

# Housing and Property Chamber

## First-tier Tribunal for Scotland

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**Decision: Property Factors (Scotland) Act 2011, section 19(1) and the First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016, Rule 31**

**Chamber Ref: FTS/HPC/PF/17/0266 - 0273**

**The Property:**

**1F, 1G, 1J, 2E, 2F, 3C, 4B, 4C Sloan Place, Irvine, KA12 0HT**

**The Parties:-**

**Ms Leung Chi Wai,**

**(“the homeowner”)**

**and**

**Apex Property Factor Ltd, 46 Eastside, Kirkintilloch G66 1GH (“the factors”)**

**The tribunal:**

**David M Preston, Legal Member; and David Hughes Hallett, Ordinary Member**

**Decision:**

**The tribunal, having made such enquiries as it sees fit for the purpose of determining whether the factor had carried out the property factors’ duties as defined in section 17 of the Act, determined unanimously that the factor has not failed to comply with those duties insofar as they relate to the termination of their appointment.**

**Background:**

1. By application dated 26 June 2017 the homeowner applied to the Tribunal for a determination as to whether the factors had failed to comply with the Code of Conduct for Property Factors (“the Code”) and to carry out the Property Factor’s duties.
2. In particular the homeowner complained that the factors had failed to comply with sections 1.1a (F) and 2.2 of the Code. Details of the alleged failures were outlined in the application and accompanying papers. The homeowner also complained that the factors had failed to carry out the property factors’ duties in that they had failed to implement the Notice of Termination of their appointment dated 21 March 2017.

3. By Minute of Decision dated 28 July 2017 a Convener with delegated powers so to do referred the application to a tribunal.

**Hearing:**

4. A hearing took place in Russell House, King Street, Ayr on 11 October 2017. Present at the hearing were: Mr Lewis Kemp, solicitor, Harper MacLeod, The Ca'd'oro, 45 Gordon Street, Glasgow G1 3PE representing the homeowner (who did not attend); Mrs Christine Davidson-Bakhshae, Mr Neil Cowan and Ms Saria Ali, all representing the factors.
5. Notice of Hearing had been sent to all parties on 28 August 2017. The homeowner returned the response form on 5 September 2017 and did not submit any additional representations or documents.
6. As at the date of the hearing the tribunal had not been provided with any response from the factors. Towards the end of the hearing, however it became apparent that the factors had submitted representations on 15 September 2017 but these had either not been received or not been processed by the tribunal administration office. The tribunal determined that in accordance with the overriding objective in terms of Rule 4 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2016 ("the Rules") the tribunal should take account of such representations. Accordingly in terms of Rule 20 the tribunal issued an oral DIRECTION that the factors' will re-submit their representations and copy same to Mr Kemp within seven days of the date of the hearing. In the event that Mr Kemp considered that there was anything contained in the representations which he had not had an opportunity to address at the hearing he should submit responses within a further period of seven days. Thereafter the factors will have an opportunity to respond to any such representations made by Mr Kemp.
7. In response to the Direction the factors re-sent their representations and productions by letter dated 18 October 2017 in which they confirmed that a copy had been sent to Mr Kemp.
8. The productions lodged by the factors comprised:
  - a. Letter from the factors to all homeowners dated 1 February 2017;
  - b. Letter from the factors to Etimon Ltd dated 18 March 2017;
  - c. Letter from the factors to Etimon Ltd dated 7 June 2017;
  - d. Letter from the factors to Etimon Ltd dated 15 June 2017; and
  - e. Extract Title Deeds.
9. No further representations in response to the factors' representations and productions were received by the tribunal by 5.00pm on Tuesday 24 October being 14 days after the hearing. Accordingly the tribunal resumed its consideration of the application.

### **Preliminary Matters:**

10. The convener outlined the procedure which it was proposed to follow at the hearing.
11. Mr Kemp advised that he had recently been appointed to represent the homeowner in these proceedings in place of the former representatives, Etimon Ltd.
12. Mr Kemp advised that the homeowner was no longer insisting on that part of the application which referred to paragraphs 1.1a (F) and 2.2 of the Code and withdrew those complaints from the application.
13. Mr Kemp told the tribunal that on perusing the documents lodged in support of the application he had noticed that the Deed of Conditions lodged related to the wrong Title Number. He produced a copy of Title Number AYR77546 which was in respect of one of the homeowner's properties at 1F Sloan Place, Irvine. He said that the copy Deed of Conditions relative to Title Number REN122954 should be disregarded and that the Deed of Conditions in the extract now produced related to all the flats in the development, including those owned by the homeowner.
14. Mr. Cowan on behalf of the factors indicated that he had noted this discrepancy and had intended to make representations about it. The tribunal provided the factors with an opportunity to consider whether they would accept the late substitution of the correct title and, after a short adjournment, they agreed to do so.
15. The tribunal accordingly allowed the homeowner to lodge the copy of Title Number AYR 77546 and to proceed on the basis of that Deed of Conditions.
16. Mr Kemp then directed the tribunal to the relevant sections of the title at paragraphs 8 and 9 on pages 6 and 7.

