

Housing and Property Chamber First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (formerly the Homeowner Housing Panel) issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 in an application under section 17 of the Property Factors (Scotland) Act 2011 ('The Act').

Chamber Ref:HOHP/PF/17/0238

24a Inchinnan Court, Inchinnan Road, Paisley, PA3 2RA ('the Property')

The Parties:

Mrs Gillian Munro residing at 24a Inchinnan Court, Inchinnan Road, Paisley, PA3 2RA ('the Homeowner')

Apex Property Factor Limited, 46 Eastside, Kirkintilloch, East Dunbartonshire, G66 1QH ('the Factor')

Committee members:

Jacqui Taylor (Chairperson) and Elaine Munroe (Ordinary Member).

Decision of the Tribunal

The Tribunal determines that the Factor has not failed to comply with Section 2.1 of the Code of Conduct and has not failed to comply with the property factor's duties.

The decision is unanimous.

Background

1. The Factor's date of registration as a property factor is 1st November 2012.
2. The Homeowner has owned her Property 24a Inchinnan Court, Inchinnan Road, Paisley, PA3 2RA since March 2010. The title of the Property is registered in the Land Register of Scotland under Title Number REN64131. The Property is part of a development of 45 flats, 15 garages and 1 storage area comprising 14,16,18,20,22,24 and 26 Inchinnan Road, Paisley. Apex Property Factors have factored the Property since May 2012. A Residents Association was formed early in 2017.
2. By application dated 22nd June 2017 the Homeowner applied to the First-tier Tribunal (Housing and Property Chamber) for a determination that the Factor had failed to comply with the following section of the Property Factor Code of Conduct ('The Code') and also had failed to carry out the property factor's duties.

- Section 2: Communications and Consultation.

Section 2.1

3. The application had been notified to the Factor.

4. By Minute of Decision by Maurice O'Carroll, Convener of the First-tier Tribunal (Housing and Property Chamber), dated 13th July 2017, he intimated that he had decided to refer the application (which application paperwork comprises documents received in the period 23rd June 2017 to 10th July 2017) to a Tribunal.

5. An oral hearing took place in respect of the application on 20th September 2017 at Wellington House, 134-136 Wellington Street, Glasgow, G2 2XL.

The Homeowner represented herself. The Factor was represented by Christine Winning Davidson-Bakshadee, Director; Neil Cowan, Legal Manager and Saira Ali, Property Manager.

As a preliminary matter the Tribunal determined that they would hear the Homeowner's application number 17/0238 together with application 17/0190, in terms of section 16 The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016.

The Homeowner had produced a copy of the Land Certificate for her Property (title Number REN64131), which included the deed of conditions for the development being the deed of conditions by Countsonic Limited registered 9th May 1990, and a copy of the Factor's Written Statement of Services.

Clause Eight of the Deed of Conditions contains the following provisions:-

- The proprietors of any one of the flats, garages and storage area has power to call an owners meeting.
- At least seven days prior notice must be given stating the place and time of the meeting and the subject or subjects for discussion.
- The Notice of the meeting must be in writing and it must be delivered to all relevant proprietors.
- At any meeting any relevant proprietor may be represented by a mandatory.
- The quorum for a meeting is 23 (ie one half of those proprietors entitled to attend, 45 in total).
- A majority vote can instruct the matters detailed in the clause.
- Harvey and Donaldson were appointed as the first factors and their appointment would continue until terminated at an owners meeting.

- Written Statement of Services.

The section of the Statement that relates to terminating the factor is as follows:

'Changing Property Factor.'

If homeowners wish to consider terminating our management service, a meeting of homeowners must be convened. All homeowners within the development must be advised of the proposed termination. In the event that the homeowners entitled to vote to reach an agreement to terminate our service they must notify us, in writing, confirming details of all homeowners in attendance and providing at least three months' notice of termination. They should provide signed mandates from those voting in favour of terminating our management service.'

The details of the application, in respect of the alleged breaches of the property factors' duties, and the parties' written and oral representations are as follows:

The Homeowner's First complaint:

Section 2: Communications and Consultation.

2.1: 'The Factor must not provide information which is misleading or false.'

The Homeowner explained that the Factor refuses to accept that their appointment has been terminated. The Homeowners have followed all of the rules and requirements to terminate the appointment but the Factor fails to accept this and refuses to leave. As the Factor will not go it is her submission that the terms of the Written Statement of Services for termination of the Factor's appointment are essentially misleading.

She explained the homeowners held a meeting on 8th February 2017. She attended the meeting. The meeting was held by Etimon Limited and ten homeowners were present. A vote was taken to oust Apex as Factor. She does not have a Minute of that meeting. The letter from the homeowners to the Factor dated 23rd February 2017 has been signed by ten homeowners and Etimon Limited signed on behalf of fourteen owners. The letter demonstrates that a majority of the owners require the appointment of the Factor to be terminated. She also explained that the letter to the Factor by Etimon Limited dated 23rd February 2017 gives the Factor the required period of three months' notice as it states that their appointment will terminate on 23rd May 2017.

