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

Housing (Scotland) Act 2006, Section 17

The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 ("the 2016 Regulations")

Chamber Ref: HOHP/PF/16/0102

11 Braehead Road, Kildrum, Cumbernauld, G67 2BG ("The Property")

The Parties:-

Mr Iain Cornwallis, Broom House, Albert Street, Dunblane, Perthshire, FK15 9DA ("the Homeowner")

Newton Property Management Limited, 87 Port Dundas Road, Glasgow, G4 0HF ("the Factor")

Tribunal Chamber Members

Maurice O'Carroll (Legal Member)
Ann MacDonald (Ordinary Member)

Decision of the Chamber

The First-tier Tribunal (Housing and Property Chamber) unanimously determined that the Factor has failed to comply with sections 1.1a A and 2.2 of the Code of Conduct for Property Factors ("the Code") in terms of section 17(1)(b) of the Property Factors (Scotland) Act ("the Act") as required by section 14(5) of the Act.

Background

1. By application dated 15 July 2016, the Homeowner applied to the Homeowner Housing Panel for a determination on whether the Factor had failed to comply with sections 1.1a A, 2.2 and various paragraphs of sections 4, 5, 6 and 7 of the Code as imposed by section 14(5) of the Act. The application also indicated a complaint in terms of the factor's duties generally was to be brought. However, by letter dated 28 October 2016, the Homeowner confirmed that he wished to insist on complaints under section 1.1a A and 2.2 of the Code only.

2. By decision dated 4 November 2016, a Convenor on behalf of the President of the Homeowner Panel decided to refer the application to a Homeowner Housing Committee. By operation of regulation 3 of the First-tier Tribunal for Scotland (Transfer of Functions of the Homeowner Housing Panel) Regulations 2016, the application was then considered by the Housing and Property Chamber of the First-tier Tribunal for Scotland ("the Tribunal").

3. A hearing of the Tribunal was held on 19 January 2017 at Wellington House, Wellington Street, Glasgow. The Homeowner did not appear, preferring to rest on the written submissions he had sent to the Tribunal. The Factor was present and represented by Mr Derek MacDonald, co-director of the Factor, Tom McCusker, Property Manager of the development of which the Property forms part and Lizanne McHugh, Regional Business Development Manager of the Factor. All three of the Factor representatives gave evidence during the course of the hearing.

4. The Homeowner intimated his concerns regarding the alleged failures in duty on the part of the Factor by letters dated 8 September 2016, in compliance with the requirements of section 17(3) of the Act.

5. A detailed response to the notification letters was sent by Mr MacDonald for the Factor in a letter dated 28 September 2016, which letter was before the Tribunal, as annotated in manuscript by the Homeowner. Other manuscript comments were added to various productions before the Tribunal which were taken into account, given that the Homeowner was not present at the hearing to provide evidence in person.

Committee findings

The Committee made the following findings in fact pursuant to Regulation 31(2)(b)(i) of Schedule 1 to the 2016 Regulations:

Section 1.1a A of the Code – Authority to Act

6. Section 1 of the Code sets out the duties of factors in relation to the Written Statement of Services ("WSoS") which it provides to homeowners of the properties they manage on their behalf. It sets out an obligation to send a WSoS to all homeowners within certain time periods and also sets out the minimum content that must be included in such WSoS. Section 1 therefore is not a statement of substantive duties which must be adhered to by factors. These are included in the later sections of the Code. Rather, it is concerned with the information that is provided to homeowners within the WSoS. Obviously, however, such information must be accurate, otherwise there would be a breach of section 2.1 of the Code which requires factors not to make misleading or inaccurate statements.

7. By way of background, the Tribunal finds that the Homeowner purchased the Property in November 2014. He does not reside there and lets the Property out to tenants. The development in which the Property is located is formed of 6 blocks each of which has different title deeds applicable to it, although a

common Deed of Conditions. In total, it consists of 215 separate individual properties being 214 flats and one shop. The Factor is a successor to the previous factor, Greenhome Property Management ("Greenhome") who managed the common parts of the development of which the Property forms part. The Factor purchased the business of Greenhome by means of an assets transfer agreement effective from 1 November 2015. Miss McHugh and Mr McCusker also transferred their employment to the Factor on that date, having previously been employed by Greenhome. On 1 November 2015, a letter was sent to all homeowners within the development informing them of the transfer. At the same time, a welcome pack was issued and the Factor's WSoS. Neither the letter of 1 November 2015 nor the welcome pack were included as evidence before the Tribunal but it accepts that they were sent.

