Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) issued under Rule 27 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017

Case reference: FTS/HPC/PF/18/2683

Re:- 56 Sleigh Drive, Edinburgh EH7 6EF

Title No: MID156166

The Parties:-

Miss Kimberly Sandra Ross, residing at 56 Sleigh Drive, Edinburgh EH7 6EF ('the homeowner');

and

The City of Edinburgh Council, North East Locality Housing Office, 101 Niddrie Mains Road, Edinburgh EH16 4FS ('the respondent')

Tribunal Members:

Richard Mill (legal member) and Sara Hesp (ordinary member)

Decision

The Tribunal unanimously determined that the homeowner is not a "homeowner" for the purposes of the Property Factors (Scotland) Act 2011 and accordingly she has no right to make an application in terms of Section 17(1) of the Act. The Tribunal does not have jurisdiction in relation to the proceedings and accordingly the application is dismissed under Rule 27 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017.

Background

By way of application dated and received on 12 October 2018, the homeowner complains about the respondent having breached the Code of Conduct for Property Factors ("the Code"). The homeowner's complaints about the alleged breach of the Code are in respect of Sections 1, 2.1, 6.1 and 6.9. The homeowner's application is in terms of Section 17 of the Property Factors (Scotland) Act 2011 ("the Act").

Documentation submitted into evidence

The written application by the homeowner which sets out the relevant complaints was accompanied by correspondence exchanged between the parties in relation to the homeowner's complaints and by relevant photographs. The exchange of communications between the parties in connection with the homeowner's formal intimation to the respondent for the purposes of Section 17(3) of the Act was also provided. Title information from the Registers of Scotland was available in connection with the property.

Following notices of referral and hearing being issued to the parties on 8 January 2019, they each lodged additional documentation. The homeowner lodged some additional written representations and two productions (A and B) under cover of letter 18 January 2019. The respondent lodged written representations under cover of letter dated 29 January 2019 and thereafter lodged a list of productions (1-5) under cover of email dated 13 February 2019. A list of legal authorities was also lodged for the hearing.

The Hearing

A hearing was held in Room D8, 126 George Street, Edinburgh EH2 4HH at 10.00 am on 20 February 2019. The homeowner was personally present and presented her own case. The respondent was represented by David Anderson, advocate, instructed by Andrew Ratter, solicitor, City of Edinburgh Council.

The respondent insisted upon their intimated preliminary submission to the effect that the Tribunal had no jurisdiction in relation to the application on the basis that it was denied that the respondent was acting as a property factor for the purposes of the 2011 Act.

The homeowner confirmed that she had received all relevant documentation and was fully aware of the respondent's position. She declined the opportunity to seek independent legal advice.

The Tribunal firstly identified that the relevant facts which were relied upon by the respondent were not disputed by the homeowner. The Tribunal then heard submissions from Mr Anderson on the jurisdictional issue and then adjourned for a period to allow the homeowner an opportunity to reflect and prepare her own submissions. The homeowner then made her submissions on the jurisdictional issue. The Tribunal adjourned again to consider this preliminary issue and following reaching a clear decision to dismiss the application invited parties back to deliver an oral decision supported by a summary of their reasons. The Tribunal undertook to issue a full written decision and reasons.

Findings in Fact

1. The homeowner is the heritable proprietor of 56/6 Sleigh Drive, Edinburgh EH7 6EF ("the property"). She purchased the property on 3 October 2014.

2. The homeowner's property is a former council flat which was sold by the respondent to a previous tenant of the property. The property is a second floor flat within a larger block of flats numbered 46-60 Sleigh Drive, Edinburgh. There are eighteen flats in this larger block, seven of which are retained in the ownership of the respondent.

3. The common stair of number 56 Sleigh Drive, Edinburgh used to access the homeowner's property is also used to access five other properties within 56 Sleigh Drive, Edinburgh. Of these six flats accessed via the common stair, the Respondent retains ownership of three of these properties.

4. In terms of the title to the six properties at 56 Sleigh Drive, Edinburgh each has a common right of ownership of the common stair and a common obligation to maintain the common stair.

