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

Property Factors (Scotland) Act 2011, Section 17

The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 ("the 2016 Regulations")

Chamber Ref: HOHP/PF/16/0165

Flat 3, The Park, Victoria Road, Forres, IV36 3AH ("The Property")

The Parties:-

Mr Donald (Dan) MacLeod, residing at the Property ("the Homeowner")

James Gibb, Residential Factors 65 Greendyke Street, Glasgow, G1 5PX, represented by Mrs Jennifer Hunter, Messrs Brodies, 31-33 Union Grove, Aberdeen AB10 6SD ("the Factor")

Tribunal Chamber Members

Maurice O'Carroll (Legal Member)
Angus Anderson (Ordinary Member)
Mike Scott (Ordinary Member)

Decision of the Chamber

The First-tier Tribunal (Housing and Property Chamber) unanimously determined that the Factor has complied with its duties in terms of sections 2.1 and 5.8 of the Code of Conduct for Property Factors ("the Code") in terms of section 17(1)(b) of the Property Factors (Scotland) Act 2011 ("the Act") as required by section 14(5) of the Act. It also finds that it has complied with its property factor duties in terms of section 17(1)(a) of the Act. Therefore no further action on the part of the Factor is required.

Background

1. By application dated 5 November 2016, the Homeowner applied to the Homeowner Housing Panel for a determination as to whether the Factor had failed to comply with sections 2.1 and 5.8 of the Code as imposed by section 14(5) of the Act. The Homeowner also complained that the Factor had failed to comply with its duty to follow and apply the terms of the Tenements (Scotland) Act 2014, sections 18 and 26.

2. By decision dated 1 December 2016, a Convenor on behalf of the President of the Homeowner Panel decided to refer the application the First-tier Tribunal for Scotland (Housing and Property Chamber)("the Tribunal").

3. A hearing of the Tribunal was held on 10 February 2017 at Forres House Community Centre, High Street, Forres. The Homeowner appeared on his own and gave evidence on his own behalf. The Factor was represented by Mrs Jennifer Hunter of Messrs Brodies and was accompanied by Ms Morgan Cooper of the Factor. Ms Cooper also provided evidence to the Tribunal.

4. The Homeowner intimated his concerns regarding the alleged failures in duty on the part of the Factor *inter alia* by letters dated 27 June and 4 July 2016.

Preliminary issue

5. Although not raised at the outset of the hearing (rather, at the commencement of her main address to the Tribunal), Mrs Hunter made a submission relating to the failure of the Homeowner to comply with the terms of section 17(3) of the 2011 Act. That section requires the Homeowner to notify the Factor in writing as to why he considers that the Factor is in breach of the property factor duties. Failure to do so potentially renders an application premature and therefore invalid, which is why it is discussed in this decision as a preliminary issue.

6. In support of her submission, Mrs Hunter referred the Tribunal to letters dated 22 July 2016 and 26 July 2016 (productions 57 and 58) from the Homeowner which in their own terms did not make a complaint. It was alleged that the Homeowner simply had immediate resort to the Homeowner Housing Panel without entering into proper correspondence with the Factor which might have resolved the dispute.

7. The Tribunal took the view that numerous items of correspondence sent to the Factor by the Homeowner did indeed indicate a complaint was being made. Moreover, they were treated as such by the Factor, as evidenced by a letter dated 12 July 2016 sent by the Factor to the Homeowner which acknowledged formal notification of a complaint. The Homeowner's letter of complaint dated 27 June 2016 was dealt with in some detail by Miss Cooper in her response dated 1 July 2016 (production 48). The matter was put beyond doubt by the Factor's letter dated 18 July 2016 (production 54) which concluded with the following words: "James Gibb residential factors do not consider you have a valid complaint...As you are aware, if you wish to continue this dispute then you may contact the Homeowner Housing Panel."

8. The Tribunal took that statement as indicating an opinion on the part of the Factor that the Homeowner had exhausted his complaint with them and that, accordingly, if he wanted further recourse, he should apply to the Homeowner Housing Panel (now the Tribunal). This approach is in accordance with section 7.2 of the Code. In the light of the above, the Tribunal was not of the view that the Homeowner's application had been brought prematurely. The Factor's submission regarding section 17(3) of the Act was accordingly rejected.