8. The WSoS that was sent at that time was produced to the Tribunal and accepted by the Factor in evidence as being the document sent on 1 November 2015 and constituting the WSoS applicable to the Property. It consists of a one page document headed "Statement of Services in Common Premises." A notable feature of the WSoS as sent is its extremely small font size which is so small as to render it practically illegible. Mr MacDonald maintained that a renewed document with a slightly larger front size was in fact sent to all homeowners in February 2016, but the Tribunal was not provided with this. It therefore proceeds on the basis of the document provided to it in evidence.

9. Because the font size is so small, the Tribunal was of the view that the WSoS already failed in a practical sense to provide the necessary information required by the relevant part of section 1 of the Code. However, on careful scrutiny, it could be made out with a certain amount of difficulty that the first paragraph of the WSoS provides in part as follows:
"NPM [the Factor] has authority to act in terms of appointment as First Manager in terms of the Deed of Conditions, **or** via appointment by the majority of homeowners, **or** any other quorate voting requirement contained within the Deed of Conditions. On request, the Property Manager will supply by return to the homeowner information specific to his authority to act." (bold script added)

10. Section 1.1aA of the Code stipulates that the WSoS should set out the basis of any authority factors have to act on behalf of all the homeowners in the group of properties which they manage. It does not permit the possibility of three alternatives as denoted by the disjunctive "or" used twice in the first paragraph of the WSoS. The actual position as it applies to the individual homeowner requires to be set out. Further, the Code does not provide for the possibility for the homeowner to have to apply to the factor in order to find out the true position. The answer requires to be found within the WSoS itself. The WSoS accepted as being the one relied upon by the Factor does not do so. Therefore, there is a breach of section 1.1aA of the Code.

11. The Property Factor Enforcement Notice to follow hereon will require amendment of the terms of the WSoS to accurately state the basis of the Factor's Authority to act. It is recommended that at the same time, the Factor takes the opportunity to carefully scrutinise the terms of their WSoS and to

ensure that it complies with the remaining part of section 1 of the Code to avoid any further applications in respect of it.

12. The reason for the alternatives for authority to act being supplied in the WSoS was explained by Mr MacDonald as being the result of the sheer quantity of properties managed nationwide by the Factor: The Newton (i.e. Factor's) portfolio has approximately 16,000 clients across 350 developments over the whole of Scotland. However, as noted above, the terms of the Code are clear and require to be specific to the property in question being managed. There is no exception provided for instances where a factor has a large number of properties in its portfolio and where a generic statement would be easier to include by way of a standard form to all its numerous clients.

13. In any event, even although the Homeowner queried the Factor's authority to act in his letter of 8 September 2016, the response dated 28 September 2016 was not unequivocal. On the fourth page of that letter at point 5, Mr MacDonald on the one hand asserted that the Factor has authority by reason of a mandate from the block owners while at the same time stating that in any event "the historical appointment position of Greenhome and now Newton is well established through custom and practice." Accordingly, even in terms of the WSoS supplied, the Factor failed to supply an unequivocal statement of the basis of its appointment when that was sought by a homeowner.

14. For the sake of completeness, the Tribunal considered whether the Factor has authority to act, although this issue was not central to the question before it (see the observations in paragraph 6 of this decision). Miss McHugh provided additional information to the Tribunal in the form of a folder of documents which included the following: An invitation to tender for property management services for the Braehead Road development; the relevant titles, including a Deed of Conditions granted by Cumbernauld Development Corporation in 1980 making provision for the appointment of a factor; a Service Level Agreement produced by the Braehead Road Residents (also included with the papers to the Tribunal); the Constitution of the Braehead Road Residents' Association authorised by the Deed of Conditions; and relevant correspondence leading to the appointment of Greenhome following the competitive tender.

15. That correspondence included an email dated 21 September 2010 from a Mr Allan Bairner who was at the time Chairperson of the Residents' Association, setting out the basis of the foundation of the Residents' Association and the decision to appoint a new factor. This ultimately led to an email dated 27 August 2012 advising homeowners that the Residents' Association had decided to appoint Greenhome as factor. Greenhome took over as factor from Messrs Ross and Liddell on 28 August 2012.

