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

Decision in respect of an Application under Section 17 of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/18/2154

24D Inchinnan Court, Inchinnan Road, Paisley, PA3 2PA ("the Property")

The Parties:-

Miss Victoria Yuill, residing at the Property ("the Homeowner and Applicant"), represented by Mr Kevin Montgomery, Renfrewshire Citizen Advice Bureau, 7 Glasgow Road, Paisley

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

Tribunal Members:-

Patricia Anne Pryce	**-**	**Chairing and Legal Member**
Elizabeth Dickson	**-**	**Ordinary Member (Housing)**

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the tribunal'), having made such enquiries as it saw fit for the purposes of determining whether the Factor has complied with the Code of Conduct for Property Factors as required by Section 14 of the Property Factors (Scotland) Act 2011 ("the 2011 Act") determines unanimously that, in relation to the Homeowner's Application, the Factor has not complied with the Code of Conduct for Property Factors and has failed to carry out the Property Factor's duties.

Following on from the Applicant's application to the First-tier Tribunal (Housing and Property Chamber), which comprised documents received in the period of 21 August to 28 September 2018, the Convenor with delegated powers under Section 18A of the 2011 Act referred the application to a tribunal on 28 September 2018.

Introduction

In this decision, the tribunal refers to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 as "the 2017 Rules".

The tribunal had available to it, and gave consideration to, the Application by the Applicant as referred to above, representations submitted by the both parties together with oral submissions made by both parties at the hearing.

The Legal Basis of the Complaints

The Applicant complains under reference to Sections 1.C.e and f, 2.1, 2.2, 3.1, 3.2, 6.1, 7.2 and 7.3 of the Code which are referred to for their terms.

Separately, the Applicant complains of a failure to carry out property factor's duties.

Hearing

A hearing took place in the Glasgow Tribunals Centre, 20 York Street, Glasgow on 7 February 2019. The previous hearing on 26 November 2018 had been adjourned.

The Applicant attended on her own behalf and was represented as above.

The Respondent was represented by Mrs Christine Davidson-Bakhshea, Director, and Mr Neil Cowan, Legal Manager, both employees of the Respondent.

Preliminary Issues:-

1. The tribunal noted that the Applicant wished late papers to be lodged. The Respondent did not object to the lodging of the documents under cover of the Applicant's email of 2 February 2019 as these were documents of which the Respondent was the author. However, the Respondent objected to the further documents which the Applicant sought to lodge. The further papers were letters from solicitors to the Respondent and letters from Indigo Square Property Limited.
2. The tribunal noted that neither party had complied with the directions issued by the tribunal in its decision of 26 November 2018. However, the tribunal noted that the Applicant had previously been under the erroneous impression that a letter had been sent to the Respondent in advance of the meeting of owners on 19 February 2018 and had given evidence to that affect at the hearing on 26 November 2018. After further investigation, the Applicant discovered that no such letter had been sent. The Applicant apologised to the tribunal for this error. Mr Cowan had produced letters dated 3 April, 7 June, 10 August, 5 September and 8 October, all 2018 which had been sent to the Applicant after the meeting of the owners. Although these contained

statements that the Respondent did not consider that the procedures for the meeting as contained within the title deeds had been followed, the letters failed to state why the Respondent was of that belief. Given that, Mr Cowan had considered that the letters which he had produced timeously to the tribunal would be sufficient to satisfy the direction. They were not as they contained nothing more than bald statements. They did not contain the reasons why the Respondent considered that the title deed procedures had not been followed. However, once again the tribunal noted that it had not been Mr Cowan's intention to mislead the tribunal.

Given the foregoing, the tribunal considered that neither party should be censured for their lack of compliance with a direction.