Tribunal findings
The Tribunal made the following findings in fact pursuant to Regulation 31(2)(b)(i) of Schedule 1 to the 2016 Regulations:

9. The Homeowner purchased the Property on 30 October 2014. It is registered in the name of the Homeowner and his wife under Title Number MOR7276. The Title Plan at page 2/3 of the productions shows the extent of the Homeowner's ownership on the Ordnance Survey map, together with the common parts and access. The Property forms part of a development of 9 units within the grounds of the converted Park Hotel. The conversion and Park Development ("the Development") was completed in or around 2006. The Homeowner and his wife occupy flat 3 which is within a separate block in the east wing of the Development with flat 4. Flats 3 and 4 are respectively on the lower and upper floors within that particular block. Units 6-9 are in a separate block and there are three self-contained properties at numbers 1, 2 and 5, The Park. The dwellings within the Development are set in extensive landscaped grounds. The factor originally appointed to the Development was Messrs Bruce and Partners. Their assets were transferred to the Factor on 2 March 2015 and they became the factors of the Property as of that date. The Factor was registered as such at all material times and is therefore required to comply with the Code.

10. Item 2 of the title deeds to the Property is a Deed of Conditions granted on 15 February 2006 by Tulloch of Cummingston Limited, then proprietors of the Park Hotel. The extent of the deed of conditions is shown on the Ordnance Survey map in the Supplementary Title Plan at production 2/4. It covers the entirety of the ground covered by the Development, including all common areas and the landscaped grounds. Clause 8 of the Deed of Conditions provides as follows:

    "Each proprietor of a dwellinghouse within the development shall be bound to insure his or her dwellinghouse, together with their interest in any common parts of a block in the development under a comprehensive Fire Insurance Policy with a reputable insurance company to the extent of at least the reinstatement value from time to time of the various subjects belonging to that proprietor..."

11. Clause Twenty Two of the Deed of Conditions relates to the rights of the proprietors within the Development. Sub-clause (a) permits meetings of the proprietors to be called by any one proprietor and for votes to be taken on the basis of a simple majority. Sub-clause (First) entitles the proprietors to establish a residents' association. The Tribunal finds that a residents' association was so established. Sub-clause (Fourth) entitles the proprietors to appoint a factor "to have charge of and perform the various functions to be exercised in the care, maintenance and management of any of the common portions of the block and the various common parts of the development..." Sub-clause (Fifth) empowers the proprietors "to delegate to the factor the whole rights and powers exercisable by a majority vote at any relevant meeting subject to such qualifications as the meeting may determine and a right to collect from each proprietor the proportions payable by him, her or them

respectively of all common maintenance *and other costs* and the factorial charges" (italics added). The clause then goes on to state that such proportions of expenses or charges for any work done *or services performed* shall be payable whether or not all proprietors are consentors, failing which authority to sue for such charges is provided.

12. The Factor provided the Homeowner with a copy of its Written Statement of Services ("WSoS") when it took over from Bruce & Partners as factor of the Development. The WSoS had been altered prior to the hearing to take account of references to HOHP now being references to this Tribunal. The substance of the WSoS dated December 2016 provided to the Tribunal was the same as that originally provided to the Homeowner in 2015.

13. Section 8 of the WSoS relates to block insurance. Section 8.1 states that "Block insurance is offered to all developments by James Gibb residential factors." Section 8.9 states: "It is very important that the declared value of a block or development is accurate on all our insurance policies. If a value is under-declared, the insurers would be unable to fully fund a rebuild in the event of 100% destruction. If a value is over-declared, the owners will be unnecessarily over paying on their insurance. Neither situation is, clearly, favourable. In order to ensure that that each insurance policy is set at the correct amount of cover, James Gibb residential factors will arrange a re-valuation survey to be carried out every five years..."

14. During 2016, the Factor arranged for just such a survey to be carried out by Messrs J&E Shepherd, Chartered Surveyors. The survey was known as an RCA (Reinstatement Cost Assessment) survey and covered the entire area of the Development. There were difficulties with this survey, however, with the result that a total of four versions were referred to by the Homeowner in his evidence. These are referred to in more detail below. The original version produced in evidence as production 6 was dated 18 May 2016, which was seen by the Homeowner on 1 June 2016.

