

Housing and Property Chamber First-tier Tribunal for Scotland



Decision and Statement of Reasons under Section 19 of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/18/3263

Re : 4 The Terrace, Ardbeg, Rothesay PA20 0NP ("Property")

The Parties:-

Sheena Sturtivant, 4 The Terrace, Ardbeg, Rothesay PA20 0NP ("Homeowner")

Bute Factors Limited, 53 Victoria Street, Rothesay PA20 0AP("Factor")

Tribunal Members:

Joan Devine – Legal Member

Elaine Munroe – Ordinary Member

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("Tribunal") unanimously determined that the Factor has complied with the Code of Conduct for Property Factors as required by section 14 of the 2011 Act and has complied with the property factor's duties. In all the circumstances the Tribunal does not propose to make a Property Factor Enforcement Order ("PFEO").

Introduction

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 First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

Following on from the Homeowner's application to the Tribunal which comprised documents received in the period 4 December 2018 to 13 March 2019 ("Application"), the Convener, with delegated powers, referred the Application to the Tribunal on 4 April 2019. The Tribunal had available to it, and gave consideration to, the Application, Productions provided by the Homeowner, Written Representation and Productions provided by the Factor and the oral submissions made by both parties at the hearing.

Hearing

A hearing took place at Moat Community Education Centre, Stuart Street, Rothesay, Isle of Bute on 29 May 2019. The Homeowner attended along with Jill Armstrong as a supporter. The Factor was represented by Lesley McDougall and Kerr Livingston of Bute Factors Limited.

The Tribunal noted that at section 7 of the Application, the Homeowner had said that the Application was proceeding under section 2.2 and 2.5 of the Code and that the Homeowner also complained about failure to comply with property factor duties. The Tribunal noted that in her email of 8 March 2019 the Homeowner stated that she was no longer insisting on the Application as regards section 2.5 of the Code. At the hearing the Tribunal confirmed with the Homeowner that was her position.

Findings in Fact

1. The Property is within a building at 3 and 4 The Terrace, Ardbeg, Rothesay PA20 0NP ("Building").
2. The Factor performs the role of the property factor of the Building.
3. The title to the Property is governed by a deed of conditions granted by Mary McKinlay Weir and Malcolm Donald Weir as the then Trustees of Malcolm Weir dated 19th and 20th and recorded in the Division of the General Register of Sasines applicable to the County of Bute and in the Books of Council and Session on 24th all days in December 1963 ("Deed of Conditions").
4. The Homeowner acquired title to the Property by disposition in her favour dated 2 May 2016.
5. The Deed of Conditions provides that the proprietors of the 9 dwellings within the Building are bound to uphold and maintain in good order and repair the common parts which include the close entering from number 3 The Terrace.
6. The Factor had written to the proprietors of the Building on 19 July 2018 to ask if they would agree that the costs associated with maintenance of the close would be borne by the proprietors only of number 3 The Terrace and would not be borne by the Homeowner. Only one proprietor had agreed.

Summary of Submissions

1. The Homeowner told the Tribunal that she lived at number 4 The Terrace, Ardbeg. She explained that it is a main door with flats above. There was a common close to the left. The management of number 4 was dealt with along with the management of number 3. She told the Tribunal that the Property had belonged to her parents. They had lived in it for 40 years. She had taken over the Property in 2016. She now lived there full time.
2. The Homeowner said that she was concerned that she had to subsidise costs for the owners of number 3 The Terrace. She appreciated that she shared common parts such as the roof but she did not use the common close and yet was being asked to contribute to the cost of maintaining the close.
3. The Tribunal drew the Homeowner's attention to the wording of paragraph 2.2 of the Code. The Homeowner said that she paid a management fee. She noted that there was a voting system in place which meant that the other 8 homeowners could always outvote her. This made her feel vulnerable. She had spoken to some other residents of the Building and they were not happy that she had not paid a contribution towards the cost of maintenance of the common close.
4. The Homeowner said that she felt that the Factor is "stonewalling" her. She said she felt that the difficulty was not being resolved at source. She thought that a meeting with all residents to discuss the situation in a positive atmosphere would be helpful. She said she did not think it was fair that her concerns were not being resolved.
5. The Homeowner was asked whether she took legal advice regarding the terms of the title when she acquired the Property. She said that the Property was gifted to her by her mother. Her mother took legal advice at the time of the transfer. She did not think that she needed to take legal advice at that time.
6. The Tribunal drew the Homeowner's attention to the wording of the Deed of Conditions which related to the Property. The Tribunal asked the Homeowner if she had read the Deed of Conditions. She said that she had read the Deed of Conditions but she did not understand it.
7. The Homeowner said that she did not request or benefit from the service of maintaining the common close.
8. The Tribunal asked the Homeowner to explain her concerns as regards communication from the Factor. She said that she was concerned that she

did not receive a response from the Factor. As no response had been received she went into the Factor's office. It then became apparent that her emails were being caught in the Factor's "spam" filter.