The tribunal makes the following findings in fact:

- The Applicant is the owner of the property known as 24D Inchinnan Court, Inchinnan Road, Paisley.
- The Respondent was the factor of the common parts of the building within which the property is situated from May 2012 until 21 May 2018 when their appointment was lawfully terminated by the owners.
- The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 from the date of its registration as a property factor.
- The Applicant and her fellow common owners properly followed the procedures as outlined within the title deeds for the properties located within Inchinnan Court for convening a meeting which took place on 19 February 2018.
- At the meeting on 19 February 2018, 35 owners voted unanimously to terminate the appointment of the Respondent as factors for Inchinnan Court and to appoint Indigo Square Property Limited as their new factor.
- The owner, Lesley Cochrane, wrote to the Respondent by letter dated 20 February 2018 advising that the owners had terminated the appointment of the Respondent and that a new factor had been appointed.
- The proper termination date of the Respondent is 21 May 2018, giving three months' notice to the Respondent in terms of their Written Statement of Services (WSS).
- The Respondent has continued to the present date to claim that it remains the factor of the property.
- The Respondent has continued to invoice owners at Inchinnan Court for management and other fees.

<u>This decision should be read along with the tribunal's decision of 26 November 2018 wherein the evidence heard on that date is fully rehearsed.</u>

Breach of Section 1.C e and f (taken together)

The Respondent had previously accepted that earlier versions of its WSS had not complied with the Code. However, as at both 26 November 2018 and 7 February

2019, the WSS did comply with the Code. The tribunal had before it a copy of the WSS which clearly demonstrated that it did comply with this part of the Code.

Given this, the tribunal found that the Respondent did not breach these parts of the Code.

Breach of Section 2.1

It was clear to the tribunal in light of the evidence it had heard that the Respondent's position as regards its continuing appointment was untenable. At the first hearing, Mr Cowan claimed that the termination of the Respondent's appointment was not competent as the owners had not been properly notified of the meeting on 19 February 2018. However, the Applicant had produced copies of the letters which had been sent to the owners and confirmation of the efforts that had been made to trace all of the owners. In addition to these substantial efforts, posters had been put up within Inchinnan Court itself advising all residents of the meeting details. The procedure within the titled deeds regarding the convening of meetings had clearly been complied with and the letters and notices had contained all of the information required by the title deeds. To attempt to insist that the termination process was somehow wanting in the context of very clear compliance with the title deed requirements beggars belief. Despite clear compliance with the title deeds, the Respondent continued to insist for the past year both to the owners and to third parties, such as the newly appointed factors, that its appointment remained. The tribunal considers that this behavior was clearly misleading and without a doubt false.

Given this, the tribunal found that the Respondent had breached Section 2.1 of the Code.

Breach of Sections 2.2

In relation to the particular threat to raise court action against Miss Yuill due to her "derogatory statements", the tribunal considered that this was not a legitimate threat of legal action. Miss Yuill had emailed querying her invoices which she was perfectly entitled to do. Mr Cowan responded by threatening her with legal action. In the circumstances, the tribunal considered that this was wholly inappropriate. There was no factual foundation for such a threat to be made. In all the circumstances, the tribunal considered that this was a threat as it was not a reasonable indication of legal action. There was no justification for such a threat to be made in the circumstances of the correspondence between the parties.

Given this, the tribunal found that the Respondent had breached Section 2.2 of the Code.

Breach of Section 3.1

Further to the evidence which had been heard on 26 November 2019, Mr Cowan submitted that although he accepted that the owners of the garages were in all likelihood also owners of the flats, to his knowledge, the owners of the garages had not been advised of the meeting. He would expect them to be involved in such a meeting. However, he conceded that the title deeds are clear that owners of the garages do not have additional voting rights by dint of being a garage proprietor. He also conceded that this argument had not been successfully before other fora. His position was that the appointment had not been terminated therefore no final accounts were required to be submitted.

Mr Montgomery submitted that it was very clear that the title deed procedures re the meeting had been fully complied with and that substantial efforts had been made to contact all owners. There had been 35 owners who attended or were represented at the meeting and all 35 voted to terminate the appointment of the Respondent and appoint a new factor. It would be unfair to require those to attend who could not vote.

Miss Yuill submitted that termination had taken place properly and that she was entitled to a final accounting in terms of this section of the Code.

The tribunal considered that the point raised by Mr Cowan regarding the garage owners was bordering on ludicrous. Termination had taken place properly. The owners were therefore entitled to a final account. Miss Yuill had not received such a final account.

Given this, the tribunal found that the Respondent had breached Section 3.1 of the Code.

Section 3.2

Miss Yuill submitted that she still awaited her final account and receipt of monies owed to her by the Respondent. Despite the owners providing the Respondent with three months' notice of the termination, the Respondent had failed to settle accounts.

