First Tier Tribunal for Scotland (Housing and Property Chamber)

Decision in terms of Rule 39 of the Schedule to the First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, in relation to a request by a Party for a Review of a Decision

Chamber Ref: FTS/HPC/PF/22/2635

Re: Property at B/1, 46 Bentinck Street, Glasgow, G3 7TT ("the Property")

The Parties: -
Emily Raine, B/1, formerly at 46 Bentinck Street, Glasgow, G3 7TT ("the Homeowner")
Hacking and Paterson, 1 Newton Terrace, Glasgow, G3 7PL ("the Property Factor")

The Tribunal: -
Melanie Barbour (Legal Member)
Helen Barclay (Ordinary Member)

DECISION

The First Tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") after a request by one of the parties to do so, decided to review its Decision of 17 November 2023; the tribunal refuses to uphold Review Issues 1 and 2, upholds Issue 3 (in part), and upholds Issue 4 of the Property Factor's review request in respect of the Decision and Proposed PFEO of 17 November 2023; the tribunal having carried out the review amends the proposed Property Factor Enforcement Order of 17 November 2024; and the tribunal thereafter issues a Property Factor Enforcement Order in relation to its Decision of 22 May and 17 November both 2023.

BACKGROUND

1. By application dated 25 July 2022, the Homeowner complained to the Tribunal that the Property Factor had failed to carry out its Property Factor duties in relation to two matters:

a. that it related to a failure to carry out the Property Factor's duties, namely they have failed in their duty to keep the common close in a reasonable state of repair and cleanliness. They have breached their duty to maintain the common areas by appointing suitable contractors (Terms of Service: Sections 3.1/3.2). The homeowners sought by way of resolution an effective deep clean completed by a reputable company. Have a more in-depth regular clean as opposed to just mopping for a few minutes every fortnight. An apology from the Property Factors for the time, effort and injury that this has caused.

b. That the property factor had failed to carry out their property factor duties by failing to uphold the title deeds and therefore charge fairly for common maintenance and repair. By way of resolution, they advised that they like their title deeds to be adhered to and therefore pay a lower proportion of the 1/11th share. They also asked that this be backdated to at least the date when they first contacted the property factor (August 2021).

2. The application was accepted on 19 August 2022; a case management discussion ("CMD") was assigned to take place on 1 November 2022; that CMD was subsequently postponed with a new date being fixed for 11 January 2023. Written representations were submitted by the Property Factor on 16 September 2022. The CMD took place on 11 January 2023. It was attended by the Homeowner, Miss Raine and also the other homeowner Mr Wilson; and Mr Henderson attended on behalf of the Property Factor. The CMD proceeded with a discussion by telephone. Reference is made to the full terms of the CMD note. A Direction was issued reference was made to its terms. Both parties submitted documents in response to the direction. The Property Factors advised that they not attend the second CMD and would rely on their previous submissions and their supplementary paperwork submitted in response to the Direction. Both homeowners attended the second CMD on 18 April 2023 again by telephone.

3. On 22 May 2023, the Tribunal determined the first part of the Homeowners' complaint. It issued its decision and proposed PFEO on 22 May 2023. The Property Factor sought a review of that decision on 1 June 2023. The Tribunal reviewed that decision on 17 November 2023. It determined that its Decision and the Proposed PFEO would not be amended. It did not issue the PFEO in respect of that decision at that time.

4. On 17 November 2023, the Tribunal determined the second part of the Homeowners' complaint. The tribunal issued its decision on that date and advised that it also proposed to make a PFEO in terms of the second part of the Homeowners' complaint. Reference is made to the terms of that Decision and proposed PFEO.

5. The Property Factor asked for time to prepare a review request. The tribunal agreed to an extension to submit their review request. The Homeowner objected to the Property Factor being allowed to submit a review request as the request was made out with the 14-day review period. The tribunal considered that there is complexity in the assessment of the Tenement (Scotland) Act 2004, the Homeowner's title deeds and their relationship with the other title deeds in the tenement. Given the complicated nature of these matters the tribunal was prepared to grant an extension to the Property Factor to take advice before submitting a Review. On 8 February 2024 the Property Factor submitted the review request for the second part of the Homeowner's complaint.

