First-tier tribunal for Scotland (Housing and Property Chamber) ("the tribunal")

Decision on Applicant's request for review of a Decision in terms of Rule 39(1) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the 2017 Regulations") and Section 43(2)(b) of the Tribunals (Scotland) Act 2014 ("the 2014 Act")

Chamber Ref: FTS/HPC/PF/19/4027

Re: Property at Flat 8, 55 Waterfront Park, Malmo, Edinburgh, EH5 1BA ("the Property")

The Parties:

Mrs Jennifer Taylor, Flat 8, 55 Waterfront Park, Malmo, Edinburgh, EH5 1BA ("the Applicant")

Mr David Taylor, 4 Barnton Park Gardens, Edinburgh, EH4 6HN ("the Applicant's Representative")

Hacking and Paterson Management Services, 103 East London Street, Edinburgh, EH7 4BF ("the Respondent")

Tribunal members
Ms. Susanne L. M. Tanner Q.C. (Legal Member)
Mr. Robert Buchan (Ordinary Member)

DECISION

The tribunal, having considered the Applicant's Representative's request for review of the tribunal's decision dated 15 December 2020, determined that the application was wholly without merit and refused the application in terms of Rule 39(3) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.

STATEMENT OF REASONS

Procedural Background

1. On 15 December 2020, the tribunal made a decision in terms of the Property Factors (Scotland) Act 2011 (“the 2011 Act”), Section 19(1), following an oral hearing teleconference at which both parties were present, led evidence and made oral submissions.

2. The tribunal’s written decision with statement of reasons dated 15 December 2020 was issued to both parties on 23 December 2020.

Applicant’s Representative’s Request for review of the tribunal’s directions

3. On 5 January 2021, the Applicant’s Representative submitted a request for review of the tribunal’s decision of 15 December 2020.

4. There are nine grounds upon which review of the decision is requested, as follows:

   “1. page 1 item 2. The Property Factor has failed to carry out its duties as a common area has not been maintained.
   2. page 5 / 3.1. The Respondent is informing the homeowners annually as to the progress by issuing a letter to homeowners requesting payment. Therefore Section 6.1 of the Code of Conduct is engaged.
   3. Page 8 / 5.6. The new correspondence is relevant in that it is further evidence that the factors are not performing their duties.
   4. Page 12 / 5.33. This is incorrect. The applicant is invoiced quarterly and pays £127 per month by direct debit.
   5. Page 13 / 5.36. This is incorrect. The Applicant pays £1524 annually to the factor. This amount is what each homeowner (approx.) pays and is significant.
   6. Page 21 / 5.75. Surely it is up to the factor to create a meaningful proposal re funding.
   7. Page 21 / 5.76. No correspondence from the factor has been received subsequent to the tribunal.
   8. Page 21 / 5.77. The question regarding insurance has been misinterpreted. The question related to the possible rejection by insurers should any future claim arise over injuries caused by lack of maintenance.
   9. The fact that the tribunal was not going to make a Property Factor Enforcement Order was expressed to Mr Taylor prior to the conclusion of the tribunal hearing. Should this decision not have been subject to deliberation by the Tribunal Panel?”

Statutory provisions relating to review

5. The tribunal may review a decision made by it in any matter in a case before it and the decision is reviewable at the tribunal's own instance or at the request of a party to the case (Section 43 of the 2014 Act).

6. Rule 39 of the 2017 Rules provides:

   "(1) The First-tier Tribunal may either at its own instance or at the request of a party review a decision made by it … 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.
   …
   (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. Rule 39(3) of the 2017 Rules provides:

   "(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."

Tribunal's Consideration of Applicant's request for review

8. The Applicant's Representative's request for review was received within 14 days upon which the decision was sent to parties and was therefore made within the specified timescale.

9. The consideration of the review request was undertaken by the members of the tribunal who issued the decision which the Respondent seeks to review, in terms of Rule 39(6).

10. The tribunal separately considered each ground of the review request, as follows:

"1. page 1 item 2. The Property Factor has failed to carry out its duties as a common area has not been maintained".

11. Page 1 of the decision contains the tribunal's decision on the application in terms of Property Factors (Scotland) Act 2011 ("the 2011 Act"), Section 19(1). The first part of the decision relates to alleged breaches of the Code of Conduct for Property Factors which were notified by the Applicant to the Respondent and included in the Application. The second part of the decision relates to alleged breaches of property factors' duties which were notified by the Applicant to the Respondent and contained in the Application.

