 2014.

11.2 The Factor became a registered Property Factor with registration number PF000140 on 7th December 2012. The Factor's duty under section 14(5) of the Act to comply with the Code arises from that date.

11.3 The development in which the Property is situated comprises 62 flats and one manager's flat. It is a sheltered or retirement housing development in terms of the 2003 Act.

11.4 There was discussion among the homeowners within the development about reducing the monthly factoring fee by removing the requirement for a weekend warden service. Meetings took place with the Factor to discuss this matter.

11.5 On 23rd May 2018, a letter was sent to homeowners and their agents or representatives by the Factor, enclosing a ballot paper to vote on whether or not to retain the current level of manager cover or amend the manager cover to Monday to Friday.

11.6 The ballot closed on 18th June 2018.

11.7 On 20th June 2018, a letter was sent to homeowners by the Factor giving the result of the vote. The Factor stated that a 2/3 majority of homeowners was required to carry the vote. The results were 19 in favour of no change and 30 in favour of amending the manager cover. The Factor stated that a larger majority was required for amending a core burden and wrote 'This can be 2/3rds or 100% of all owners.'

11.8 The Factor did not inform the homeowners in advance that the decision they were taking referred to a core burden in terms of the 2003 Act.

11.9 The Homeowner complained to the Factor, producing a document dated 15th July 2018 that outlined his complaint. The Homeowner requested that the Factor revoke the ballot result letter of 20th June 2018 and reissue it to show correctly the majority result under the Deed of Conditions.

11.10 On 10th August 2018, the Factor's Director of Customer Services responded to the Homeowner, and stated that legal advice had been taken and that the decision on the vote had been taken correctly.

11.11 On 24th August 2018, the Homeowner responded to the Factor, on behalf of the SMC Owners Group, giving notice of an application to be made to the Tribunal.

11.12 The ballot carried out by the Factors was valid.

11.13 The Factor did not provide clarity to the homeowners in relation to the way in which the ballot was to be decided.

11.14 The Factor did not respond to the Homeowner's request for a meeting to discuss matters following the ballot.

11.15 The Factor did not provide misleading or false information.

11.16 The Factor has a clear written complaints resolution procedure as required by the Code.

11.17 The Factor did not refuse to resolve the homeowner's concerns, or unreasonably delay in attempting to resolve them.

11.18 The Factor did not fail to carry out the property factor's duties.

Determination and Reasons for Decision

12. The Tribunal took account of all the documentation provided by parties and the oral submissions and evidence.

Failure to comply with section 2.1 of the Code

13. The Tribunal did not find that the Factor had failed to comply with this section of the Code. In their letter of 23rd May 2018, the Factor stated that a formal

vote was required in accordance with the Deed of Conditions. The starting point for any decision to be taken in relation to the development is the Deed of Conditions, so the information provided was not misleading or false. The Factor did not go so far as to state that the vote would be carried by a simple majority, which would have been misleading. It is unfortunate that the Factor did not explain matters fully within that letter.

Failure to comply with section 7 (paragraph 2 of the preamble) of the Code

14. The Tribunal considered Ms Mullen's submission that there could be no breach of the preamble. The Tribunal rejected that submission. There is nothing in the relevant legislation or Code to support that view. Accordingly, the Tribunal went on to consider the matter. The Tribunal found that the Factor had not refused or unreasonably delayed in resolving or attempting to resolve the Homeowner's concerns. Rather, the Factor considered the concerns and came to a conclusion with which the Homeowner did not agree.

The Tribunal also considered Ms Mullen's submission that there should be no consideration of the alleged failure by the Factor to respond to requests for a meeting, as this had not been notified by the Homeowner in advance. The Tribunal rejected that submission. The Homeowner made a complaint that the Factor refused to resolve his concerns, or had unreasonably delayed in attempting to resolve them. Fair notice of the overall complaint had been given to the Factor. The Homeowner expanded upon that at the Hearing, indicating this as an example of the Factor's alleged failure. The Tribunal decided that there was no prejudice to the Factor in allowing this matter to be addressed, particularly given that one of the people to whom a request for a meeting had been made was present at the Hearing. In reaching this decision, the Tribunal took account of the overriding objective set out in Rules 2 and 3, which requires the Tribunal to seek informality and flexibility in its proceedings, while dealing with proceedings in a manner proportionate to the complexity of the issues and the resources of the parties.

Failure to comply with section 7.1 of the Code

15. The Tribunal found that the Factor had not breached this section of the Code. While it was unfortunate that the Factor failed to update the Tribunal details in their complaints procedure, it could not be said that they did not have a clear written complaints resolution procedure setting out a series of steps, with reasonable timescales linking to those set out in the written statement. They have such a procedure and followed the procedure in this case. The correct details for the Tribunal were give to the Homeowner prior to the application to the Tribunal, and the policy has since been updated. The reference to the SPSO was not incorrect.

Failure to carry out the property factor's duties

16. The Tribunal did not find that the Factor had failed to carry out the property factor's duties. The Tribunal was persuaded that the development is a 'sheltered or retirement housing development' as defined in section 54 of the

2003 Act. The Tribunal was persuaded that the Deed of Conditions does not provide a way in which decisions on core burdens can be decided, as the reference to a superior in Clause FIFTEENTH is no longer valid. Therefore, the Factor was correct to decide the ballot in terms of the provisions of the 2003 Act, which provides that such decisions must be taken by a 2/3 majority of homeowners. That does not mean that 100% of owners must take part in the vote, but that 100% of owners must be balloted.

Observations

17. The Tribunal had concerns at the lack of information in the Factor's letter of 23rd May 2018. It was incumbent upon the Factor to explain matters fully to the homeowners, and it is not clear why that was not done. The Tribunal was also concerned that the Factor did not respond to the Homeowner's requests for a meeting to discuss matters; however, that was not seen as a failure to comply with section 7 of the Code, as it was clear that the decision had been made, the complaints procedure had been complied with, notification of the intention to submit an application to the Tribunal had been given, and it is unlikely that a meeting would have changed the decision.

18. The Tribunal noted that the Homeowner had referred in an email of 5th November 2018 to the Deed of Conditions being superseded by an amended version of a later date. This was not discussed at the Hearing. The Tribunal noted that the Title Sheet for the Property referred to a Deed of Conditions registered in 1985 and a further Deed of Conditions registered on 3rd March 2004. The Tribunal noted that the Factor's representative had referred to the latter Deed of Conditions at the Hearing, and that the terms of the relevant clauses discussed at the Hearing appeared to be the same in the 1985 and the 2004 Deed of Conditions.

19. Accordingly, the Tribunal found that the Property Factor did not breach the Code or fail in carrying out its property factor's duties.

Right of Appeal

20. 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.

H Forbes

Legal Member and Chairperson

5th December 2018