Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 ("the Act") and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, in an application made to the Tribunal under Section 17 of the Act

Chamber reference: HOHP/PF/16/0179

The Property: 2/2, 72 Clincart Road, Mount Florida, Glasgow G42 9DU ('the property")

The Parties:

Colin Thomas, residing at 2/2, 72 Clincart Road, Mount Florida, Glasgow G42 9DU ("the homeowner")

Macfie & Co Management Services Limited, incorporated in Scotland under the Companies Act (SC084796) and having their Registered Office at 5 Cathkinview Road, Mount Florida, G42 9EA ("the property factors")

Tribunal Members – George Clark (Legal Member) and Mary Lyden (Ordinary Member)

Decision by the Housing and Property Chamber of the First-tier Tribunal for Scotland in an application under section 17 of the Property Factors (Scotland) Act 2011('the Act')

The Tribunal has jurisdiction to deal with the application.

The property factors have failed to comply with their duties under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act") in that they have failed to comply with Sections 2.1 and 2.5 of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

The Tribunal does not propose making a Property Factor Enforcement Order in respect of the failure by the property factors to comply with their duties under Section 14 of the Act.

The Decision is unanimous.

Introduction

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

The property factors became a Registered Property Factor on 7 December 2012 and their duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Tribunal had available to it and gave consideration to the application by the homeowner dated 27 November 2016 and received on 30 November 2016, with supporting documentation, the homeowner's letters to the property factors dated 8th October 2016, 4 November 2016, 17 December 2016 outlining the details of his complaint, his letter to the Tribunal dated 24 February 2017, withdrawing his complaint in relation to Property factor's duties and the property factors' responses to the homeowner contained in letters dated 26 October 2016, 15 November 2016 and 5 January 2017.

Summary of Written Representations

(a) By the homeowner

The following is a summary of the content of the homeowner's application to the Tribunal and supporting documentation, set out by reference to the relevant Sections of the Code of Conduct.

Section 1.1a.B.c. "The written statement should set out the core services that you will provide. This will include...the frequency of property inspections (if part of the core service)".

The homeowner stated that the property factors were supposed to be carrying out periodic inspections of the building and, in line with Section 6.4 of the Code of Conduct, should have had in place a programme of works indicating when these were to take place.

Section 2.1. "You must not provide information which is misleading or false."

The homeowner's complaint related to a repair to a fire party wall with the neighbouring property. The property factors had arranged for a repair at a total cost of £2.250 plus VAT. That cost had been split by the property factors 8 ways amongst the owners of 70-72 Clincart Road, but the 8 properties next door had not been asked to pay their share. It was a dividing partition wall and part of the repair

included the chimney serving the next door property, so the bill should have been split 16 ways. The homeowner had been misled by the property factors, as they had not advised that the bill should be shared with the neighbouring stair.

Section 2.5. "You must respond to enquiries and complaints received by letter or email within prompt timescales."

The homeowner referred in his complaint to the property factors having failed to reply to a simple communication such as an email. He had received no response to three emails to Mr Andrew O'Hare of the property factors dated 28 June, 7 September and 16 September 2016. The written Statement of Services stated that emails would be replied to within 7 days. On 24 June 2016, the property factors had said that they were waiting for a third quote for a repair to internal plaster works. The homeowner had still not received it as at the date of the application (27 November 2016). The written Statement of Services said that their stated time frame was 28 days.

The homeowner also complained about the inability of the property factors to correct an invoice. He had received an invoice on 2 March 2016 which included a fee of £11.50 for a repair to a downpipe, which was later covered by buildings insurance. He had requested three times by email and twice by visiting the property factors' office, for this invoice to be corrected. He had eventually received an email from Mr O'Hare on 22 September 2016, stating that it would be corrected by the end of that day (a Thursday) or at latest by the following Tuesday. As at 8 October 2016, he was still waiting for this March invoice to be corrected.

Section 7. "It is a requirement of Section 1 of this Code that you provide homeowners with a copy of your in-house complaints procedure and how to make an application to the Tribunal". The homeowner's contention was that the property factors had failed to provide him with a copy of their complaints procedure.

