Housing and Property Chamber
First-tier Tribunal for Scotland

First-tier Tribunal for Scotland (Housing and Property Chamber)
DECISION in respect of the Homeowner's Application made under the Property Factors (Scotland) Act 2011 Section 19

Chamber Reference: FTS/HPC/LM/18/3261

The Parties:

Mr Aylmer Millen, residing at 5 Hillpark Grove, Edinburgh, EH4 7AP ("the Homeowner")

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD ("the Property Factor")

The Property: 5 Hillpark Grove, Edinburgh, EH4 7AP

Tribunal Members:

Mr James Bauld, Chair Person

Andrew Murray, (Ordinary) Surveyor Member

Decision

1. The Tribunal determines that the Property Factor had not refused to resolve , or unreasonably delayed in attempting to resolve the homeowner's concerns as required in terms of section 1793) of the Act and accordingly the tribunal did not have jurisdiction to determine the application and accordingly determined to make no further order.

Background

2. By application dated 30 November 2018, the Homeowner applied to the Tribunal alleging that the Property Factor had failed to comply with the Code of Conduct for Property Factors ("the Code"). He alleged breaches of sections 2,1. 2.5, 7.1 and 7.2 of the Code and that the Property Factor had also failed to carry out the Property Factor's' duties After sundry procedure a hearing was set to take place on 14 February 2019 in Edinburgh and appropriate intimation of that hearing was sent to both the Homeowner and the Property Factor.

3. Prior to the hearing, both parties lodged additional documents for the benefit of the Tribunal.

Hearing on 14 February 2019

1. The Homeowner was in attendance at the hearing on 14 February 2019. The Property Factor was also present and was represented by Karen Jenkins who is a member of their staff.

2. The Tribunal commenced by reminding parties of the relevant provisions from the First-tier Tribunal for Scotland Housing & Property Chamber (Procedure) Regulations 2017 (hereinafter referred to as "the Regulations"). In particular the Tribunal reminded parties of the effect of the overriding objective which requires the Tribunal to deal with proceedings justly. The Tribunal reminded parties that in dealing with proceedings justly the Tribunal was obliged to seek informality and flexibility in the proceedings, to deal with matters in a proportionate manner and to avoid delay.

3. The Tribunal also noted that in the application, the Homeowner had made reference to a previous Application which he had made to the Tribunal under reference number FTS/HPC/PF/18/0043. It was also noted that other applications had previously been made by the Homeowner against the Property Factor. Both parties readily acknowledged that they had previously attended Tribunal hearings in respect of these previous applications.

4. The hearing began by the Tribunal indicating to the parties that it appeared to the Tribunal that there were two issues which had led to the Application being made. The first issue was the alleged failure by the Property Factor to respond to a complaint which had been made by the Homeowner by emails dated 26 October 2018 and 5 November 2018. This issue was the basis of the complaints under the Code in relation to sections 2.5, 7.1 and 7.2 The second complaint was an allegation that the Property Factor was not acting in accordance with the provisions of the title deeds to the Property in connection with the convening and conduct of meetings of proprietors within the Hillpark Brae development and the manner in which decisions were taken at such meetings and this issue was also alleged to breach section 2.1 of the Code .

5. With regard to the first aspect of the complaint, which dealt with an allegation that the Property Factor had not responded to complaints, the Tribunal referred the parties to a recent decision of another Tribunal under chamber reference FTS/HPC/PF/18/1855. In that decision, another Tribunal had taken the view that an Application by a Homeowner was premature and accordingly did not fall within the jurisdiction of the Tribunal. Section 17 (3) of the Act specifies that an Application may not be made to the Tribunal unless firstly the Homeowner has notified the Property Factor in writing as to why the Homeowner considers the Property Factor has failed to comply with the various duties and secondly that the Property Factor has refused to resolve, or unreasonably delayed in making attempts to

resolve the Homeowner's concerns. In the Tribunal Decision mentioned, the view taken by the Tribunal was that the Homeowner was required to follow the Property Factor's complaints procedure where that complaints procedure was reasonable overall.

6. In this application by Mr Millen, the written statement of services of the Property Factor indicated that they would deal with complaints by acknowledging any initial correspondence within 48 hours and secondly correct any problems within 28 business days. Mr Millen's email of 5 November 2018 to the Property Factor indicated he requires a response within 14 days. He sent a further email on 26 November indicating he had received no response and made an Application to the Tribunal dated 30 November 2018. In terms of the written statement of service, the Property Factor had 28 business days from receipt of the compliant to resolve matters. That period of time would not have expired until 13 December 2018. That period was accordingly well beyond the date of the submission of the Application to the Tribunal. Accordingly the Tribunal indicated to the parties that there was an argument that the Application lodged by the Homeowner was premature as he had not allowed the Property Factor time to deal with his complaint in terms of their policy. It was however noted by the Tribunal that the Property Factor had failed to comply with the first part of their complaints policy in relation to acknowledging correspondence within 48 hours.