5. In terms of the title to the property, the homeowner has a common right of ownership with a number of other properties in relation to a range of different component common parts. She has a right in common with only those other owners of flats at 56 Sleigh Drive in respect of some parts, a common right of ownership with all other seventeen proprietors in the larger block 56-60 Sleigh Drive in respect of other parts and a right in common with a number of selected properties within the larger block in relation to a number of other specified common parts.

6. There is no Deed of Conditions or other burden within the title of the homeowner's property, and those of her neighbouring properties, which requires a management or maintenance scheme to be in operation in respect of the common parts, nor is there any Deed of Conditions or other burden which provides for or requires a property factor to be engaged.

7. The respondent is not responsible for maintenance and repairs in respect of any of the common parts associated with the homeowner's property. Responsibility for common repairs lies with all of the owners of the properties as specified within the relevant titles. The homeowner is in the same legal position as the respondent as far as common parts are concerned. This is notwithstanding the fact that she owns a lesser share of the common property than the respondent.

8. The applicant has requested that the respondent organise further repairs, including redecoration of the common stair. The respondent has declined to do so as they have no delegated authority to do so. They have not been hired by the homeowner or any other homeowners to do so. It is not paid to perform such a service. The respondent has carried out ad hoc repairs where issues of health and safety are concerned which affect their tenants, including an occasion when such an ad hoc repair was carried out to a certain number of steps at the property. The respondent has not acted in a way which suggests or infers it is acting as a property factor by custom and practice. There are no ongoing routine inspections or maintenance performed by the respondent.

9. The respondent does not provide any gardening, grass cutting or landscaping services to the homeowner's block nor adjoining blocks of flats. A previous occupant of the property at 48 Sleigh Drive, Edinburgh was in receipt of assistance under the Garden Aid scheme operated by the respondent. Grass cutting in the vicinity of the homeowner's property was carried out historically in that context, including broadly one-half of the back common green area. Such service was not provided as a consequence of the respondent owning any of the properties within the larger block. One other private homeowner of the larger block carried out grass cutting for the remaining one-half of the entirety of the garden or back green area. The former occupant of number 48 Sleigh Drive has now left. Gardening services have accordingly been withdrawn. It is the responsibility of each of the individual homeowners (or their tenants depending upon the terms of the relevant lease) to make arrangements for gardening and grass cutting.

10. The respondent historically offered to provide a stair cleaning service both within the homeowner's stair at 56 Sleigh Drive and in respect of the adjoining properties in the larger block at numbers 58 and 60 Sleigh Drive, Edinburgh. Terms of engagement letters have been issued to some owners. The homeowner has never received such a letter. Stair cleaning is carried out fortnightly. The Respondent has never invoiced the homeowner for this service. This is a single discrete service which the respondent provides to one of the common parts of the homeowners property. She retains the option to withdraw from the stair cleaning arrangement. There is no contractual arrangement between the homeowner and the respondent. She could refuse to allow her portion of the stair to be cleaned and elect to clean this herself or make alternative arrangements. The respondent has no obligation to provide this service to the homeowner.

11. The respondent historically provided and maintained stair lighting in every common stair in its local government area. Over more recent times, the respondent has restricted the service to common stairs where it owns properties such as the homeowner's. Throughout the occupation of the homeowner at her property, the stair lighting has been upgraded to her satisfaction. There are no ongoing routine inspections nor maintenance performed by the respondent.

12. The respondent can provide pest control services to any homeowner within its local government area. It can also carry out such services by self- instruction relative to its own properties. The response time for private properties not owned by the respondent is slow as homeowners retain the right to instruct private contractors to carry out necessary work. The respondent has on an ad hoc basis carried out any pest control services in respect of the larger block within which the homeowner's property is situated. There are no ongoing routine inspections or maintenance performed by the respondent.

Reasons for Decision

The Tribunal has had regard to all of the documentary and oral evidence placed before it. The Tribunal is satisfied that it had sufficient evidence upon which to reach a fair determination of the application.

The Tribunal had regard to the overriding objective to deal with the proceedings in a manner which was appropriate to the complexity of the issues and the resources of the parties.

The Tribunal focused its attention on the jurisdictional issue. The respondent disputes it is or acts as property factor.

Section 17(1) of the Act entitles a homeowner to apply to the Tribunal (the former homeowner housing panel) for determination of whether a property factor has failed in certain respects.

