

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision and Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 19 of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/21/2084

Re : Flat 0/2, 4 Cyprian Court, Lenzie G66 5BP ("Property")

The Parties:-

Ian Donald, Flat 0/2, 4 Cyprian Court, Lenzie G66 5BP ("Homeowner")

Bield Housing and Care, Craighall Business Park, 7 Eagle Street, Glasgow G4 9XA ("Factor")

Tribunal Members:

Joan Devine – Chairing and Legal Member

Ahsan Khan – Ordinary Member

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("Tribunal") unanimously determined that the Factor has complied with the Code of Conduct for Property Factors as required by section 14 of the 2011 Act and has complied with the property factor's duties. In all the circumstances the Tribunal does not propose to make a Property Factor Enforcement Order ("PFEO").

Introduction

1. In this decision the Property Factors (Scotland) Act 2011 is referred to as the "2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as the "Code" and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as the "Rules". The Homeowner's application to the Tribunal comprised documents received between 30 August and 7 November 2021 ("Application"). A Case Management Discussion ("CMD") was held on 16 December 2021. Reference is made to the Note of the CMD.
2. At the conclusion of the CMD the Tribunal noted that the facts that were agreed between the Parties were that the Development Management Scheme registered on 20 March 2018 and the Deed of Conditions registered on 4 March 2019 ("Deed of Conditions") both applied to the Property. The Factor agreed with the Homeowner that in terms of the Deed of Conditions, the costs for each block at Cyprian Court were to be split by 12. The Factor undertook to take steps to address that to re-allocate the cost of works already carried out and prepare separate budgets for each Block for 2022/2023.
3. At the conclusion of the CMD what appeared to be in dispute was firstly the validity of the establishment of a reserve fund by the Factor in light of the Development

Management Scheme which applied to the Property and secondly whether the Factor had provided the Homeowner with a sufficiently detailed financial breakdown of charges made. The Tribunal determined to fix a further CMD to review the best way to resolve the issues in dispute once the Homeowner had taken the opportunity to consider the terms of the Development Management Scheme which applied to the Property.

4. In advance of the continued CMD the Homeowner lodged a written submission annexed to an email dated 10 February 2022. The Factor lodged a written submission annexed to an email also dated 10 February 2022.

The Code

5. In the Application the Homeowner complained about breach of section 3.2 and 3.3 of the Code. The complaint also related to a failure to carry out Property Factor duties.

Section 3.2 of the Code states:

"Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor"

Section 3.3 of the Code states:

"You must provide to homeowners, in writing at least once per yeara detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests you must also supply supporting documentation and invoices....."

Continued CMD on 25 February 2022

6. A continued CMD took place by teleconference on 25 February 2022. The Homeowner, Mr Donald, was in attendance. The Factor was represented by David MacInnes. As regards the complaint under section 3.3 of the Code, Mr Donald said that the information provided was now adequate.
7. As regards section 3.2 of the Code Mr Donald's complaint was that the Factor had created a sinking fund. Mr Donald said that within the titles there were two Burdens on the Property. Number 5 was the Development Management Scheme. Number 6 was the Deed of Conditions. He said that the Development Management Scheme applied to the completed development and allowed for a reserve fund. He said that the factoring arrangements for the Meadows development as a whole was with Ross & Liddell. He said that burden 6, the Deed of Conditions, applied only to the two blocks of flats and contained the factoring arrangements for the Property.
8. Mr MacInnes agreed that the Deed of Conditions applied only to the two blocks of flats. He said that Ross & Liddell factored the common areas outwith the boundary of

the development. He said that until recently, Ross & Liddell had not issued a bill. He said that they had now sent an invoice to the Factor.

9. The Tribunal noted the terms of section 3.2 of the Code and asked Mr Donald if he had sold his property. He said that he had not but he understood that if a homeowner did sell their property sums held by the Factor would not be returned to them.
10. Mr Donald said that the charges in advance made by the Factor described as cyclical maintenance were equivalent to a sinking fund. Mr Donald said that he thought that charging in advance for cyclical maintenance was good practice but the problem here was the sheer volume of funds retained. Mr Donald said that his concern was that two years after the development came into operation money was collected by the Factor that equated to a lot more than was paid out in costs. He said that he is told that when an owner leaves the development money will not be returned to owners. He said that the total of the sums retained by the Factor was approximately £59,000. He referred to the "summary of other funds" in the document headed "re-allocation of costs" annexed to the submission from the Factor lodged on 10 February 2022.
11. Mr MacInnes said that the charges made which had generated a surplus had been retained by the Factor in terms of rule 20.3 of the Deed of Conditions. Mr MacInnes drew the Tribunal's attention to the document headed "re-allocation of costs" and noted that it did not show a sinking fund. He said that the budgets issued did not include a sinking fund. Mr MacInnes said that the sums totalling approximately £59,000 were not a sinking fund. He said that these funds were accumulated from a surplus which the Factor was entitled to retain in terms of rule 20.3 of the Deed of Conditions. The Tribunal noted that at the CMD Mr MacInnes said that there was a reserve fund and yet at the continued CMD, he was saying that there was not. Mr MacInnes said that the budget for 2021/22 had nothing in it for cyclical maintenance nor did the budget for 2022/23. He said that homeowners had appealed against the level of service charge and this resulted in a revised budget being issued. The Tribunal asked Mr Donald if he had received the revised budget. He said that he had received it on 17 June 2021 and it contained nothing for cyclical maintenance. Mr MacInnes said that nothing would go into the budget for major repairs without the consent of homeowners. He said that what had gone into the budget in the past had been fairly small.
12. Mr MacInnes said that at the outset of the development it had been necessary to create a budget and the Factor had looked at their previous experience at other developments and used that to set the budget at a level they had used before. He said that the same budget template was used for each development operated by the Factor. What happened then, however, was firstly the build quality at Cyprian Court was better than they had seen elsewhere. Secondly some contractors did not do what they had been asked to do which meant that other services could not commence such as cleaning. Thirdly the Covid pandemic took place which meant that services were suspended. Finally, Ross & Liddell had not charged for factoring

which had been budgeted for. He said that the Factor now have Ross & Liddell's bill and they will be paid from the surplus.