7. The Tribunal, having drawn parties attention to the possible lack of jurisdiction, then addressed the substantive complaint which had been raised by the Homeowner. The complaint was that the Property Factor was not following the procedure set down in the title deeds in respect of the way in which certain votes were taken at meetings.

8. It was noted by the Tribunal and agreed by the parties that the title deeds set out a specific procedure with regard to meetings of proprietors of the whole Hillpark Brae development. The title deeds allow a Factor who has been appointed to carry out certain works where they do not exceed £2000 in total. For any works beyond that threshold, it is a requirement of the deeds that the Property Factor must convene a meeting of proprietors to obtain approval of such works. The procedure for such a meeting is set down in the burdens section of the title deeds. It is not possible to obtain approval for such works by means of a postal ballot of proprietors.

9. The title deeds are clear that at any meeting which has been properly convened, proprietors are entitled to attend and may vote on any issue . If a proprietor cannot attend then he or she is entitled to be represented by any other person who has been appointed as the proprietor's mandatory. Such appointment must be done by written mandate and that person may attend and vote and act on behalf of the proprietor who has given the mandate.

10. The Homeowner's complaint in this matter related to his allegation that the Property Factor was "soliciting" votes from proprietors. In particular he made reference to the letter of 12 October 2018 which had been sent to the proprietors which provided details of a meeting to be held on 25 October 2018 to deal with proposed repairs to the drains at the development.. Attached to that letter was a list of matters upon which the meeting would be required to make a decision. The letter to the proprietors indicated to them that a quorate meeting required the attendance of at least 20 proprietors or their "mandates".

11. The attachment to the letter set out a variety of possible works and also indicated to the proprietor that they should "ask your nominated proxy to bring this completed mandate along to the meeting on Thursday 25 October 2018".

12. On being questioned by the Tribunal Ms Jenkins indicated that the meeting on 25 October was quorate. She also indicated that some Homeowners had completed the attachment and had remitted them directly to Charles White Limited. She indicated however that she did not use any of these responses as votes at the meeting. It was noted by the Tribunal, and was specifically mentioned in Mr Millen's Application, that the previous Decision of the Tribunal under reference number FTS/HPC/PF/18/0043 had also dealt with a similar complaint with regard to an allegation that the Property Factor was departing from the voting requirements of the deed of conditions. In that earlier Decision, the Tribunal indicated that they understood the Homeowner's concerns about certain communications which suggested there may be a departure from the Decision making process contained within the title deeds. However that Tribunal accepted there was no evidence of any Decision having been taken on the basis of such communications and accordingly did not find any breach of the duties or of the Code.

13. The Tribunal then had a discussion with the parties with regard to the meaning of the relevant provisions of the title deeds. The parties seemed willing to discuss these matters informally. Mr Millen's view was that a "mandatory" who had been appointed by any proprietor required to attend the meeting and must be allowed to cast a vote having listened to the views expressed at the meeting. Such a person could not attend simply to cast a vote as instructed by the proprietor who had granted the mandate. He also indicated that the attachment to the letter of 12 October could not be treated as a formal appointment of someone as a mandatory. There would require to be a separate written form from the proprietor appointing the person as their mandatory. Mr Millen also questioned whether a "proxy" was the same as

a "mandatory". His view was that a proxy was someone who had been appointed simply to attend to cast a vote which had been pre-determined whereas a "mandatory" would have an open mandate to vote on behalf of the proprietor.

14. The Tribunal noted that at the meeting on 25 October it had been decided by the proprietors to proceed with the various drainage works by a method of appointing a single contractor to undertake the works. The Tribunal noted from Ms Jenkins that the works had not yet commenced as negotiations were still ongoing with that particular nominated contractor. She also conceded that she had not provided any updated information to the proprietors in respect of these ongoing negotiations. The Tribunal noted that section 6.1 of the Code of Conduct requires a Property Factor to inform Homeowners of the progress of works including timescales for completion. There was no Application before the Tribunal alleging a breach of this part of the Code and accordingly this tribunal makes no decision on this matter.