Section 10(5) of the Act defines a "homeowner" which means –

(a) an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor, or

(b) an owner of residential property adjoining or neighbouring the land which is –

(i) managed or maintained by a property factor, and

(ii) available for use by the owner.

Section 2 of the Act defines what a property factor is. In particular Section 2(1)(b) is in the following terms:-

> a local authority or housing association which manages the common parts of land used to any extent for residential purposes and owned –
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> (i) by two or more other persons, or
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> (ii) by the local authority or housing association and one or more other person.

The homeowner accepts that the respondent can only be held to be a property factor if the terms of Section 2(1)(b) are fulfilled because the other potentially relevant provision which relates to local authorities, namely Section 2(1)(d) cannot be fulfilled because the title to her property does not require her to pay for the costs of the management or maintenance of any common parts.

The focus of the issue in dispute between the parties for the purposes of the jurisdictional issue is whether or not the respondent as a matter of fact "manages the common parts" for the purposes of Section 2(1)(b). If the Tribunal were to conclude that the respondent is not managing the common parts of the homeowner's property

then they are not a property factor and neither is she a homeowner for the purposes of the Act and, as a consequence of that, her application is incompetent.

The Tribunal had regard to their findings in fact which were established by way of agreement with the parties. Some time was taken to ensure the homeowner was accepting of the relevant facts.

There is nothing contained within the terms of the Act which assists in the definition of someone who manages the common parts of property. The Tribunal concluded that in the absence of any specific direction which required the need for contractual or formal arrangements that such would not be required and accordingly the absence of a relevant Deed of Conditions or other burden to create a management scheme and the appointment of a property factor was not determinative of the issue and the matter as to whether an individual or body manages the common parts is a question of fact in each case.

The Tribunal concluded that in order to create an obligation that a person or body manages the common parts, he/she/it would require to have delegated responsibilities (whether in writing or orally) and he/she/it would require to have accepted (whether in writing or by way of practice) these responsibilities. One would ordinarily expect such a person to receive payment in respect of the provision of such a service, but this of itself again is not determinative in the Tribunal's view.

The provision of discrete services such as stair cleaning which the respondent provides to the homeowner cannot, in the view of the Tribunal, create a property factor arrangement which places the respondent under any obligations to perform any tasks. The provision of a specific service does not amount to management. The stair cleaning is the only specific service which the respondent is providing on an ongoing basis. There is no discretion or delegated authority to the respondent to make decisions from time to time and to bind the homeowner and other homeowners. The homeowner and other relevant private owners of other flats do not have to opt into the scheme which the respondent is currently operating. The homeowner retains a choice. The common stair is otherwise not as a matter of fact managed nor monitored in any way.

The respondent is one of a number of owners who have chosen to provide a service. Hypothetically, by way of example, if the homeowner herself was to offer to clean the stairs of the entirety of the common stair at 56 Sleigh Drive and even if she were to charge the other five heritable proprietors a one-sixth share each this would not in the determination of the Tribunal make her a property factor. It would not require her to register as a property factor and be bound by the obligations which come with such status, including an obligation to comply with the Code of Conduct for Property Factors. This would be absurd and could never have been the intention behind the legislation.

The Tribunal sought guidance from relevant legal text books. Words and Phrases Legally Defined, (author David Hay MA LLM of the Inner Temple), Barrister, at page 1832 stipulates that "manager" will not apply to a man who acts once or twice, but he must be a delegate having the control of all the affairs of the company. The respondent is not a body with any delegated powers. The respondent has no

responsibilities or obligations to the homeowner. The Tribunal had regard to Bell's Dictionary and Digest of the Law of Scotland, Seventh edition. A factor is defined as a person employed to do business for another for hire ie they are an agent. The respondent is not employed by the homeowner or any other relevant homeowner of the respondent's individual block or larger block of flats. The respondent was not formally or informally appointed in such a role.

The respondent has, as a matter of fact, never unilaterally undertaken, expressly or impliedly, undertake the functions of a manager of any of the common parts of the homeowner's property. The respondent, as a matter of fact, has no relationship with the homeowner or the other owners of the relevant properties which indicates that it manages the common parts. The respondent has no power or duty beyond those vesting in it as a property owner to provide a range of services or activities for the management, maintenance or repair of the common parts.