12. The tribunal made the decision that *"2. The Property Factor has not failed to carry out its property factor's duties".* The reasons for that decision are contained within the decision, with reference to each of the alleged breaches.

13. No basis is specified by the Applicant's Representative for review of that decision other than an assertion by the Applicant that "the Property Factor has failed to carry out its duties as a common area has not been maintained". He does not specify why a review of the decision is necessary.

14. The alleged breaches of property factors' duties were fully ventilated during the hearing and the tribunal made its decision having considered parties' evidence and submissions.

15. The fact that the Applicant's Representative does not agree with the tribunal's decision is not a ground for review which has merit.

16. The tribunal considers that Ground 1 of the review request is wholly without merit and refuses to review its decision on this basis.

"2. page 5 / 3.1. The Respondent is informing the homeowners annually as to the progress by issuing a letter to homeowners requesting payment. Therefore Section 6.1 of the Code of Conduct is engaged."

17. Page 5 / 3.1 is a finding of fact and law made by the tribunal in the following terms: *"As the phase 2 car park steelwork has not been instructed, the second requirement of Section 6.1 of the Code of Conduct, that the Respondent must inform homeowners of the progress of this work, including estimated timescales for completion, is not engaged."*

18. The tribunal's findings in fact were made by the tribunal having considered parties' evidence and submissions.

19. In relation to phase two of the car park steelwork, the tribunal made the following findings in fact, amongst others:

"2.16 Maintenance is required to the car park steel works to scrape and repaint the steelwork in the underground car park ("phase 2 car park steelwork").

2.17. The cost of the phase 2 car park steelwork was estimated at £7150.00.

2.18. The Respondent has made repeated requested for funds from homeowners on the Development for the cost of the phase 2 car park steelwork to enable those works to be instructed.

2.19 As at 4 November 2020, homeowners have paid £2009.42 towards the phase 2 car park steelworks, which is 28.1 per cent of the total amount requested by the Respondent.

2.20 The Applicant has paid her requested share of the phase 2 car park steelwork.

2.21. Without the allocated ring fenced funds the Respondent cannot instruct the phase 2 car park steelwork from current Development operational funds.

2.22. The Respondent had intended to instruct the phase 2 car park steelwork in summer 2020 if sufficient funds had been in place to do so.

2.23 As the phase 2 car park steelwork has not yet been instructed, there is no update on progress and estimated timescales for the Respondent to provide to homeowners including the Applicant."

20. The tribunal's findings in fact and law, including finding in fact and law 3.1, were made having regard to its findings in fact and the application of the applicable law.

21. There are findings in fact to support the finding in fact and law recorded at page 5, 3.1. The tribunal was entitled to reach the finding in fact and law which is recorded at page 5, para. 3.1.

22. The fact that the Applicant's Representative does not agree with the tribunal's finding in fact and law at page 5, para 3.1 is not a ground for review which has merit.

23. The tribunal considers that Ground 2 of the review request is wholly without merit and refuses to review its decision on this basis.

24. ***“3. Page 8 / 5.6. The new correspondence is relevant in that it is further evidence that the factors are not performing their duties.”***

25. Paragraphs 5.4 to 5.6 of the decision relate to the Applicant’s Representative’s motion to lodge late documentation which related to roof repairs at the Development and the tribunal’s decision not to allow that documentation to be lodged for the reasons specified therein.

26. The subject of roof repairs was not a matter before the tribunal for consideration. The tribunal does not have jurisdiction in terms of the Property Factors (Scotland) Act 2011 to consider matters which are not notified to the Respondent and contained within the Application. For that reason, the tribunal members determined that the new correspondence was irrelevant to the matters under consideration and that the tribunal was unable to consider the matter of the roof repairs or other issues at the Development as the alleged breaches of the Code of Conduct / property factor’s duties arising therefrom did not form part of the present Application and had not been notified as required by the 2011 Act.

27. Should the Applicant wish to make an application to the tribunal in respect of other matters which did not form the subject of the Application under the consideration of the tribunal, she would be entitled to do so, following notification to the Respondent of the same in accordance with the relevant provisions of the Property Factors (Scotland) Act 2011.

28. The tribunal considers that Ground 3 of the review request is wholly without merit and refuses to review its decision on this basis.