REVIEW OF A DECISION

39.—*(1) The First-tier Tribunal may either at its own instance or at the request of a party review a decision made by it except in relation to applications listed in rule 37(3)(b) to (j)(1), where it is necessary in the interests of justice to do so.*

(2) An application for review under section 43(2)(b) of the Tribunals Act must—

(a)be made in writing and copied to the other parties.

(b)be made within 14 days of the date on which the decision is made or within 14 days of the date that the written reasons (if any) were sent to the parties; and

(c)set out why a review of the decision is necessary.

(3) If the First-tier Tribunal considers that the application is wholly without merit, the First-tier Tribunal must refuse the application and inform the parties of the reasons for refusal.

(4) Except where paragraph (3) applies, the First-tier Tribunal must notify the parties in writing—

(a)setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing; and

(b)may at the discretion of the First-tier Tribunal, set out the First-tier Tribunal's provisional views on the application.

(5) In accordance with rule 18, the decision may be reviewed without a hearing.

(6) Where practicable, the review must be undertaken by one or more of the members of the First-tier Tribunal who made the decision to which the review relates.

(7) Where the First-tier Tribunal proposes to review a decision at its own instance, it must inform the parties of the reasons why the decision is being reviewed and the

decision will be reviewed in accordance with paragraph (4) (as if an application had been made and not refused).

(8) A review by the First-tier Tribunal in terms of paragraph (1) does not affect the time limit of 30 days in regulation 2(1) of the Scottish Tribunals (Time Limits) Regulations 2016(2) for making an application for permission to appeal.

6. The review request was made in writing.

7. It does not appear to have been copied to the other party. The tribunal notified the other party and provided them with time to make submissions.

8. Given the terms of the review request, we are prepared to undertake the review. We are entitled to do so at our own instance where we consider it is in the interests of justice to do so. We consider that the request sets out why the review of the decision is necessary. The tribunal does not require that a further hearing is required to determine the review.

9. As noted on 8 February 2024 the Property Factor submitted their review request. Reference is made to the full terms of their review request. Taking each matter in turn we would respond as follows: -

ISSUES OF REVIEW

FIRST

The tribunal appears to believe that it is for the factor to apply the Tenement Management Scheme (TMS) to the property/homeowners, i.e. the factor is to administer the TMS and tell the homeowners how their property shall be run. Our understanding is that it is for the homeowners to decide how to administer their property and instruct their factor on how they decide to proceed regarding their property. In this case, since 2006 the homeowners have instructed the HMPS to apportion costs 1/11th.

10. We do not agree that we determined that the factor is to administer the TMS and tell the owners how to run their property. As set out in our Decision at paragraph 61 the title deeds provide for a factor to be appointed and they can take charge of the care, maintenance and management of the common parts. The factors in discharging their duty would have to do so in terms of the title deeds, failing which the fallback provisions

of the Tenement Management Scheme and the Tenement (Scotland) 2004 Act (the 2004 Act) apply. We do consider that where the Property Factor was unable to apply the title deeds, then that should have been raised with the owners and the owners, should have been advised that the terms of the 2004 Act apply.

11. Included in our findings in fact are that: -

    [37] During 2022 the Factors consulted on a revised apportionment with homeowners.

    [41] On 31 August 2022, the Factors wrote to the Homeowners advising that they had taken legal advice with regard to the apportionment of shares as the Homeowner was refusing to acknowledge the existing arrangement made by the collective ownership in 2006. They advised that they now write to the owners to advise of their intention to apportion all future common charges and insurance premiums in line with what is stated in each title deed and the reasons behind that.

    [42] By email dated 5 December 2022, the Factors advised the Homeowners that they had been unable to obtain consent from the top floor flat owners to enable the Factor to amend the existing apportionment of shares in line with the shares that are outlined within the Deed of Conditions.

12. The correspondence sent out from the Property Factors indicates that the Property Factors, as agents of the owners, were carrying out actions with a view to determining the appropriate apportionment of the common charges. Given their actings it would seem to us to be correct that they would have to do so by following the correct legal procedure. The tribunal understands that the correct procedure to be followed is by having regard to the provisions of the Tenement (Scotland) Act 2004, if the title deeds for the property and development are deficient.