The Tribunal had regard to a decision of a homeowner housing committee (constituted by the Tribunal's predecessor of the Homeowner Housing Panel) case reference number HOHP/PF/13/0250. This decision is not binding but is authoritative. The facts of that case are similar to that in the current application by the homeowner. The Tribunal had regard to and adopts the reasoning which is set out at paragraphs 16-30 of that decision which is in the following terms:-

> "16. The starting point for the committee on this issue is the statutory provision which gives it jurisdiction to consider the application. That provision is Section 17(1). In terms of Section 17(1) the HOHP, as represented by this committee, must have before it an application by a "homeowner". "Homeowner" is defined in Section 10(5) as set out above. In the present case the application claims he is a homeowner in terms of paragraph (a) of Section 10(5). For that to be satisfied an owner must own land, the common parts of which are "managed" by a "property factor".
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> 17. The expression "property factor" is itself defined in Section 2(1) as noted above. Other than in identifying a "property factor" requires to be managing in the course of his business if he is not a local authority or housing association (and in excluding certain persons), the definition in Section 2(1) does not expand upon the requirement to "manage" the common parts of the land owned in part by the owner.
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> 18. The word "manage" is capable of more than one meaning. It can involve greater or lesser degrees of control of the thing being managed. Management can involve acts of maintenance. There might appear to be some force in the respondent's additional submissions set out above. However, the additional submission cannot be decisive. It is difficult to see that a person whom an owner or owners have hired to provide ongoing maintenance of common parts owned by them is not a "property factor" in terms of the Act, but that one who is hired to provide maintenance of land not so owned is. Rather the word "managed" is key to the whole Act. It must be interpreted in the context of the Act as a whole and not merely in relation to other parts of Section 2.

19. The Act has two substantive parts. Part 1 sets up a compulsory registration scheme, the purpose of which is to ensure that the persons who require to be registered ensure compliance with the Property Factor Code of Conduct ("the Code of Conduct") which sets out minimum standards of practice for such persons. The persons who require to be registered are "property factors" in terms of Section 2. Part 2 of the Act sets up the Homeowner Housing Panel which is to determine applications by homeowners complaining of breaches of the Code of Conduct (where it applies) or "property factor duties" as these are defined in Section 17(5). It is interesting to note that the definition in Section 17(5)(a) defines such duties as being "in relation to the management of the common parts".

20. Looking at Part 1 of the Act, Section 3 provides for a person who is, or *intends* to become a property factor to apply for registration. Once a registered such an applicant becomes a "registered property factor" as that expression is used in the Act. However, Section 3 makes it clear that a registered property factor need never have actually become a "property factor" in terms of Section 2(1) definition. This is reinforced in Section 3(2) which provides that an application for registration must specify "(e) any dwelling houses, flats or land in relation to which the person acts or *expects to act* as property factor" (committee's emphasis).

21. In passing it is worth noting that a person continues to be registered even if he ceases to act as a factor for properties which he did so at the time of registration. Equally there is no requirement on a registered property factor to notify the register of any new property that he has begun to manage.

22. Section 12(1) provide that,

"Except where Subsection (2) or (3) applies, a person who operates as a property while unregistered is guilty of an offence."

In Section 12(1) "operates" must be interpreted as having the same meaning as "acting" in Section 12(4) which provides a defence, and "acts" in Section 3(2)(e) relating to registration. To adopt any different approach would undermine the central criminal deterrence which underpins the effectiveness of the Code of Conduct.

23. Neither Section 3, nor Section 12, nor Section 2 in the Sections draw any distinction between private persons and local authorities and housing associations as to what conduct amounts to "management" of the common parts which requires registration in order to prevent the commission of a criminal offence.

24. Taking the applicant's contention to its logical conclusion, if a private contractor is hired by one owner or owners acting together to carry out

a one-off repair to a common outside wall, the contractor would require to register under Section 3 in order to avoid an offence under Section 12 since that one-off repair would amount to "management" of the common parts. The committee cannot think that the Scottish Parliament intended that such conduct would require registration in order to avoid the criminal offence. Such an interpretation of "management" would be absurd. It is a principal statutory interpretation that when presented with a number of possible meanings, the one which gives leads to absurdity should be avoided.