### **Representations:**

#### *Homeowner*

17. Mr Kemp explained that the homeowner owned 8 out of the total of the 30 flats in the development. He submitted that in accordance with the procedure for terminating the appointment of the factors as outlined in paragraph 9 of the Deed of Conditions, a meeting of the proprietors of the development had been convened by Notice dated 18 January 2017 sent by Etimon Ltd on behalf of the proprietors of 18 flats in the development as specified therein, a copy of which had been lodged with the application. He explained that the Notice was dated 18 January 2017 although a post-it note had obscured the date on the copies lodged with the tribunal. The post-it note indicated that the Notice had been sent to every property at Sloan Place.

18. Following the meeting on 3 February 2017 a Notice of Termination of the factors' appointment dated 21 March 2017 was sent to the factors. The Notice provided details of 18 proprietors who had voted in favour of the termination. A copy of that Notice had been lodged with the application.
19. The factors had failed to recognise and implement the Notice of Termination of 21 March 2017. In this respect they had failed to carry out the factors' duties.

### *Factors*

20. In response, Mr Cowan said that the factors did not accept that the correct procedure had been followed by the homeowner. He submitted that the meeting had not been properly called and that any vote taken was of no effect. He said that it was not for the factors to educate another factor on the correct procedure to be followed.
21. Mr Cowan submitted that in terms of the Deed of Conditions the meeting must be called by at least 15 proprietors and not by an agent on behalf of proprietors. He also submitted that every one of the 30 proprietors should be provided with the Notice but there was no evidence that this had been done. In fact, he said that the letters were addressed to "the proprietors" at the various flats. As a matter of fact, many of the properties are let out and are not occupied by the proprietors, a fact of which the homeowner is aware as she herself lets out her flats.
22. In the absence of the due process of termination of their appointment as required by the Deed of Conditions, any vote to terminate their appointment was of no effect.

### **Discussion**

23. Mr Kemp submitted that it was perfectly acceptable for an agent to act on behalf of a number of proprietors and for that agent to provide the Notice of Meeting. He also suggested that it would be unduly onerous for a homeowner to identify the addresses for all proprietors and have them submit requisitions for a meeting. The Deed of Conditions was silent on the detail of serving Notices of meetings and that to send or deliver Notices to the proprietors at the flats was sufficient. He confirmed that the Notices had been hand delivered to the flats by Etimon Ltd.
24. Mr Cowan said that it was not unduly onerous and that it would be a straightforward matter to identify proprietors and their addresses by reference to either the Land Register or the Register of Landlords. He re-iterated the factors' position that the Deed of Conditions had to be construed literally and that required at least 15 proprietors (or the Property Manager) to convene a meeting and not anyone else.
25. In response to a question from the tribunal, Mr Cowan said that the Notice calling the meeting had to be signed by 15 proprietors and that such a Notice, even if signed by one proprietor on behalf of 14 others would not comply. He said that no written authority appointing Etimon Ltd as the homeowner's agent had been

provided. The letters which had been sent to them had been unsigned in any event.

26. The tribunal referred the parties to the factors' Statement of Services which had been lodged with the application. The provisions for "Changing Property Factor" specified that: all homeowners within the Development must be advised of the proposed termination; the factors must be notified in writing of a decision to terminate with details of all homeowners in attendance at the meeting; and signed mandates should be provided from those voting in favour of the termination.
27. Mr Kemp argued that the terms of the titles and, in particular the Deed of Conditions would take precedence over the Statement of Services.
28. Mr Kemp said that it was arguable whether, in the circumstances, a meeting was actually necessary as a majority of the proprietors (18) were in fact calling the meeting to terminate the appointment. In such circumstances those 18 votes, being a majority of the flats, would be sufficient to terminate the appointment. Mr Cowan argued that this could not be the case as those proprietors who were content to maintain the status quo would be denied any opportunity to express their views and seek to change the minds of some who may have been in support of a change.
29. Mr Kemp submitted that the homeowner had complied with the terms of the Deed of Conditions in relation to the termination and that took precedence over any provisions of the Statement of Services. He said that the required Notices: calling the meeting; and of termination of the appointment had been duly given.

### **Findings and Reasons:**

30. In coming to its decision the tribunal considered the oral representations of the parties as well as the written submissions and productions lodged by both parties. The tribunal did not consider that the factors' representations, which were lodged after the hearing for the reasons stated above, added anything to the arguments presented at the hearing. It did however find that the productions lodged by the factors were helpful in providing a more complete picture of events.
31. The tribunal found that when the factors were made aware of the Etimon Ltd letter of 18 January 2017 they wrote to all homeowners on 1 February 2017 setting out their position. The tribunal noted that the letter from Etimon Ltd of 18 January 2017 referred to the meeting as taking place on 3 February 2017 while the factors' letter referred to the meeting as having (by that time) been on 27 January 2017. Thereafter Etimon Ltd wrote to the factors on 21 March purporting to give Notice of Termination to the factors. In response (although the date of the letter is confusing) the factors sent their letter which is dated 18 March 2017 to Etimon Ltd advising of their intention to challenge any purported decision. There followed further correspondence between Etimon Ltd and the factors dated 7 and 15 June 2017 none of which addressed the specific reasons for the factors' challenge to the procedure. No effort was made by Etimon Ltd to ascertain the

reasons why the factors considered that the correct procedures had not been followed.

