Housing and Property Chamber
First-tier Tribunal for Scotland

Decision: Section 43(2)(b) of the Tribunals (Scotland) Act 2014

Chamber Ref: FTS/HPC/PF/19/0935

The Property: Flat 2/6, 17 Stewartville Street, Partick, Glasgow G11 5HR

The Parties:

Mr Gary Glen, residing at 2 Oak Park, Bishopbriggs, Glasgow G64 1UB. ("the homeowner")

and

Hacking & Paterson Management Services, 1 Newton Terrace, Glasgow G3 7PL ("the factors")

Tribunal Members:
David Preston (Legal Member) and Elizabeth Dickson (Ordinary Member).

Decision:

1. **The tribunal finds that the factors are not in breach of the terms of the Code of Conduct for Property Factors ("the Code").**

Background:

1. By application dated 20 March 2019, as amended by email dated 25 April 2019, the homeowner sought a determination that the factors were in breach of Sections 2.4 and 2.5 of the Code.

2. By Notice of Acceptance dated 16 May 2019 member of the Tribunal with delegated powers so to do referred the application to this tribunal for determination. A Notice of Referral and Hearing was sent to the factors on 22 May 2019 advising that a hearing would take place on 11 July 2019 at 10.00am and requiring that any written representations on the application be submitted by 12 June 2019.

3. By letter dated 31 May 2019 the factors submitted their response and representations. They sought a review of the decision of the legal member to refer the application to this tribunal and requested that the matter of the Tribunal's jurisdiction to deal with the application should be dealt with as a preliminary issue.

4. By a Direction dated 12 June 2019 the tribunal confirmed that it would consider the factors' representations as a preliminary matter at the hearing scheduled for 11 July 2019 and thereafter, if appropriate, would proceed to consider the merits of the application.

5. A hearing took place at the Glasgow Tribunal Centre on 11 July 2019 at 10.00 am. The applicant, who had indicated that he was unable to attend due to work commitments, was represented by his sister, Ms Gayle Glen. There was no appearance by or on behalf of the factors who had indicated in their written representations of 31 May 2019 that they did not intend to attend any hearing. The tribunal considered that the factors had voluntarily waived their right to be present or make further representations and was content to proceed in accordance with the Direction dated 12 June 2019.

6. Following the issue of the Decision and the Proposed Property Factor Enforcement Order ("PFEO") the factors, by letter dated 19 August 2019,

requested that we review the Decision. By Decision dated 15 November 2019 the tribunal agreed to the factors' request to review the Decision dated 6 August 2019 for the reasons set out therein.

7. On 8 January 2020 a further hearing was convened to review the Decision of 6 August 2019. Present at the hearing were: the homeowner who represented himself; and the factors who were represented by Mr David Doran, Managing Director.

8. Following notification of our agreement to review our Decision, the factors submitted written representations by letter dated 29 November 2019. No further representations were submitted by the homeowner who was content to proceed on the basis of those already lodged.

Hearing:

9. The factors referred to an exchange of emails between them and the homeowner on 13 September 2017, copies of which had not previously been seen by the tribunal, in which the homeowner stated that he was satisfied that in relation to a complaint by him on 17 August 2017, the factors' email was "..broadly in line with…" his points and accepted the factors' gesture of goodwill of a £20 credit to his common charges account and considered the matter closed.

10. Mr Doran argued that therefore any part of the complaint and application which referred to the installation of the chain could not be relevant to the tribunal's deliberations.

11. The tribunal noted that the complaint of 17 August 2017 related to the installation of the chain at the entrance to the carparks, which the homeowner acknowledged was the same issue referred to by the applicant in relation to this application as an example of where the factors had failed to comply with section 2.4 of the Code.

12. The homeowner said that while he had accepted the factors' gesture of goodwill, he did so on the understanding that they would change their process and not accept instructions from the group of a small number of owners in the development and would consult with all owners.

13. The homeowner asserted that this had not happened and referred to the chain of emails between 27 February and 12 March 2019 which demonstrated that the factors were continuing to consult with the group over the installation of a barrier at the north car park which had been at the suggestion of the group. He had responded to suggest that quotations should be obtained for barriers at both car parks since by installing only one, the problem of unauthorised parking would shift to the other car park. The factors said that if other owners gave feedback in line with the homeowner's view, they may propose the installation of two barriers. They did not specifically put the suggestion of two barriers to the owners.

14. The homeowner referred to the situation in relation to the engineer's report which related to the condition of the car park and the proposals for maintaining and repairing it. He complained that the factors had provided a copy of it to the group of homeowners and had refused to provide a copy to him or any other owners until it had been discussed with the group. The homeowner argued that this was improper and was not in accordance with the requirements of section 2.4 of the Code.

15. The homeowner referred to the email dater 1 November 2018 from Andrew Harvey which referred to the engineer's report and stated " We invited comments from the Owners Group, however as yet we have not received any clear instruction from them on how to proceed."

16. Mr Doran reiterated that instructions were not taken from the group. It was used as a sounding board for ideas and suggestions.

17. Mr Doran clarified that the email of 1st November was referring to how to proceed to consult the Owners rather than how to proceed or not with any

work and accepted that the wording was poor and could have been better framed.