She referred the Tribunal to the letter from the Factor to Etimon Limited dated 27th February 2017 which states that the Owners' meeting was not held in accordance with the title deeds. She explained that as the section of the Factor's Written Statement of services headed 'Changing Property Factor' does not refer to a requirement to comply with the title deeds the Written Statement of Services is misleading.

The Factor's response:

Neil Cowan, on behalf of the Factor, explained to the Tribunal that the letters from Etimon Limited to the Factor dated 23rd February 2017 and 1st March 2017 both make reference to

the proprietors meeting having been held in accordance with the title deeds. This demonstrates that Etimon Limited were aware of the requirement to comply with the provisions of the Title Deeds. The Written Statement of Services states that if homeowners wish to consider terminating their management service a meeting of homeowners must be called. He does not consider it to be misleading not to specifically state that the meeting must be held in accordance with the title deeds.

The Tribunal's Decision:

The Tribunal acknowledged that for something to be misleading it must be causing someone to believe something that is not true.

The Written Statement of Services states that if homeowners wish to consider terminating their management service a meeting of homeowners must be called.

The Tribunal determined that this section of the Written Statement of Services is not misleading as it is not untrue to state that a meeting of homeowners must be called to terminate the management service. Consequently the Factor has not failed to comply with section 2.1 of the Code of Conduct.

However the Tribunal do consider this section of the Written Statement of Services to be incomplete as it does not explain that the meeting of homeowners must be called in compliance with the provisions of the Title Deeds. Notwithstanding the fact that the Written Statement of Service is incomplete in this respect Etimon Limited were clearly aware that the provisions of the title deeds must be complied with as they have specifically referred to this in their letters of 23rd February 2017 and 1st March 2017.

The Homeowner's Second complaint:

Breach of Property Factor's Duties

The Homeowner explained that the Factor has failed to comply with the property factor's duties as the Factor has been advised that a majority of the owners wish to terminate their engagement of the Factor. As she had already explained the letter from the homeowners to the Factor dated 23rd February 2017 has been signed by ten homeowners and Etimon Limited signed on behalf of fourteen owners. The letter demonstrates that a majority of the owners require the appointment of the Factor to be terminated. She also explained that the letter to the Factor by Etimon Limited dated 23rd February 2017 gives the Factor the required period of three months' notice as it states that their appointment will terminate on 23rd May 2017.

The homeowners have complied with the regulations to remove the Factor but the Factor refuses to accept that his appointment as Factor has been terminated.

She separately explained that a number of the owners met in January and formed a residents' association with the common aim of terminating the appointment of the Factor as factor of the development. As far as she is aware the residents' association does not have a

constitution. She does not have a list of the names of people who have joined the residents' association.

The Factor's response:

Neil Cowan, on behalf of the Factor advised that two homeowners meetings had been held. The first was held on 27th January 2017 and the second was held on 8th February 2017.

He referred the Tribunal to two emails from Sarah Watters of Etimon Limited.

The first is dated 3rd March 2017 (which the Homeowner had labelled 'Evidence 8') which states:

'Please feel free to update your neighbours at Inchinnan Court also, we do not have contact details for all and are unable to let everyone know.'

The second is dated 5th April 2017 (which the Homeowner had labelled 'Evidence 9') which states:

'If I have missed any proprietors in this email who you believe would be interested in our progress, please feel free to forward them this correspondence.'

He explained that both emails evidence the fact that the two meetings had not been correctly held as the emails clearly show that Sarah Watters had not contacted all of the owners to advise them that the meetings as she does not have contact details for all of the owners. Consequently proper intimation had not been made.

He also advised the Tribunal that there was no provision in the title deeds for owners meetings being called by an agent of a Homeowner. Clause Eighth of the Deed of Conditions states that an owner may call a residents meeting and at such a meeting an owner may be represented by a mandatory. However there is no provision within Clause Eighth for a mandatory calling a meeting. Sarah Watters is not a homeowner of a property in the development and consequently she is not entitled to call the owners meetings.

Neil Cowan emphasized that the residents meetings held on 27th January 2017 and 8th February 2017 have not been properly constituted as the required period of seven days prior notice had not been given to all relevant proprietors, as required by clause Eighth of the Deed of Conditions. Also the Written Statement of Services requires that all homeowners within the Development must be advised of the proposed termination and this has not happened. Consequently the meeting on 8th February 2017 was not authorized to terminate the Factor's appointment and accordingly the Factor has not failed to comply with the property factors' duties.

The Tribunal's Decision:

The Tribunal acknowledge that the procedure for terminating the Factor's appointment is contained in the Deed of Conditions, the Factors Written Statement of Services and the Title Conditions (Scotland) Act 2003 and to some extent these provisions overlap.

The Deed of Conditions for the development does not specifically state the procedure to be followed to terminate factors other than the initial factor, Harvey and Donaldson.