9. The Tribunal asked the Homeowner if the Factor had pursued the outstanding invoices. She said that no legal action had been taken.
10. The Homeowner said that some bills which she received were not clear. For example, she received a bill for the cost of dealing with a hedge, but she has no hedge outside her property. On contacting them, the Factor clarified that this related to a hedge to the side of the Property. Also the Homeowner said that sometimes the subject heading on the invoices is wrong. Sometimes it will refer to 2/3 The Terrace, when in fact the bill relates to 4 The Terrace where the Homeowner resides. She said that on occasion bills were wrongly apportioned and a credit had to be given.
11. The Homeowner said that the Factor had never been abusive. She did however think it was intimidating that the Factor kept saying that there was nothing they could do about the title to the Property.
12. Lesley McDougall of the Factor told the Tribunal that Bute Factors Limited took on management of the Building last year. She said the Factor has to work with whatever is stated in the title to the property being managed. She told the Tribunal that the Factor had asked the other proprietors within the Building if the costs of maintaining the common close could be split 8 ways instead of 9. Only one owner agreed to that.
13. Ms McDougall was asked whether a residents' meeting had been called. She said that it was very difficult to arrange a residents' meeting as of the 8 other properties, 6 were holiday homes. In those circumstances it was difficult to identify a suitable time and date.
14. The Tribunal asked Ms McDougall whether the costs associated with the maintenance of the common close had been met by other proprietors. She told the Tribunal that the cost of painting the common close had been met by the residents of the Building other than the Homeowner. The cost of cleaning had simply been paid from the float held by the Factor.
15. The Tribunal asked the Homeowner to explain how it was she thought that the Factor had breached the Property Factor duties. She said that she wanted them to tell her what the options were available to her to resolve her concerns. She said that she thought that the Factor should give her advice regarding the management of the Building. She again said that she felt she was being "stonewalled".

16. The Tribunal asked the Homeowner what it was she wanted them to do. She said that she wanted the Factor to advise her of the options that she could explore over and above asking the other proprietors within the Building to sign a mandate to re-allocate the costs for the common close.
17. Mr Livingstone drew the Tribunal's attention to the letter issued by the Factor to the other proprietors in the Building dated 19 July 2018. He said that he felt that the letter was very clear. The wording had been approved by the Homeowner. He said that it made clear that any change would only bind current residents. Mr Livingstone said that he felt that the letter was reasonably detailed in its attempt to get the point across. Mr Livingstone said that all of the proprietors to whom the letter was issued had responded. Only one had agreed to a reallocation of costs. He said that the Factor cannot change the allocation which is set out in the Deed of Conditions. That would cause concern to the other proprietors.
18. The Homeowner said that her concern was she did not know where this would stop. For example, what if the other 8 proprietors asked for an intercom system to be installed. She queried whether she would have to pay for that. Mr Livingstone said that there was a difference between maintenance and an improvement. Mr Livingstone reiterated that the Factor has no option other than to work within the terms of the title which applies to the Property.

Remedy Sought

19. The Tribunal asked the Homeowner what remedy she sought. She said that she wanted to understand the options available to her. She wanted the Factor to provide advice regarding the management of the Building. She wanted the Factor to help to identify a way of managing the Building that would not involve the homeowner paying for a service which she neither requested or used. She felt it would be helpful for a meeting of residents within the Building to be called to discuss her concerns.
20. Mr Livingston said that the letter of 19 July 2018 to other proprietors was very clear and detailed in explaining the point in issue. Any change to the allocation of costs agreed with current proprietors would not bind subsequent proprietors. He said that all of the proprietors had responded to the letter and only one agreed to a re-allocation of the costs for maintenance of the close. Ms McDougall said that of the 8 other properties, 6 were holiday homes.

The Code

21. Section 2.2 of the Code states:

"You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action)."

Findings and Reasons for Decision

22. The Tribunal determined that there had been no breach of the Code and the Factor had not failed to comply with their duties as a property factor.
23. The Homeowner's complaint was that the Deed of Conditions was unfair as it provided for her contributing to the cost of maintenance of common parts of the Building which included a common close which she did not use. She felt aggrieved that the Factor had not called a meeting of residents in the Building to discuss her concerns and had not sought to explore with her options that may be available to her to resolve her concerns.
24. The Factor had explained to the Homeowner the meaning of the Deed of Conditions in their letter of 19 April 2018. They had suggested writing to the other proprietors proposing a re-allocation of the costs of maintaining the close. They had prepared a letter to the proprietors and agreed its terms with the Homeowner. The Factor had contacted other proprietors within the Building to seek consent to a departure from the cost allocation set out in the Deed of Conditions. All of the proprietors had replied but only one agreed to a re-allocation of costs.
25. The Tribunal determined that the Factor was obliged to manage the Building in accordance with the Deed of Conditions. The terms of the Deed of Conditions were clear. The cost associated with maintaining the common parts, including the close, were to be met by the 9 proprietors of the Building, which included the Homeowner. The Tribunal determined that the Factor had sought to address the Homeowner's concerns by writing to the other proprietors within the Building to seek consent to a departure from the cost allocation set out in the Deed of Conditions. The Tribunal determined that the Factor had not communicated in a way that was abusive, intimidating or threatening. The Tribunal determined that the Factor had not breached the property factor duties.

Appeals

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

Signed
Joan Devine, Legal Member

30 May 2019
Date