Mr Cowan submitted that the Respondent still considered itself to be the factor and therefore considered that this section of the Code did not apply.

The tribunal determined above that the termination had been carried out properly. Given this, this section of the Code applies to the present situation. The Respondent conceded that it did not consider that it had to implement this section and therefore had not implemented it.

Given this, the tribunal found that the Respondent had breached Section 3.2 of the Code.

Section 6.1

Miss Yuill submitted that she was not insisting on this alleged breach of the Code.

Section 7.2

Miss Yuill advised that her complaint had been ongoing since February or March 2018 and she had felt forced into making her present application as the Respondent had refused to answer her concerns. The Respondent's complaints procedure was never followed. Mr Cowan had simply dealt with her correspondence, had never given her a time limit for responses nor had he referred her concerns up to the Director for a final reply.

Mr Cowan submitted that he had not treated the correspondence from Miss Yuill as a complaint. She had never used the word "complaint" so he had not treated it as such.

The tribunal did not agree with Mr Cowan's view on what constitutes a complaint. It was clear from the extensive correspondence produced by both parties in the present process that the Applicant had raised several issues which clearly were complaints, albeit she had not used the word "complaint". The tribunal considers that Mr Cowan's view of what constitutes a complaint is extremely narrow and simply erroneous. Mr Cowan requires to look beyond simple labels. It is clear from the correspondence that the Applicant had raised several issues with the Respondent but had never been advised of either a timescale for response nor of a final reply from the Director. The Respondent had failed to implement their own complaints procedure. Miss Yuill had therefore never received, as part of this course of correspondence, details of how to contact the tribunal.

Given this, the tribunal found that the Respondent had breached Section 7.2 of the Code.

Section 7.3

The Applicant submitted that she was not insisting on this alleged breach of the Code.

Failure to carry out the property factor's duties

The Applicant submitted that these failures were to be found under the two headings as follows:-

1. Failure by the Respondent to state how the title deeds had not been complied with in relation to the meeting and to provide the owners with a reason as to why the vote was incorrectly called.

This had been fully rehearsed in relation to the breaches of the Code outlined above. The Respondent could not show that the title deeds had not been complied with in relation to the convening and conduct of the meeting of the owners. The tribunal had issued a direction to the Respondent to produce the letter which Mr Cowan had claimed he had sent to the owners wherein he advised the owners how the title deeds' procedure had been breached. However, the letters he produced did not state this. It They simply stated that the title deeds had been breached.

Given all of the foregoing evidence, the tribunal found that the Respondent had failed to carry out its property factor duties in this regard. It failed to provide this reasoning to the Applicant while still insisting that its appointment continued. Despite being confronted with clear and unequivocal evidence that the meeting had been called properly, the Respondent took a rather perverse stance insisting that its appointment continued.

2. The erroneous apportionment of the invoices on a 1/45th proportion rather than a 1/61st as required by the titled deeds.

Miss Yuill submitted that she did not know that she had been wrongly charged by the Respondent until her neighbour told her about her own tribunal application and the issue of the apportionment of charges. Miss Yuill submitted that the Respondent had been the factor since May 2012 and had erroneously charged her a 1/45th share of the bills when, in terms of the title deeds, it should be a 1/61st share.

Mr Cowan accepted that the title deeds stated that the share for owners is 1/61st. However, he stated that when the Respondent took over in May 2012, the previous factor had charged 1/45th of the owners. This had been accepted by the owners. There was a historical agreement, though he conceded that there was no agreement in writing. He could provide no legal authority for his proposition that historical erroneous practice should take precedence over the terms of title deeds. The Respondent did not know who the owners of the 16 garages were for charging purposes.

The tribunal was astounded that the Respondent took this view. The terms of the title deeds are clear and concise in this matter. It is clear that the title deeds provide for a 1/61st apportionment among the common owners.

Given this, the tribunal found that the Respondent had failed to carry out its property factor duties. The Respondent had not implemented the clear terms of the title deeds when issuing invoices. Rather than investigating who the owners of the garages were and charging them accordingly, the Respondent had simply chosen to divide up the cost between the 45 flat owners. These invoices had been wrongly apportioned since May 2012.