The Written Statement of Services sets out the procedure to be followed to terminate the appointment of the Factor. Considering each of the requirements in turn:

(a) *'A meeting of Homeowners must be convened.'*

The Written Statement of Services states that a meeting of homeowners must be convened but does not explain the procedure to be followed when calling the meeting. Accordingly reference must be made to the Deed of Conditions which sets at clause Eighth the procedure to be followed to call an owners meeting. The requirements for a validly called owners meeting are:

(i) *It must be called by an owner.*

The meeting held on 8th February 2017 had not been called by an owner. It had been called by Sarah Watters of Etimon Limited in terms of her email dated 7th February 2017. The Tribunal understands that Sarah Waters was not an owner of a property within the development but she represents the company Etimon Limited which lead the residents association.

The Tribunal accept that under the general law of agency there would be no difficulty with an agent of an owner of a property within the development calling a residents' meeting. However, the email from Sarah Watters, did not clarify that she was acting as agent and calling the meeting on behalf of a named owner. The Tribunal had not been provided with evidence to the effect that Sarah Watters and Etimon Limited were authorised to act on behalf of an owner or owners in calling the meeting or a copy of the constitution of the residents association, which may have clarified the position.

Accordingly the Tribunal determine that the requirement that the meeting is called by an owner, or a demonstrable authorised agent of the owner, have not been met.

(ii) *A minimum of seven days proper notice in writing must be given.*

The email of 7th February 2017 stated that the residents meeting was taking place on 8th February 2017. The Tribunal determine that the required 7 days notice had not been given.

(iii) *A copy of the notice must be delivered to all relevant proprietors.*

In connection with the email from Sarah Watters of Etimon Property dated 7th February 2017. The Tribunal noted that the email was addressed to info@etimon.co.uk and copied to Sonia@etimon.co.uk. No evidence was provided that the email of 7th February 2017 was sent to all of the homeowners of the development. The last paragraph of the email from Sarah Watters dated 3rd March 2017 states:

'Please feel free to update your neighbours at Inchinan Court also, we do not have contact details for all and are unable to let everyone know.'

The Tribunal considers this to be clear evidence that intimation had not been made to all relevant proprietors and accordingly determine that the requirement that the notice must be delivered to all relevant proprietors had not been met.

(b) *'All homeowners within the Development must be advised of the proposed termination.'*

As explained above the email from Sarah Watters of Etimon Property dated 7th February 2017 was addressed to info@etimon.co.uk and copied to Sonia@etimon.co.uk. No evidence was produced to the Tribunal demonstrating that the email had been sent to all of the owners.

Accordingly, as already stated, the Tribunal determined that the requirement that all homeowners within the development must be notified of the proposed termination has not been met.

(c) *'In the event that the homeowners entitled to vote to reach an agreement to terminate the service of the Factors they must notify them, in writing, confirming details of all homeowners in attendance and providing at least three months' notice of termination. They should provide signed mandates from those voting in favour of terminating the factor's management services.'*

The Tribunal acknowledged the Homeowner's position that the letter dated 23rd February 2017 addressed to Apex Property Factor Limited met this requirement as it had been signed by ten owners and also by Etimon Limited on behalf of fourteen owners and the letter gave Apex Property Factors Limited the required three months' notice.

However, the Tribunal had not been provided with either a Minute of the meeting which took place on 8th February 2017, a sign in sheet for the meeting, an Agenda for the meeting or signed mandates by the owners authorising Etimon Limited to sign on their behalf.

Consequently no evidence had been produced evidencing the homeowners who attended the meeting on 8th February 2017. Also no evidence had been produced evidencing that Etimon Limited had authority to sign the letter dated 23rd February 2017, on behalf of the fourteen named owners.

For the reasons stated the Tribunal determine that the terms of the letter to the Factor dated 23rd February 2017 does not effectively terminate the appointment of the Factor.

The Tribunal acknowledge that separately, the Title Conditions (Scotland) Act provides that the rules for terminating the appointment of a property factor are contained in the title deeds, failing which the decision is made by a simple majority (Section 28(1)). As explained above, the Deed of Conditions does not set out the rules to be followed to terminate the Factor.

Consequently in terms of the Title Conditions (Scotland) Act a simple majority may terminate the Factor. However, as stated the Tribunal did not find the letter to Factor dated 23rd February 2017 to be evidence of a majority decision as the signed mandates by the owners authorising Etimon Limited to sign on their behalf had not been produced.

As the homeowners have failed to comply with the provisions in the Written Statement of Services for the termination of the Factor, the terms of clause Eighth of the Deed of Conditions in respect of calling the proprietors meeting and no evidence having been produced to the effect that Etimon have authority to sign the letter terminating the Factor's appointment on behalf of the specified proprietors the Homeowner has not complied with the requirements to terminate the Factor and accordingly the Factor has not breached their property factor's duties by failing to accept the terms of the letter dated 27th February 2017.

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.

Signed **J Taylor** Date 7th October 2017

Chairperson