15. The Homeowner complained to the Factor about the accuracy of the survey and the various assumptions included within it inter alia in his letters of 27 June and 4 July 2016 referred to above. The final version of the RCA survey produced at production 7 is dated August 2016. Following that, an insurance policy was taken out with Allianz (production 8) which details a buildings reinstatement value of approximately £4.5m and a total premium for the Development of £7,322.27. Originally, following the first survey, the Homeowner had been informed that his share of the total premium was to be £720.62.

16. The Homeowner had previously been paying approximately £500 by way of common insurance premium. Production 22/1 details a common insurance charge for the period 1 May 2015 to 27 May 2016 (i.e. nearly 13 months) of £524.48 prior to the RCA survey complained about. Following the Homeowner's complaint about the first survey, which included intervention by the local CAB, a revised survey was carried out which involved full on-site measurement and a revisal of the assumptions previously adopted being

applied. Following that, a different insurance figure was arrived at with a consequently lower premium. At that point, the Factor agreed to apportion the sum of £497.63 to the Homeowner in respect of his share of the overall common insurance premium. That apportionment of the premium is detailed at production 9. In evidence, the Homeowner appeared to indicate that the premium still did not represent best value for money but provided no equivalent insurance quote on the same basis in support of that assertion.

17. Production 9 was only revealed to the Homeowner, shortly prior to the hearing when it was lodged as a production. Until that production was intimated, he was unaware of the respective proportions being paid by the other proprietors within the Development. The reason given for this belated information regarding apportionment was concerns about data protection (of other common proprietors within the Development). It might have assisted matters if the Homeowner had been provided with that information at an earlier stage in the proceedings, given that it was in relation to a matter which was, after all, a common debt.

18. The Homeowner still does not accept the outcome of the RCA survey and continues to withhold the sum of £39.64, being his share of the cost of the work carried out by J&E Shepherd, although not the premium payment itself.

19. As noted above, the Factor offered to provide block insurance for the Development as part of its WSoS. The term "block insurance" means a policy which covers multiple buildings. The Tribunal was satisfied that the Factor in fact provided such insurance cover for the Development.

20. Production 4 relates to a decision of the residents' association committee on the provision of block insurance. The Chair of the committee, Deborah Newton, arranged for an Extraordinary General Meeting to be held on 1 July 2016 at 16.00h. The sole agenda item for decision that day was whether "to opt out of the block buildings insurance policy for The Park." Production 5 is an email from Mrs Newton confirming that at the EGM, the majority of residents voted to continue to retain block insurance for the Development. The Tribunal was satisfied that a majority of residents at a validly constituted meeting elected to maintain the block insurance arrangements for the Development. Following that meeting, the residents' committee disbanded for unconnected reasons.

The Code – Section 2.1

21. Section 2.1 of the Code provides that factors must not provide information which is misleading or false.

22. In the course of his evidence to the Tribunal, the Homeowner detailed what he saw as the four iterations of the RCA survey, the main faults with which are summarised here. The survey in Mr MacLeod's view suffered from muddled descriptions which did not accord with the actual addresses the Development, or the differences between different parts of them. The reinstatement cost of the Property as at the date of entry in 2014 (per the Home Report) was £235,000. Within 18 months, in terms of the RCA, that had jumped up to £458,000 (excluding garage) There was listed within the survey a common

stairwell with a reinstatement value of £71,000 whereas in fact no such stairwell existed.

23. The second report listed a reinstatement cost of £340,096 which was still an inexplicable increase of more than £100,000. The floor area of the Property was incorrectly stated as being 129 sq m whereas it ought to have been closer to 78 sq m in terms of the Home Valuation Report obtained by the Homeowner on purchase. A third report dated 5 July 2016 received by the Homeowner on 7 July 2016 prompted him to contact Messrs J & E Shepherd directly. Mr George Brewster from Shepherds opined that the third report was merely a copy of the second report which appeared to have been issued directly to the Factor which he could not explain. The Homeowner appeared to indicate that the Factor had in some way altered the second report, but the purpose or effect of such alleged changes was not made clear. The Factor gave evidence that the second report was issued to it in pdf format so could not have been changed, which evidence was accepted.