16. Mr Bairner's tenure appears to have pre-dated the Homeowner's ownership of the Property by a number of years which might be the reason why the Homeowner has apparently no knowledge of him. In addition, the Residents' Association now appears to be defunct since the time of the appointment of Greenhome. However, the Tribunal finds that neither of these facts affects the

validity of the ultimate appointment of Newton Property Management Limited as Factor for the development as successor to Greenhome.

17. The only documents not supplied were the relevant Mandates signed by a quorum of the members (three in number) of the Residents' Association appointing Greenhome, the Factor's predecessor. The reason provided for this omission by Miss McHugh was that they were contained in an archive maintained by Greenhome but which were not transferred on 1 November 2016. As a result of this, the Factor was unable to obtain them prior to the hearing. The Tribunal was satisfied on the balance of probabilities that such mandates were produced at the relevant time, given the terms of the surrounding correspondence produced. In light of that, a clear link was demonstrated going from the original factoring arrangements under the title deeds to Greenhome and thence to Newton Property Management Limited, the present factor. The Tribunal was accordingly satisfied that the Factor has authority to act based upon the evidence provided.

Section 2.2 of the Code – Threatening communications

18. Section 2.2 of the Code provides that factors "must not communicate with homeowners in any way which is abusive or intimidating or which threatens them (apart from a reasonable indication that you may take legal action)."

19. It appeared to the Tribunal that most of the comments included in correspondence between the parties as annotated by the Homeowner fell within the category of communications included in the parenthesis in section 2.2 of the Code and were not abusive or threatening. Clearly, if factor bills are not being paid, then it is reasonable for factors to indicate to non-paying homeowners that legal action may be taken if such non-payment persists.

20. There were, however, three instances within the correspondence supplied which were of concern to the Tribunal and the Factor was therefore questioned in regard to these matters.

21. The first of these was a letter dated 28 June 2016 sent to the Homeowner from the Factor's Debt Recovery Department. In the third paragraph of that letter, the following is written in block capital letters and in bold: "We may also require to advise other owners in your development of your arrears."

22. The Factor explained that the Data Commissioner has confirmed that where there are joint and several debts (as factoring debts are) then it is permissible to reveal the identity of non-paying homeowners. This is accepted by the Tribunal. The Factor's practice in relation to homeowner debts is more fully explained in the debt recovery procedures adopted by the Factor and which are available to homeowners within the development.

23. The Tribunal, however, did not accept that the bald wording within the letter of 28 June 2016 accurately reflected the correct position as set out in the debt recovery procedure. It instead gave the impression that the Homeowner's identity and the fact of his failure to pay factor fees would be released

imminently to the other homeowners within the block, who themselves might be required to make up the shortfall.

24. The more nuanced position in the debt recovery procedures is that where a factor debt enters the public domain such as after the registration of a Notice of Potential Liability or the obtaining of a decree for payment, then the identity of the debtor may be made known to other homeowners who might then be liable to cover a proportion of the non-payer's fees. That is not the impression given by the sentence in bold capital letters contained within the letter of 28 June 2016. Any reasonable reading of those words would give the impression that such disclosure could happen at any time forthwith and which may result in unpleasant repercussions from other homeowners within the development. The statement contained within the letter, in the view of the Tribunal, ought to have been worded in such a way as to reflect the reality of the situation and the practice of the Factor as set out in its debt recovery procedures, rather than to have been phrased in such blunt and threatening terms. Accordingly, the Tribunal found that particular instance to be in breach of section 2.2 of the Code.

25. The second example is a statement in an email to the Homeowner from Mr McCusker dated 20 April 2016 which stated: "I should also advise that as you have not paid your share of the common charges and are in arrears you are barred from holding office in any new committee." When asked for evidence to vouch this assertion, the Factor was not able to show anything in writing to support it. It was, it said, an understanding reached by the previous, now defunct, Residents' Association which Mr McCusker was articulating. The Tribunal did not accept that evidence and would have required to see something more to support such an assertion. However, despite that, it was not persuaded that the statement, although inaccurate, amounted to one which was abusive, threatening or intimidating.