“***4. Page 12 / 5.33. This is incorrect. The applicant is invoiced quarterly and pays £127 per month by direct debit.”***

29. Page 12, para 5.33 contains a summary of the Applicant’s Representative’s response to the evidence and submissions of the Respondent in relation to the alleged breach of Section 6.1 of the Code of Conduct. The tribunal has recorded that, *“Mr Taylor stated that he knows that the whole matter hangs around funding. The Respondent invoices the Applicant £157 per month as a monthly charge by direct debit. …”* .

30. The Respondent’s evidence and submissions on the question of invoicing and the Applicant’s choice to pay by direct debit are also recorded in the tribunal’s decision, including at para 5.27, where it is recorded that, *“Ms Blair stated that the Respondent issues invoices on a quarterly basis in arrears. Those*

quarterly invoices itemise what has been spent. All the charges paid out come from the float. Per property it is £300. She stated that Mrs Taylor has chosen to settle quarterly invoices by way of monthly Direct Debit. That takes the annual cost and divides by 12."

31. It appeared at the outset of the Applicant's Representative's evidence and submissions that he thought that the Applicant was invoiced on a monthly basis. The tribunal has recorded the words that he used in its decision.

32. However, the tribunal reached the view, having heard both parties' evidence and submissions that the Respondent invoices homeowners on the Development quarterly in arrears; and that the Applicant chooses to make a monthly payment by direct debit. Finding in fact 2.9 is in the following terms: *"Homeowners including the Applicant are invoiced quarterly in arrears in respect of ongoing charges. Their payments are added to the float fund."*

33. The fact that the Applicant chooses to pay quarterly invoices by direct debit is a matter of convenience for the Applicant. The fact that the Applicant chooses to pay monthly by direct debit towards quarterly charges, and the amount of those monthly payments, is not a material fact upon which the tribunal relied to make its decision about the alleged breach of Section 6.1 of the Code of Conduct and does not form the basis of a finding in fact.

34. The tribunal considers that Ground 4 of the review request is wholly without merit and refuses to review its decision on this basis.

"5. Page 13 / 5.36. This is incorrect. The Applicant pays £1524 annually to the factor. This amount is what each homeowner (approx.) pays and is significant."

35. Para 5.36 is a continuation of the Applicant's Representative's submissions relative to the alleged breach of Section 6.1 of the Code of Conduct, as discussed in relation to Ground 4, above.

36. Para 5.36 records that *"Mr Taylor asked if Ms Blair could indicate the amount of arrears in the development as there is a lack of funding and he wants to know why. He stated that the homeowners are paying £120 per year and there seems to be continual lack of funding. He wishes to know how many properties are in arrears and what work has been done; how many times have the Respondents have used the debt recovery service."*

37. The tribunal accepts on the basis of what was said by the Applicant's Representative there is an accidental slip in the decision in relation to the phrase "£120 per year" and that it should read "£120 per month".

38. The tribunal hereby notifies the parties in terms of Rule 36 of the 2017 Rules that is has corrected the accidental slip by substituting the words "£120 per month" in place of "£120 per year".

39. However, the total amount paid by the homeowners in factoring charges on an annual basis for all management and maintenance of all aspects of the Development is not a material fact upon which the tribunal relied to make its decision about the alleged breach of Section 6.1 of the Code of Conduct and does not form the basis of a finding in fact.

40. The tribunal considers that Ground 5 of the review request is wholly without merit and refuses to review its decision on this basis.

"6. Page 21 / 5.75. Surely it is up to the factor to create a meaningful proposal re funding."

41. Para 5.75 forms part of the Respondent's response to an alleged breach of property factors' duties: "*WSS, clause 3.2, "Core Services, two points: "arranging and administering maintenance of common property by appointing contractors and service suppliers"; and "Enforcing debt recovery procedures for unpaid common charges accounts including instruction of legal action"…";*

42. Para 5.75 records a question put to Ms Blair by the tribunal and her response. *"In response to a question from the chair, Ms Blair stated that if Mr Taylor wanted to put a proposal to the other owners to collect the balance of the funds to have works carried out, the Respondent would disseminate the proposal to the other owners."*

43. Para 5.75 records part of the submissions heard by the tribunal as opposed to a decision by the tribunal in relation to the alleged breach of property factors' duties.

44. In any event, the Applicant's request for review Ground 6 is framed as a question and no basis for review is specified.

45. The tribunal considers that Ground 6 of the review request is wholly without merit and refuses to review its decision on this basis.

“7. Page 21 / 5.76. No correspondence from the factor has been received subsequent to the tribunal.”