18. The factors' position as stated by Mr Doran was that they did not accept any instructions from the group but consulted with them on any ideas and suggestions for necessary works at the property. They then referred the issues to the other homeowners for agreement or approval where necessary. They found this process to work well in taking forward any items of maintenance, repair or improvement of the common parts.

19. The factors considered that the Deed of Conditions permitted them to proceed with such matters in this way. He referred to clause ELEVENTH (a) of the Deed of Conditions which states:

> *"The Property Council shall comprise the proprietors of all the Dwellinghouses provided always that when more than one person is included in the term "proprietor" of any Dwellinghouse only one of such persons may be a member of the Property Council. (b) Subject as aftermentioned, the Property Council shall have power (i) to appoint a Factor; (ii) to have executed any works of repair or maintenance, decoration, renewal, improvements et cetera of the Common Parts or any part thereof"*

It was the factors' view that the 'Property Council' has always existed as it comprises the proprietors of all the properties in the development at any given time and the group of proprietors with whom they consult comprises an appropriate number of owners. Mr Doran said that clause ELEVENTH(c) provides for meetings to be convened by any 8 proprietors of which 1/3 (16) would form a quorum. A majority of votes at any such meeting (9) may instruct works of repair or maintenance, decoration, renewal, improvements to be done and therefore he contended that the group comprised an appropriate number.

20. The homeowner said on a number of occasions that his objection to the factors consulting with the group was that it had not been validly constituted. He said that it was entirely informal; and had no mandate to speak on behalf of the owners in the development.

21. Mr Doran said that the homeowner had been invited to join the group, but he had not done so. He also said that the group had contacted the other owners and invited them to become involved but the responses had been that the majority of owners did not want to be involved until such times they were being asked for a decision about something specific (email dated 8 February 20918 from 'Elaine' to 'Gillian' ~28 of factors' productions).

22. Mr Doran was unable to say when a meeting of the proprietors had been arranged, or whether any such meeting had ever taken place. he explained that the group of interested owners had been formed following a major fire in the building and had initially comprised 8 members but this had grown to 11. So far as the factors were aware, the group communicated with others in the building and had sought to recruit additional owners to liaise with the factors. Since then the factors have engaged with the group and sought their views initially on proposals, which were invariably referred to the remaining owners for approval where necessary and for funding.

23. Neither the title deeds nor the factors' Terms of Service and Delivery Standards (ToSaDS) imposes a threshold or level of delegated authority above which owners require to be consulted which is the reason that the chains were installed, and the engineers' report obtained without obtaining prior approval. However, the implementation of the recommendations (which was on-going) was the subject of wider consultation and approval.

Reasons:

Section 2.4

24. The tribunal carefully considered the written representations made by both parties and the oral representations made by them at the hearing. It was satisfied on the evidence before it that the factors were not in breach of the Code in respect of their inter-actions with the group of homeowners. There are a number of ways in which factors can become aware of issues

which need their attention. They can carry out periodic inspections and assess whether any work is required at their own instance or they can be contacted by an owner or a number of owners. Where there is a threshold below which they can proceed without the owners consent they can so proceed or obtain approval of the owners by correspondence or at a meeting duly convened. In the present case, the factors have been presented with an informal group of involved owners who liaise with them about issues requiring attention. It is unfortunate that there was a reluctance on the homeowner's part to liaise with the group and appeared to be an underlying issue between that group and the homeowner although we were not presented with any evidence in this regard.

25. We were satisfied that the homeowner had been offered the opportunity to join the group. In any event we are of the view that he could communicate his views to them or direct to the factors to have his views taken into account.

26. We find that the factors are entitled to communicate with any group of owners formal or otherwise and seek their views and opinions as a sounding board before consulting the owners as a whole. While entitled to do so, they should be fully transparent with all other owners and not delay providing the other owners with any information they may request. They can also respond to suggestions from them as appropriate. The essential element, which the factors have demonstrated here is that they consult with the owners as a whole and do not act on instructions from the group.

27. The wording in the email of the 1st November could have more accurately reflected the factors position. It is also unfortunate, perhaps that the factors told the homeowner that they would wait and see whether other owners responded as he had by suggesting a barrier on the south car park before pursing that option. However, we do not find that in so doing they breached the Code.

28. In relation to the factors' views about Clause Eleventh (a) of the Deed of Conditions, the provisions apply to votes at meetings at which all interested owners have the opportunity to be heard by the others and a vote taken after discussion. To consult with a 'closed' group does not provide that opportunity to the other owners. Further, Clause ELEVENTH gives power to the Property Council to instruct any works of "repair or maintenance, decoration renewal, and improvements but "common charges" for which owners are liable are defined as only including 'authorised' improvements. Such authorisation must come from proprietors and the tribunal does not accept that the authorisation refers to planning permission or building warrants.

Section 2.5

29. Having considered the emails and correspondence presented to us we did not find any significant delay in responding by the factors apart from one or two delays caused by holidays or changes in personnel.

30. While certain of the matters identified above may be unfortunate or could have been handled better by the factors, we are unable to say that they are sufficiently serious in nature as to amount to a breach of the Code.

Appeals

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.

David Preston

Chairman

17 January 2020