Final Submissions of Parties

Miss Yuill submitted that she wanted a finalised account in which she wanted the Respondent to account to her for the excessive amounts she had paid the Respondent since May 2012 due to the erroneous apportionment. In short, she wanted the money she had paid to be recalculated at a 1/61st share.

In addition, Miss Yuill wanted the account issued to remove the £2,051.05 in respect of "pro-formas" which is presently showing as a debt on her account. These are monies which the Respondent had sought for payment to account for works they wished to instruct in Inchinnan Court but had never done so due to lack of ingathered funds from owners. Miss Yuill stated that the Respondent also included this amount in debt recovery actions against owners.

Miss Yuill submitted that the Respondent had also invoiced her for £708.56 since the date of termination of the Respondent's appointment. She would like this sum removed from her account as the Respondent has not been the factor during that period.

Mr Cowan submitted that there was a contractual arrangement between parties for the Applicant to pay a 1/45th share, although he accepted that this was not in writing. He further submitted that the Respondent was entitled to treat the money due in terms of "pro-formas" as a debt, albeit he conceded that the Respondent was not out of pocket in respect of these matters as no works had been instructed due to lack of funds. Finally, his position was that the Respondent continued to be the factor.

Observations

The tribunal noted the final submissions by parties. It was of some concern to the tribunal that the Respondent continued to insist on spurious grounds to justify its position. In particular, the Respondent founded on an unwritten "contractual agreement" with owners where there was none but where there were very clear and unequivocal terms within title deeds in relation to apportionment of charges among owners. The conduct of the Respondent is of concern to the tribunal. In addition, there was a clear and unanimous vote by the owners in a properly convened meeting in line with the procedures as contained within the title deeds. Despite very clear evidence, the Respondent continued to insist that it remained as factor. Despite continued questions by the Applicant, the Respondent refused to deal with the Applicant's concerns as a complaint and instead chose to threaten her with entirely unfounded and spurious threats of legal action. This left the Applicant with no option but to make the present application to the tribunal. The course of conduct by the Respondent in this matter has been bordering on bullying. Even when confronted with clear evidence at the hearing, the Respondent continued to stubbornly maintain its stance, despite all evidence to the contrary.

The tribunal opined that the sum of £500 is a fair and reasonable sum which the Respondent should be required to pay to the Applicant by way of compensation for the stress and improper threats of unfounded legal action. Further, the tribunal opined that the Respondent should make good to the Applicant the erroneous sums she has been asked to pay by way of the wrong apportionment of charges. The Respondent must, in terms of the Code, make a proper final accounting to the Applicant, with the termination date of 21 May 2018. This should include removing from the Applicant's account all sums directly referable to "pro-formas".

Reasons for Decisions

Section 19(1)(b) affords the tribunal discretion as to whether or not to make a Property Factor Enforcement Order. The tribunal opined that in light of all of the matters noted in this decision, such an order should be proposed. The Respondent fully accepted the breaches and failures as noted above.

Property Factor Enforcement Order (PFEO)

The tribunal proposes to make the following property factor enforcement order:-

Within 28 days of the date of communication to the Respondent of the property factor enforcement order, the Respondent must:-

1. Re-calculate, and thereafter re-issue, all invoices issued to the Applicant by the Respondent since May 2012 until 21 May 2018, using the correct 1/61st share as stated in the titled deeds and to remove all entries relating to pro-formas.
2. Repay to the Applicant any sums due to the Applicant once Part 1 of the PFEO has been completed.
3. Pay to the Applicant the sum of £500.
4. Provide documentary evidence to the tribunal of the Respondent's compliance with the above Property Factor Enforcement Order by sending such evidence to the office of the First-tier Tribunal (Housing and Property Chamber) by recorded delivery post.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the tribunal proposes to make a property factor enforcement order, they must before doing so—
(a) give notice of the proposal to the property factor, and
(b) allow the parties an opportunity to make representations to them.

(3) If the tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the tribunal must make a property factor enforcement order."

The intimation of this decision to the parties should be taken as notice for the purposes of section 19(2) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal's office by no later than 14 days after the date that this decision is intimated to them. If no representations are received within that timescale, then the tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a property factor enforcement order may have serious consequences and may constitute an offence.

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.

…….. Chairing Member

7 February 2019

……. Date