13. The factors consider that the title deeds are deficient because they do not add up to 100%.

14. The Factors provided the title deeds for each property in the tenement 44-50 Bentinck Street, the deeds show that there were originally 8 properties in the tenement. Number 40 was subdivided and became 40 and 46 Basement, in those two deeds the share for maintenance and repair was subdivided to be 1/16th share for both properties.

15. The third-floor flats have also been subdivided and there are now 4 flats where there were previously 2. Those four title deeds make no provision for the subdivision of the share of the maintenance, and therefore as read the title deeds for those properties appear to allocate a 1/8 share for each.

16. It is therefore the case that the title deeds now contain a discrepancy and read together do not add up to 100%.

17. The Factors were aware of the problem with the title deeds. The Homeowners were also aware of the problem with the title deeds. As the Factors were undertaking consultation with the owners on the question apportionment in 2022, then, they do not appear to have considered themselves bound by whatever the homeowner's agreed position of 2006 was. Reference to this is set out in the Decision at paragraph [37].

18. The Property Factors as agents of the owners, in carrying out their 2022 consultation about the percentage of owner liability, should have used the terms of the Tenement (Scotland) Act 2004 to undertake this consultation, and this would have provided the Factors with a statutory scheme of rules to follow. This is what the Tenement (Scotland) Act 2004 was designed to address.

19. We do not uphold this aspect of the Property Factor's review request.

SECOND

The tribunal appears to believe that Rule 4.2(b) of the Tenement Management Scheme applies, which requires Rule 1.2(b) or (c) to apply. However, we understand the common property of the tenement to belong equally to all homeowners (i.e. more than 2 of them) and that therefore Rule 1.2(a) applies and subsequently 4.2(a) applies. With the owners having equal shared ownership and thus an equal 1/11th share would appear to be correct in the application of the TMS

Schedule 1 of the 2004 Act provides

1.*2 Meaning of "scheme property"*

For the purposes of this scheme, "scheme property" means, in relation to a tenement, all or any of the following–

(a) any part of the tenement that is the common property of two or more of the owners,

(b) any part of the tenement (not being common property of the type mentioned in paragraph (a) above) the maintenance of which, or the cost of maintaining which, is, by virtue of a tenement burden, the responsibility of two or more of the owners,

(c) with the exceptions mentioned in rule 1.3, the following parts of the tenement building (so far as not scheme property by virtue of paragraph (a) or (b) above)–

(i) the ground on which it is built,(ii) its foundations,(iii) its external walls, (iv) its roof (including any rafter or other structure supporting the roof), (v) if it is separated from another building by a gable wall, the part of the gable wall that is part of the tenement building, and (vi) any wall (not being one falling within the preceding sub-paragraphs), beam or column that is load bearing.

4.2 Maintenance and running costs

Except as provided in rule 4.3, if any scheme costs mentioned in rule 4.1(a) to (d) relate to–

(a) the scheme property mentioned in rule 1.2(a), then those costs are shared among the owners in the proportions in which the owners share ownership of that property,

(b) the scheme property mentioned in rule 1.2(b) or (c), then–

(i) in any case where the floor area of the largest (or larger) flat is more than one and a half times that of the smallest (or smaller) flat, each owner is liable to contribute towards those costs in the proportion which the floor area of that owner's flat bears to the total floor area of all (or both) the flats,

(ii) in any other case, those costs are shared equally among the flats,

and each owner is liable accordingly.

20. Common property is not a defined term in the 2004 Act. The whole terms of the Act need to be read to understand what is meant by common property in terms of rule 1.2(a). Some assistance in understanding this question can be found in Gloag and Henderson's *The Law of Scotland.* In chapter 34.160 they consider the Law of the Tenement under the 2004 Act and explain that: -

"Law of the tenement under 2004 Act: The 2004 Act begins by codifying the common law in relation to the boundaries and pertinents within a tenement, apportioning ownership on the same basis as under the common law.