15. The Tribunal then had a discussion with parties with regard to the provisions of the title deeds regarding meetings. The parties agreed with the Tribunal that it would be better if they could come to a conclusion with regard to the meaning of the provisions in the title deeds. The parties agreed that constant references and Applications to the Tribunal were counter-productive and both parties indicated that they wished that their relationship could be more amicable. Accordingly the Tribunal and the parties then had a discussion with regard to interpretation of the provisions of the title deeds relating to meetings. The tribunal indicated its view to the parties that there is no restriction on the person who can be appointed as a mandatory. The title deeds are completely silent. Accordingly it would appear to be entirely competent for a proprietor to nominate the Property Factor to attend a meeting as their mandatory. It was however clear that the appointment of the mandatory required to be by written mandate from the proprietor. The attachment to the letter of 12 October did not constitute a proper written mandate. Either that type of notice would require to be amended for future use or a separate form of mandate would require to be provided. An example of a written mandate for another meeting which took place in December was produced to the Tribunal. This was a mandate from another proprietor within the Hillpark Grove development authorising two of his neighbours to attend the meeting on his behalf and to cast their vote on his behalf. The Tribunal did not wish to express a view on whether the title deeds allowed the proprietor to appoint two persons as their mandatory and what might happen if those two persons disagreed on how the vote should be cast.

16. With regard to the outcome of the meeting in October, Ms Jenkins indicated that the manner in which the vote was cast at the meeting did actually match the intention shown on the other "voting slips" which had been returned directly to the Property Factor. Accordingly they accepted that the meeting reflected the general view of the proprietors of Hillpark Grove.

17. During the various discussions, Mr Millen indicated that he did not believe it was particularly onerous to get 20 proprietors to attend meetings. This view was not shared by Ms Jenkins. After some discussion Mr Millen seemed to acknowledge that on certain occasions it may be difficult to persuade enough proprietors to turn up for such meetings. The title deeds had seemed to anticipate such a problem by the provision of mandatories.

18. The Tribunal then had further discussions with the parties about the resolution of this case. The Tribunal took the view that the parties seemed content to resolve the matter without the need for the Tribunal making any formal orders. The tribunal is required to make a decision. The tribunal takes the view that the application is premature in terms of section 17(3) of the Act and accordingly determines that it has no jurisdiction to deal with the substantive complaints

19. However the parties seemed content that the Tribunal should also make some recommendations with regard to future practice with the hope that the implementation of such practice might avoid further referrals to the Tribunal.

20. Accordingly the Tribunal indicates to the parties that it might be worthwhile for the Property Factor to review and improve the letters which are sent to the proprietors in connection with forthcoming meetings. The letter should add full information with regard to the provisions in the title deeds relating to the appointment of a mandatory. It should explain to proprietors they can appoint a mandatory to attend on their behalf. The Tribunal also indicated to the Property Factor that any attachment to such letters could be amended to allow a proprietor to appoint a mandatory by using that specific form. The Tribunal also indicates to the parties that the appointment of the Property Factor as mandatory would be competent in terms of the title deeds. Any mandates which were properly completed by proprietors appointing the Property Factor could be used to ensure that meetings were quorate and that decisions could be taken.

21. The Tribunal also indicates strongly to the Property Factor that their failure to acknowledge Mr Millen's initial complaint on 26 October and thereafter on 5 November fell short of their own complaints policy and the provisions in their written statement of service. The Tribunal had noted that previous complaints to the Tribunal by Mr Millen had resulted in Property Factor Enforcement Orders being made against the Property Factor requiring payments to be made by the Property Factor to Mr Millen. The Tribunal expressed to the Property Factor their disappointment that such orders having been made, the Property Factor then still failed to respond to Mr Millen in accordance with their own timescales. The Tribunal expressed some surprise that the Property Factor did not seem to react promptly and properly to Mr Millen's complaints given the previous history of Applications to the Tribunal. The tribunal strongly suggest to the Property Factor that any future correspondence or complaints should be

handled at least in accordance with their own policy and with a much greater degree of priority than had been given to this complaint. The Tribunal indicated to the Property Factor that should they fail to respond to complaints properly in the future then further Applications may well be made and further orders may be made involving significantly higher compensatory payments. Had the tribunal not taken the view that this application was premature then it is likely that the tribunal would have found that the Property Factor's initial failure to respond to Mr Millen's' complaint was a breach of the Code and the tribunal would have considered making a further PFEO

Decision

1. The Tribunal acknowledges that both parties attended the hearing on 14 February and approached the hearing in a constructive and purposeful manner. Both parties were entirely honest with the Tribunal and seemed keen to resolve matters without the necessity of further referrals to the Tribunal.
2. The Tribunal has accordingly decided that this Application was premature in terms of Section 17 (3) of the Act. Although that decision means that no formal order is made in this application, The Tribunal however encourages both parties to consider the terms of this Decision and to work with each other in a constructive, amicable manner in the future and hopes that a more constructive and purposeful relationship can be achieved between the parties. Mr Millen himself acknowledged that he took no pleasure in bringing matters to the Tribunal and regarded it as time consuming and aggravating. He indicated he would prefer not to require to make Applications to the Tribunal. It is hoped that parties will take into account the comments made in this Decision and also the orders made previously in their future dealings in connection with this Property.

Right of Appeal

1. 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. The party must seek permission to appeal within 30 days of the date the decision was sent to them.

2. Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

J Bauld

Signed. Legal Member Date: 8 March 2019