26. The third example arose from a letter dated 15 July 2016 sent to the Homeowner from Messrs Gordon & Noble, a third party debt collection agency. Again, many of the statements within it were simply in relation to the possibility of legal proceedings which are unobjectionable. However, it also contained the following statement: "Failure to pay outstanding arrears within **seven days** will result in our requiring to follow up this letter initially via a variety of methods **including contacting you by telephone at your home or work address**" (bold script in the original).

27. The letter was correctly addressed to the Homeowner at his home address in Dunblane. There was accordingly no issue regarding reaching the Homeowner to communicate the possibility of imminent legal action. The Tribunal considered the vague threat of follow up by "a variety of methods" and to include telephone calls to his place of work (with the possibility of causing embarrassment there) to be deliberately intended to cause additional concern on the part of the recipient over and above the legitimate statement that legal proceedings may be taken.

28. The Tribunal might have been persuaded that the above statement constituted a breach of section 4.9 of the Code had it still been before it. However, since the complaint under that section had been expressly withdrawn by the Homeowner, it was not in a position to make such a finding. Since the statement was not made by the Factor, the Tribunal found no breach of section 2.2 of the Code in respect of it.

Decision

29. Therefore, in light of the evidence before it and for the reasons and to the extent provided above, the Tribunal finds that the Factor has breached its duty to comply with the Code in respect that it failed to adhere to the terms of sections 1.1a A and 2.2 thereof. In terms of section 19(2) of the Act, the Tribunal is required to propose a Property Factor Enforcement Order. Notice of the proposed Order will follow this decision under separate cover.

Appeals

30. A Homeowner or Factor aggrieved by the decision of the Tribunal may seek permission to appeal from the First-tier Tribunal to the Upper Tribunal on a point of law only within 30 days of the date the decision was sent to them.

Signed: M O'Carroll Date 30 January 2016
Chairman

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Tribunal Chamber Members

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Ann MacDonald (Ordinary Member)

Notice of Property Factor Enforcement Order ("PFEO")

This Notice should be read in conjunction with the decision of the Tribunal of even date under reference HOHP/PF/16/0102

1. By decision of even date with this Notice, the Tribunal determined that the Factor had breached its duties in terms of s 17(1)(b) of the 2011 Act in that it had failed to comply with sections 1.1a A and 2.2 of the Code of Conduct for Property Factors as required by s 14(5) of that Act.

2. In accordance with s 19(3) of the 2011 Act, having been satisfied that the Factor has failed to carry out the property factor duties, the Tribunal must make a Property Factor Enforcement Order. Before making an Order, to comply with s 19(2) of the Act, the Tribunal before proposing an Order must give notice of the proposal to the factor and must allow the parties an opportunity to give representations to the Committee in relation to this Notice.

3. The intimation of this Notice of Property Factor Enforcement Order to the parties should be taken as notice for the purposes of section 19(2)(a) and the parties are hereby given notice that they should ensure that any written representations which they wish to make under s 19(2)(b) must reach the First-tier Tribunal for Scotland (Housing and Property Chamber) by no later than 14 days after the date the decision is intimated to them.

4. If no representations are received within that timescale, then the Tribunal will proceed to make a PFEO in the following terms without seeking further representations from the parties.

5. Therefore, the Committee propose to make the following PFEO:

   Within 28 days of the communication of the PFEO to the Factor, the Factor must:

   (i) Issue a revised Written Statement of Services to the Homeowner in reasonably legible font which accurately sets out the Factor's authority to act as factor for the Property.

   (ii) Pay compensation to the Homeowner in the sum of one hundred pounds (£100) in recognition of the time and inconvenience caused by the Factor's failure to comply with its duties under the Code of Conduct for Property Factors. At the Factor's discretion, said sum in compensation may be offset against any outstanding debts properly and lawfully due to the Factor by the Homeowner.

   (iii) Provide documentary evidence of compliance to the Homeowner Housing Panel with the above Orders within 7 days of having done so by recorded delivery post.

Appeals

6. A Homeowner or Factor aggrieved by the decision of the Tribunal may seek permission to appeal from the First-tier Tribunal to the Upper Tribunal on a point of law only within 30 days of the date the decision was sent to them

Signed: M O'Carroll Date 30 January 2016

Chairman