32. The production of the additional correspondence by the factors provided a context for the letter from them of 15 June 2017. Taken on its own the letter appears dismissive and provided no detail. However the earlier correspondence made it clear that the factors were challenging the process of the meeting and vote, even although it did not specify any detail of the challenge.
33. The tribunal rejected the factors' submission that Notice calling a meeting in terms of the Deed of Conditions could not be given by an agent on behalf of the relevant number of proprietors. The Notice dated 18 January 2017 had identified a total of 18 of the flats for whom the agent acted. If the factors had concerns about the appointment of Etimon Ltd, then they could have asked for letters of authority when they became aware of the meeting.
34. The tribunal rejected Mr Kemp's suggestion that the fact that the meeting had been called by a majority of proprietors in the development might render a meeting unnecessary. The purpose of the letter was to indicate those proprietors who had agreed to convene the meeting. Such agreement does not amount to a vote in favour of the termination. The meeting is necessary for a discussion and vote amongst those proprietors who attend or are represented by a mandatory at the meeting. This would be particularly so in the event that the meeting was held on 3 February 2017 by which time the factors' letter of 1 February 2017 would have been available for consideration by the homeowners.
35. The tribunal also rejected the factors' submission that the Notice would be ineffective if delivered to the proprietors at the flats. His suggestion that addresses could be found in the Land Register or Register of Landlords was rejected. The address of proprietors contained in the registered Titles in the Land Register can only be taken as correct as at the date of registration. The address is not updated if proprietors change their address. The Register of Landlords would not provide a full list of proprietors as it only referred to such properties as may be rented.
36. The tribunal determined, however that the correct procedure for termination of the factors' appointment had not been followed by the homeowner.
37. The tribunal rejected Mr Kemp's submission that the Deed of Conditions took precedence over the Statement of Services.
38. The tribunal accepted that this would be case if there was any inconsistency between the Deed of Conditions and the Statement of Services. Factors are required by section 1.1a (F) of the Code to include clear information on how to change or terminate the service arrangement in the Statement of Services. The information to be provided is required to state any "cooling off" period, period of notice or penalty charges for early termination. Such information would not normally be found in a Deed of Conditions. Therefore the intention of the Code is that the Statement of Services may include specific requirements with regard to termination not contained in the titles.

39. The procedure to be followed for termination of the factors' appointment in this case is as set out in the Deed of Conditions and the Statement of Services: First: a minimum of 15 proprietors may call a meeting of all the proprietors and all proprietors within the development must be advised of the proposed termination. The tribunal accepted that the Notice of 18 January 2017 satisfied those requirements. Second: a quorum of proprietors entitled to vote at any such meeting (16, either in person or by duly appointed mandatory) must be in attendance at the meeting. Third: in the event of a vote agreeing to the termination, the notification of termination should confirm details of homeowners in attendance at the meeting, as well as signatures from those voting in favour of the termination. The Notice of 21 March 2017 detailed the 18 properties in respect of which Etimon Ltd acted for the proprietors. It neither specified: who had been in attendance at the meeting; nor who had voted in favour of termination.
40. The tribunal could see no reason why: a list of those attending the meeting, together with details of any duly appointed Mandatories attending on behalf of any proprietors; or a note of voting numbers for or against the termination and any abstentions could not have been provided at the very least. The tribunal noted that the applicant appears to reside in Singapore and there is no evidence as to whether she was in attendance at the meeting in person or by Mandatory. In the latter case the tribunal would require to see the terms of any written mandate. The tribunal would also have expected, in light of the need for the matter to be referred to the tribunal, that a minute of the meeting with a record of votes cast for and against the termination and any abstentions, would be available and produced. In the absence of such evidence the tribunal could not be satisfied that a valid vote had taken place.
41. The tribunal observed that the Statement of Services referred to "signed mandates from those voting in favour of terminating our management services". It questioned what exactly was intended by the use of the word "mandates" that word also appears in the Deed of Conditions in respect of a proprietor who is entitled to attend a meeting but is represented by any other person as a Mandatory appointed by written mandate to attend, vote and act on behalf of the proprietor giving the mandate. The factors explained that the Statement of Services was intended to refer to signatures of those voting in favour of terminating the appointment.
42. In any event the tribunal finds that insufficient information had been provided to satisfy the requirements of the Deed of Conditions and Statement of Services in relation to the termination of the appointment and accordingly finds that the factors had not failed to carry out their duties in this regard.

### **Right of Appeal:**

**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.**

D Preston

Chairman

25 October 2017