46. Para 5.76 follows directly from the point discussed in relation to Ground 6, above. It is in the following terms:

    “The ordinary member asked Ms Blair whether it was intended that a more proactive tone would be used in the letters, stating that it should be dealt with sooner rather than later or will become much more expensive. Ms Blair responded that ultimately the homeowners need to take responsibility for their maintenance obligations and that ultimately the Respondent’s hands are tied without funds. She does not know what the float position will be in four months. There may be sufficient in four months. If there are funds available to undertake these works then the Respondent will instruct it, whether or not it is an emergency. The Respondent can continue to request funds from homeowners. It is the Respondent’s intention to ask for the homeowners’ support and funding. Ms Blair intends to send a letter to owners.”

47. The tribunal’s decision on the merits of the Application is concerned with past matters which have been notified by the Applicant to the Respondent and included in the Application.

48. In any event, it is noted that no timescale was specified by the Ms Blair as to when she intended to send a letter to homeowners relative to a further request for funding for phase two of the steel works.

49. If the Applicant considers that the fact that the Respondent has not issued such a letter amounts to a breach of the Code of Conduct or a breach of property factors’ duties, she or her Representative can notify the factor of the same and consider making a fresh application to the tribunal.

50. The tribunal considers that Ground 7 of the review request is wholly without merit and refuses to review its decision on this basis.

“8. Page 21 / 5.77. The question regarding insurance has been misinterpreted. The question related to the possible rejection by insurers should any future claim arise over injuries caused by lack of maintenance.”

51. Para 5.77 is a record of submissions made by the Respondent relative to alleged breach of property factors’ duties and follows from the paragraphs discussed in relation to Grounds 6 and 7, above.

52. Para 5.77 records that: *“Ms Blair stated that at the moment there is no insured event in order to deal with this as an insurance matter.”*

53. The Applicant’s Representative had the opportunity to respond to submissions made by the Respondent during the oral hearing. His response is recorded in the decision paras 5.79 to 5.80. The fact that the Applicant’s Representative does not agree with what was said by Ms Blair or considers that that demonstrates a misunderstanding on her part is a matter that he could have raised during the hearing.

54. In any event, the submission by Ms Blair in relation to insurance did not lead to a finding in fact on a material matter to the tribunal’s decision relative to alleged breach of property factors’ duties.

55. The tribunal considers that Ground 8 of the review request is wholly without merit and refuses to review its decision on this basis.

“9. Page 26 / 8.1. The fact that the tribunal was not going to make a Property Factor Enforcement Order was expressed to Mr Taylor prior to the conclusion of the tribunal hearing. Should this decision not have been subject to deliberation by the Tribunal Panel?”

56. Para 8.1 records the tribunal’s decision not to make a Property Factor Enforcement Order (“PFEO”) for the reason specified: *“Because the tribunal determined that there had not been a breach of the Code of Conduct Sections 6.1 and 6.9 or of the specified Property Factor’s duties, the tribunal did not make a Property Factor Enforcement Order.”*

57. The tribunal’s decision on the merits of the application was reached by the tribunal members after the oral hearing had concluded and the tribunal members had deliberated.

58. There was no statement made during the oral hearing by either tribunal member to the Applicant’s Representative that the tribunal was not going to make a PFEO. As a matter of fact, the tribunal members would have been unable to do so as they had not deliberated and reached that decision at that time.

59. Prior to concluding the hearing, the legal member / chair explained to both parties the procedure which would follow the hearing in order that parties understood what to expect. That included an indication that the tribunal would deliberate and reach a decision on each individual alleged breach of the Code of Conduct and alleged breach of property factors’ duties; and that the tribunal

would issue a written decision with a statement of reasons and, if appropriate, a proposed PFEO, in relation to which parties would have the opportunity to make representations thereafter. Both parties then confirmed that they understood the process to follow and had no questions in that regard.

60. Despite confirming that he understood the process which would follow, the Applicant's Representative may have misunderstood the information provided to him about the process to follow upon the oral hearing and formed the incorrect impression that the tribunal had reached a decision on the merits, which it had not.

61. The tribunal considers that Ground 9 of the review request is wholly without merit and refuses to review its decision on this basis.

Summary

62. For all of the reasons given above, the tribunal is of the view that the Applicant's Representative's request for review is wholly without merit and it is therefore refused in terms of Rule 39(3) of the 2017 Rules.

Appeals

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.

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Ms. Susanne L M Tanner Q.C.
Legal Member and Chair

14 January 2021