24. In any event, a fourth report was produced following an on-site survey as should have been done in the first place in the view of the Homeowner. Following the final survey, the gross floor area of the Property was given as 98.88 sq m which the homeowner accepted as being sufficiently accurate. In addition, the reinstatement cost of the Property was given as £240,000 which also accorded with the value provided in the Home Report.

25. In light of the above evidence, the Tribunal made three conclusions: (i) the original RCA survey was inaccurate and required to be corrected. Had it not been for the Homeowner's complaints, that would not have been done. Accordingly, his initial complaints had been vindicated; (ii) the factual inaccuracies contained within the survey must have caused considerable irritation to the Homeowner, especially given that it took three revisions from the original report before the correct figures were employed by the surveyors; but that (iii) J & E Shepherd were the authors of the RCA survey.

26. The Factor had not itself provided incorrect factual information. Moreover, it was reasonable for the Factor to rely upon the professional expertise of a firm of highly reputable surveyors to carry out the revaluation. In doing so, they had complied with the terms of Section 8.9 of their WSoS (and best practice) with the consent of the majority of the proprietors within the development. In supplying the surveys to the Homeowner, it had merely passed on information provided to it by a suitably qualified firm of professionals. Accordingly, it did not find that the Factor had breached the duty contained within Section 2.1 of the Code.

27. Finally in relation to this section, the Homeowner took exception to the use of the term "non-standard" in the Factor's letter of 1 July 2016 (production 48). As noted above, the Development is a conversion from a hotel, incorporating some newly built elements (including the unit in which the Property is situated). To describe it as non-standard is perhaps stating the obvious, given that the Development is by its nature individual and unique and not replicated anywhere

else. The Tribunal could not see anything false or misleading in the use of that term.

The Code – Section 5.8

28. Section 5.8 of the Code requires factors to inform homeowners of the frequency with which property revaluations will be undertaken for the purposes of buildings insurance.

29. The Factor submitted a late production numbered 76 of the bundle being an invoice from the Factor dated 2 June 2016 with enclosure. The late submission of that document was not objected to by the Homeowner and was permitted by the Tribunal. The enclosure is a letter of the same date which was inserted with the invoice which was sent to the Homeowner by ordinary post. The Homeowner did not recollect reading that letter but was content to accept that it had indeed been included as stated. The letter gave notice that an RCA survey had been carried out and provided details as to how a pdf copy of it could be obtained. The fourth paragraph of the letter stated:
"Royal Institution of Chartered Surveyors guidance suggests that these [revaluation] surveys should be carried out every three years but our insurers only require these to be carried out every five years."

30. In light of the above, the Tribunal was satisfied that the requirements of section 5.8 of the Code had been complied with.

Factor duties

31. The Homeowner considered that the RCA survey had been incorrectly carried out by reason of the treatment of the Property within it. He accepted that there should be insurance for common parts within the Development, but appeared to contend that the block comprising flats 3 and 4 ought to be separated from the rest of the Development and treated as a discreet unit on its own.

32. In support of that contention, the Homeowner referred to sections 18 and 26 of the Tenements (Scotland) Act 2004 and the accompanying explanatory notes. Section 26(1) defines a tenement as being a building or part of a building which comprises two related flats, or more than two such flats at least two of which are (a) intended to be in separate ownership and (b) are divided from each other horizontally. Section 18(1) provides for a duty on each tenement owner to effect and keep in force over his property a contract of insurance for the reinstatement value of it. Section (2) provides that the duty under subsection (1) may be satisfied by way of a common insurance policy arranged for the entire tenement building. The explanatory note to the Act states that the subsection allows owners to have a combination of common and individual policies of insurance, whether or not there is any provision for a common policy in the title deeds.