13. The Tribunal noted rule 20.5 of the Deed of Conditions which states: "*All sums held by the Factor in respect of the Development (whether by virtue of this or any other rule) are held by him in trust for the Flat Proprietors*". In light of that the Tribunal asked if funds are held by the Factor in trust for homeowners in terms of the Deed of Conditions then should they not be returned if a homeowner sold their property? Mr MacInnes said no it would not be returned as this was a protection against a deficit arising. He said that in this case a surplus has arisen as the budget was set at the start of the year based on estimated costs which in reality turned out to be substantially lower than estimated. He said that if the Factor did not have this surplus they could not instruct major works without collecting further sums from the homeowners. He said that the liability to repair rests with the sharing owner.
14. As regards breach of factor's duties, Mr Donald said that his complaint was the issue referred to at paragraph 19 of the note of the CMD. He said that the Factor had passed money to the Association without the consent of homeowners. He said that a meeting of homeowners should have been convened to authorise this. Mr MacInnes said that 21 out of 24 homeowners were relaxed about this payment. He said that when the surplus had been accumulated homeowners appealed against the level of the service charge and this was reduced. He said that 21 homeowners had asked for the funds to be transferred to the Association. Mr Donald said that this was not allowed by the titles without a meeting of the homeowners being convened.
15. The Tribunal asked if the resident's association has been properly constituted. Mr MacInnes said that it was. He said it had been established early on in the development. He said that the resident's association had drafted a constitution. He understood that the association wished to revise the constitution but had run into difficulties in that regard.
16. The Tribunal told the parties that it was their view that they had sufficient information to allow them to proceed to make a decision. The Tribunal asked the parties if they were content for the Tribunal to do that or whether they wished a hearing to be fixed. The parties indicated that they were content for the Tribunal to make a decision.

Findings in Fact

1. The Homeowner is the proprietor of the Property.
2. The Property is a flat within a block of 12 at Cyprian Court, Kirkintilloch, Glasgow.
3. The Factor performs the role of property factor at Cyprian Court.
4. The Deed of Conditions registered on 4 March 2019 applies to the Property and contains the factoring arrangements for the Property.

Findings in Fact and Law

1. In terms of rule 20.3 of the Deed of Conditions where in any year the annual maintenance charge exceeds a flat proprietor's liability under the Deed of Conditions, the excess is to be retained as an advance payment for liability in subsequent years. The Factor is therefore entitled to retain a surplus if it arises.
2. In terms of rule 14.1 of the Deed of Conditions the flat proprietors may make decisions in respect of matters specified in Rule 17 at any meeting called in accordance with rule 14.1.

Tribunal Findings and Reasons for Decision

17. The Tribunal noted that the complaint under section 3.3 of the Code had been resolved by the re-allocation of costs by the Factor. The Tribunal determined that there had been no breach of the Code under section 3.3.
18. As regards the complaint under section 3.2 of the Code, the Tribunal noted that the section applied where there had been a change in ownership of a property. There had been no change in ownership in this case. The Homeowner's complaint under this section related to the establishment of a sinking fund. The Tribunal considered the issue in the context of breach of factor's duties. The Tribunal noted that the revised budget for 2020/21 did not contain an allowance for cyclical maintenance or a sinking fund. This was also the case for the budget for 2022/23. In the circumstances there had been no breach of the Code or of the factor's duties. The Factor was entitled to retain a surplus in terms of rule 20.3 of the Deed of Conditions. The Tribunal noted the provisions of rule 20.5 of the Deed of Conditions which provided that sums held by the Factor in respect of the Development are held in trust for the Flat Proprietors. Rule 23 of the Deed of Conditions contained provisions regarding change of owner or occupier. The Tribunal noted that rule 23 was silent as regards what would happen to any funds held in trust in the event of a change in owner. It therefore seemed to the Tribunal that a departing owner would be entitled to request payment of sums held in trust on their behalf.
19. As regards the payment made by the Factor to the resident's association, the Tribunal asked the Homeowner what remedy he sought in the event the Tribunal took the view the Factor had acted incorrectly. The Homeowner said that the remedy he sought was for the Factor to understand that they could not pass money collected from homeowners to a third party without a meeting of the resident's association. The Tribunal noted that in terms of rule 17.1 of the Deed of Conditions, it provided that the Flat Proprietors could appoint a factor to exercise such powers as they may specify including the power to make a binding decision on the matters mentioned in paragraphs "(t) to (g)". Those paragraphs did not include a payment of the nature about which the Homeowner complained in this Application. The Factor should not have made the payment without a meeting of the Flat Proprietors. As the majority of Flat Proprietors had asked for the payment to be made and as the Homeowner did

not seek a specific remedy, the Tribunal declined to find that there had been a breach of factor's duties.

Appeals

In terms of section 46 of the Tribunals (Scotland) Act 2014 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.

Legal Member

Date : 9 March 2022