25. The Bill which led to the 2011 Act was a private members bill introduced by Patricia Ferguson MSP. In the Policy Memorandum, for the Bill, published by the Scottish Parliament and prepared on behalf of Ms Ferguson by the Govan Law Centre, the primary objective of the Bill was stated to be "to create a statutory framework which would protect Scottish homeowners who *contract* with property factors." (paragraph 2). In paragraph 10 of the policy Memorandum it is noted that,

> "The management of shared repair and maintenance responsibilities is often administered by property factors. Property factors undertake a range of management tasks" examples of which are then listed (committee's emphasis).

This underlines that the aim is to regulate persons who contracted with homeowners to provide a range of administrative tasks over a period of time, whether such persons were private providers, local authorities or housing associations. It was aimed to cover persons who were contractually obliged to provide a range of such activities. It was not aimed at persons whether tradesmen, building contractors or others performing such roles providing one-off repairs with no responsibilities outwith those individual instructions.

26. The interpretation of "managed" and "management" set out above has been reflected in the Code of Conduct made under the Scottish Ministers and laid before and approved by the Scottish Parliament all under Section 14(1) to (4) of the Act. This code came into force on the same day as the substantive provisions of the 2011 Act, namely 1 October 2012 having been laid for approval by the Scottish Parliament on 30 April 2012 and thereafter approved by resolution of the Scottish Parliament. The Code itself followed a consultation carried out by the Scottish Government on a draft code which was based on core standards prepared for a voluntary accreditation scheme for property and land managers that the Scottish Government consulted on in 2010. It can be seen that the Code and the Act were part of the same legislative exercise. As such the Code can cast light on the meaning and scope of the Act.

27. In Section 1 the Code of Conduct requires the production of a written statement of services with a statement of the basis of any authority to

act, the "core service" that the factor is to provide and the types of services and works which may be required in the overall maintenance of the common parts in addition to the core service. The written statement also requires to set out in the management fee charge, any arrangements towards a floating fund and clear information on how to change or terminate "the service arrangement". Section 2.4 of the Code requires the provision of consultation procedure with a group of homeowners and their written approval before providing worker services beyond the "core service". Section 3.3 of the Code requires the provision of at least an annual detailed financial breakdown of charges made and a description of activities charged for. Section 3.5b requires local authorities or registers of social landlords to account for homeowners' floating funds separately from their own funds.

28. The content of the Code therefore reinforces the view that where a person carries out repairs to common parts merely on a one-off ad hoc basis, he or it does not "manage" those common parts in the sense of Sections 10(5) or 2(1) of the Act and is not required to register under the Act.

29. In the present case, the respondent was also prepared to change the common lighting system and to carry out door entry repairs as and when required. However, such work is instructed ad hoc by the private homeowner or if not instructed by them then it is initiated by the respondent ad hoc for its own interest. Such work by private contractor can hardly be "management" giving rise to the registration and criminal consequences set out above and the committee is unable to see why the position is any different with regard to "management" for a local authority of housing association.

30. Moreover the carrying out of two, three or however many ad hoc repairs to common parts will not make a contractor required to register. Rather what is needed for "management" and therefore a duty to register, is an agreement with the service provider (which may or may not be contained in the Title Deeds) given the power or duty to provide a range of services for the upkeep of the common parts."

In all the circumstances the Tribunal established that the respondent does not manage the common parts of the applicant homeowner's property and accordingly is not a property factor. Accordingly the Tribunal had no jurisdiction to consider the homeowner's complaints and dismissed the application.

Concluding Comments

It is clear that the homeowner has misunderstood the relationship between herself and the respondent. This may be as a consequence of her failure to understand her own and other property owners' obligations which arise from the terms of the burdens of her title deeds. She may wish to obtain formal legal advice. It may also be the case that there has been a lack of clarity provided to the applicant homeowner and other private homeowners within the homeowner's individual block

and larger block of flats about the nature of the relationship between the respondent and her and those others collectively. Whilst there is certainly no obligation on the part of the respondent to provide such clarification, it does seem to the Tribunal that it may be beneficial for the respondent to periodically (for example by-annually) make all and any arrangements and lack of them clear to all homeowners. This would ensure that any new occupiers are well aware of the respondent's interests, their provision of services and the matters which they do not have any responsibility for.

Appeals

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.

R Mill

Legal Member :

Date : 22 February 2019