Therefore, the bottom flat takes the solum, and, with the solum, the airspace above it,[732] subject only to the statutory innovation that where the roof of the tenement building slopes, a sector which includes the roof (or any part of it) shall also include the airspace above the slope of the roof (or part) up to the level of the highest point of the roof.[733] The effect of this new provision is to allow the owners of the owner of a top flat, and accordingly of the roof,[734] to construct dormer windows. The issue of "pertinents" is dealt with in s.3 of the Act. The Act lists as pertinents a close and a lift by means of which access can be obtained to more than one of the flats.[735] Other possible pertinents include a path, outside stair, fire escape, rhone, flue, conduit, cable, tank or chimney stack.[736] Where the titles are silent on the ownership of these parts, the Act provides that each flat served will have a right of common property in any close or lift by means of which access is afforded to more than one flat. No right of common property attaches where a flat is not so benefited [.737] The right of common property is in the whole thing, and not simply in the thing to the extent to which an individual property is served by it. Therefore, for example, a right of common ownership in the whole of a close will attach as a pertinent to the owner of a flat on the ground floor of a tenement, irrespective of the fact that only a very small part of the close may serve his property.[738]"

21. Rule 1.2(a) refers to common property. Rights of common property are defined in various sections of the Act. Rights under Rule 1.2 (b) and (c) are for those parts which do not fall within Rule 1 .2 (a). Rule 1.2(b) applies where there are title deeds dealing with parts of the tenement which do not fall into rule 1.2(a) common property; and Rule 1.2 (c) where neither (a) or (b) applies and it defines parts of the tenement building. Rule 1.2 provides the meaning of scheme property. To understand therefore what is included in Rule 1.2.(a) the rest of the Act should be considered, as explained in *Gloag* above.

22. In the present case, the title deeds show that Burden 3 (FIRST) provides a definition for parts of the tenement the maintenance of which is to be the responsibility for two or more owners, the definition set out in that Clause and (SECOND) maintenance of those parts, fall within the statutory definition of Rule 1.2(b).

23. The Tenement (Scotland) Act 2004 applies where the title deeds are deficient. As noted by the Property Factor they are deficient in the present case. The title deeds do however have burdens dealing with parts of the tenement. Given that the title deeds are deficient, then rule 1.2(b) provides the definition of scheme property in this case. Accordingly, rule 4.2 (b) applies in determining scheme costs liability and

apportionment (unless the owners decide to make a Scheme Decision under Rule 3.1(g)).

24. The tribunal does not therefore uphold this part of the review request.

THIRD

The Factor has no evidence of the floor space of the properties; do not believe that the Factor has a duty to apply the terms of the TMS; the Factor is not qualified to or paid to do this work; the terms of service do not provide them with authority to incur costs on homeowners; the applicant has sold their property, and the other owners are operating satisfactorily on 1/11th share.

25. Given our determination under SECOND above, we consider that Rule 4.2(b) applies. We accept that there was no real evidence provided as to the floor space. The Homeowner's application does state that they pay the same fees, maintenance and insurance as a 10-bedroom hotel at number 50 which has approximately three times the floor space of their flat. If that is correct it would appear that liability should be apportioned on the basis of floor area.

26. We consider that there is a duty upon the Property Factor to apportion liability in accordance with the terms of the 2004 Act because the title deeds are deficient. If not following a legal duty it is unclear what duty the Factor asserts, they should follow. The Factor has an overarching duty to conduct its business in a way that complies with all relevant legislation. We consider this includes the Tenement (Scotland) Act 2004.

27. If the assessment of the owner's floor space is not a service that the Property Factor provides, then they could consult with owners and give advice to the owners about the Tenement (Scotland) Act 204 and seek instruction from the owners as to how the Factor should apportion liability in accordance with the terms of the Tenement (Scotland) Act 2004. At the very least the Property Factor should notify the owners as to what the law sets out as a means of allocating costs for maintenance. If owners agree that a 1/11th share is their preferred allocation of liability they would be entitled to vote for this as a Tenement Management Scheme decision, and any aggrieved owner will have a right of appeal to the sheriff.

28. There is no evidence before the tribunal that the 1/11th share liability is operating satisfactorily with the other owners.