33. The Tribunal was of the view that the terms of the Tenements (Scotland) Act 2004 were irrelevant to the application before it. Numbers 3 and 4 The Park are indeed divided horizontally and could on their own in isolation be considered as complying with the definition of "tenement" within the terms of the 2004 Act. If that were the only property which was being factored, then it

would indeed be open to the Homeowner to choose to insure it either by way of an individual policy or a block policy or a combination of the two. However, that analysis does not provide the full picture. The full extent of the subjects being managed by the Factors goes beyond the block inhabited by him and his wife and encompasses the entire Development as illustrated by the Supplementary Title Plan. The applicable legislation is therefore the Property Factors (Scotland) Act 2011. The 2011 Act is informed by the relevant contractual provisions which are applicable. These are the terms of the Title Deeds and the WSoS.

34. As noted above, Clause 8 of the Deed of Conditions makes specific reference to the obligation on individual proprietors to insure their properties and the common parts included therewith for the full reinstatement value "of the various subjects belonging to that proprietor." Accordingly, in the absence of a block insurance policy covering the entire Development, the Homeowner would have been quite correct to assert that his obligation to ensure only fell to him to that extent. On that basis, the only property and common parts he would be obliged to insure would be the subjects illustrated on the title plan to the Property.

35. However, Clause Twenty Two set out above makes provision for common action on the part of the proprietors to the Development. Such common action which may be delegated to the Factor under sub-clause (Fifth) includes all common maintenance "and other costs" and the right of the Factor to be reimbursed for "services performed" in furtherance of that clause. The provision of insurance is a service. Carrying out the RCA survey is also a service performed. Section 8 of the WSoS, which is the contract between the proprietors of the block and the Factor, makes provision for block insurance for the Development. It follows that since the EGM of the residents' association voted to continue with block insurance on 1 July 2016, all proprietors are obliged to pay a proportion of the costs thereby incurred.

36. The Homeowner is therefore obliged to pay for his share of the RCA survey and to pay a proportion of the block insurance premium, even although he is a dissenter to that course of action, as the majority of the residents voted to continue with block insurance. This is all in terms of the Deed of Conditions which binds the Homeowner and his successors in title. It would only be in the event that a majority vote of the residents at a duly constituted meeting decided to overturn the vote of 1 July 2016 that the Homeowner's contention regarding insurance would be valid.

37. For these reasons, the Tribunal rejected the arguments made on behalf of the Homeowner based upon the Tenements (Scotland) Act 2004. It accepted the argument on behalf of the Factor that they had no option but to continue with the provision of block insurance, given the terms of their own WSoS and the clear decision of the majority of residents to continue with block insurance as expressed on 1 July 2016 (Productions 4 and 5).

38. On this basis, the insurance obligation on the part of the Homeowner consists not only of the common parts of the Property but also a proportion of the common elements of the Development as listed in the RCA survey at

production 7, being all of the landscaped grounds, all of the garages, lighting, boundary fences, gate piers and common tarmac areas. The Factor's insistence on charging for a proportion of the cost of the survey and an equitable proportion of the common insurance premium is not therefore in breach of their duties as factor.

Decision

39. The Tribunal finds that the Factor has not breached its duty to comply with the Code either in respect of section 2.1 or 5.8 thereof. It also finds that the Factor has not failed to comply with any other factor duties arising from any other source. The decision was unanimous.

Expenses

40. At the conclusion of proceedings, Mrs Hunter made an application for expenses in terms of Regulation 10 of the 2016 Regulations. That Regulation provides that a party may claim expenses against another party to the proceedings where that party has through unreasonable behaviour put the other party to unnecessary or unreasonable expense.

41. The Tribunal considered the application and determined that the Homeowner had not acted unreasonably in the course of the proceedings before it. Given the uncertainty surrounding the RCA survey and the obvious errors made in the course of it, the Tribunal considered that it was reasonable for the Homeowner to seek clarity regarding the final version of the survey, in terms of its lawfulness, before an impartial judicial body. In the course of his submissions to the Tribunal, the Homeowner provided written documentation and oral submissions in support of a view reasonably held by him, in a timely and appropriate manner. The fact that he has been unsuccessful does not diminish in any way his entitlement to be heard by the tribunal and to have his application followed through to a conclusion. The application is denied.

Appeals

42. **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.**

Signed: M O'Carroll Date 22 February 2016
Chairman