29. We note that the Homeowner is no longer an owner of the property and is no longer affected by the apportionment of liability of the title deeds. The Tribunal does consider that affects the purpose of any PFEO, as the Homeowners going forward would not be affected by an unfair apportionment of the title deeds. This application was made by the Homeowner and not on behalf of the owners.

30. We uphold this aspect of the review request in part in so far as we agree that there was no documentary evidence which could be relied upon to evidence floor area of the properties, and the Factor would not have been able to obtain the floor area of properties if owners refused to provide entry for the purposes of measuring floor area.

FOUR

The Factor has no right to access private properties. They would have no right to carry out the assessment ordered in the PFEO and would be unable to comply with same. Under section 24(2)(a) of the Property Factors (Scotland) Act 2012 we would have a reasonable excuse for being unable to comply with the PFEO

31. While we accept that the Property Factor has no right of entry. They do have a duty to comply with the law and we consider that this includes notifying the owners about the provisions of the Tenement (Scotland) Act 2024 as the title deeds are deficient. They act as agents of the owners. They should at least provide the owners with the ability to make an informed choice about what rights exist in respect of maintenance liability. If a consultation on the apportionment of liability for maintenance takes place, it should take place in accordance with the terms of the 2004 Act. Such an approach ensures that an aggrieved owner would have a right of appeal to the Sheriff Court.

32. It appears that the Property Factor is not prepared to adopt a purposive approach in applying legal requirements,

33. In terms of section 24(2)(a) of the Property Factors (Scotland) Act 2012, we do not agree at this stage that the Factors have a reasonable excuse for being unable to comply with the PFEO, given at the current time they have made no effort to obtain

this information. If the PFEO is made and the Property Factor is later unable to comply they can seek a variation or revocation under Section 21.

34. We are prepared to uphold this part of the review request.

PROPERTY FACTOR ENFORCEMENT ORDER

35. The tribunal has amended the terms of the PFEO to take into account that the Homeowner has now left the property. We have increased the award of compensation to be paid to the Homeowner. The award of compensation is broken down into (1) £270 relates to the cleaning aspect of the first part of the application. (2) We have increased the proposed compensation to be awarded under Part 2 of the application. We now award compensation of £1000 to the Homeowner for the failure by the Property Factor to ensure that they conducted the consultation about the liability for maintenance costs in accordance with the Tenement (Scotland) Act 2004 at the time that they undertook the consultation in 2022.

36. We have increased the compensation because, the Homeowner no longer owns the property, and they will therefore no longer be in a position to assert their rights that apportionment is made in accordance with the 2004 Act. Given that their property had been sub-divided, and their share in the title deeds was 1/16th, and there is a hotel which they believed was about 3 times the size of their property, we think it would have been likely that the terms of rule 4.2(b) (i) would have applied in this application. The Homeowner would have had a right of appeal under the 2004 Act had the 2022 consultation been conducted in accordance with the provisions of that Act. We consider that the Property Factor's failure to conduct the consultation under the terms of the 2004 Act was not helpful to the Homeowner. We consider that while a Property Factor cannot force owners to comply with the 2004 Act, they can provide proper advice to those owners that the 2004 Act is to be applied where the title deeds are deficient. They should have conducted any consultation in accordance with the terms of the 2004 Act and affected owners would have obtained rights of appeal if such a process had been adopted.
37. We consider that the Factor's failure to adopt such a process likely has caused the Homeowner financial loss, did cause inconvenience, and prevented the Homeowner

from being able to effectively assert their legal rights under the 2004 Act. We consider that a payment of compensation of £1,000 is appropriate in all the circumstances.

DECISION

38. The tribunal refuses to uphold Issues 1 and 2, upholds Issue 3 (in part); and upholds Issue 4 of the Property Factor's review request in respect to the Decision and Proposed PFEO of 17 November 2023.

39. The tribunal having carried out the review amends the proposed Property Factor Enforcement Order of 17 November 2024.

40. The tribunal thereafter issues a Property Factor Enforcement Order in relation to its Decision of 22 May and 17 November both 2023.

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.

Melanie Barbour Legal Member and Chair

2 AUGUST 2024 Date