Failure to carry out the Property Factor's duties

The homeowner's complaint under this heading was withdrawn by the homeowner in a letter dated 24 February 2017.

(b) By the property factors

The following is a summary of the written responses by the property factors to the homeowner's complaint:-

Section 1.1A.b.c.

The property factors' response was that their written Statement of Services stated that property inspections could be carried out by prior arrangement. They did not normally attend a property without ensuring that at least one proprietor could provide

access. Given the proximity of the Property to their office, the property factors could keep a close eye on the building as they passed it every day.

Section 2.1.

The property factors stated that the work had been carried out following submission of three estimates and that their accompanying correspondence clearly stated that the cost would be divided 8 ways. A majority of owners had agreed to accept the estimate on that basis. The homeowner had been amongst those whose agreement was received. The adjoining tenement had no factor and, as the agreement of all of its owners would have been required, it was unlikely that the work could have proceeded. The property factors have also stated that due to the difficulties in making contact with these owners and seeking their consent and payment, they concluded that it would be impractical to pursue this aspect. By consenting to a one-eighth share, the owners of Numbers 70-72 were bound by a majority vote.

Section 2.5.

The property factors' response to the complaint was that the nature of email correspondence between the parties was somewhat brief for the most part and it appeared to be punctuated with acknowledgements followed by verbal discussions in their office between the homeowner and Mr O'Hare of the property factors. Their Managing Director, Mr Graeme Dickson, who sent the response to the complaint, agreed that there were gaps, but since discussions had ensued, his assumption had been that matters were proceeding normally.

In relation to the internal plaster work repairs, the property factors confirmed that they had requested three estimates at the outset but, despite numerous reminders, the third estimate had not been submitted. They had since obtained two estimates, which would be submitted shortly for the proprietors' approval. The property factors were not in a position to compel companies to respond to requests for quotes.

Section 7.

In a letter dated 5 January 2017, the property factors pointed out that, by his own admission, the homeowner had received a copy of the written Statement of Services, so his allegation that they had failed to send him a copy of their Complaints Procedure was factually incorrect.

The property factors understood that the homeowner had now received the corrected invoice to which he referred in his application.

Subsequent Correspondence

The homeowner responded on 4 November 2016 to the property factors' letter of 26 October and, in turn, the property factors replied on 15 November 2016. The following is a summary of that exchange of correspondence.

In his letter of 4 November 2016 the homeowner said that the Managing Director's assumption that matters were proceeding normally was wrong, as the discussions related to an invoice which took from March to October 2016 to correct. If they had dealt with it sooner, it would have been resolved before the contractor went into liquidation. On 15 November 2016, the property factors replied that the sum involved had already been laid out by them prior to March 2016. The refund was to be made by the contractor, who the property factors had paid on behalf of all the proprietors. The contractor company had, however, been liquidated and the property factors were assuming that they would be reimbursed by the liquidator, but the homeowner was well aware that there would be no final loss to him or the other proprietors, as the debt had been met by the property factors in the belief that they would be reimbursed.

In his letter of 4 November 2016, the homeowner asked where the owners stood in relation to a guarantee for the mutual wall works. The property factors replied that no guarantee could be expected on such jobbing repairs other than where negligence could be shown, although they would have expected any firm to attend to any repairs relating to work which failed to reach a normal tradesmanlike standard.

The homeowner accepted that he knew the adjoining tenement was not factored, but that had absolutely no effect on the situation. The property factors could not assume that the job would not have gone ahead had they approached the owners of that tenement to gain their agreement. The fact that they were not approached at all showed a lack of attention on the part of the property factors. It should have been clearly stated in correspondence that the option to approach the next door tenement could be taken with a view to splitting the cost 16 ways instead of 8. The homeowner accepted that he did agree to pay a one-eighth share, but this was prior to any work being carried out and what he could now clearly see had been done was for the benefit of both tenements. The property factors' had misled the owners of 70-72 into believing that it was just their building that was in need of repair.

The view of the property factors was that discussions had taken place with the proprietors whose flat was directly affected by the roof defects of the neighbouring property. Due to the difficulties in making contact with the owners of that tenement to seek their consent and payment, it had been concluded that it was impractical to pursue this aspect. It was open to the owners of 70-72 to pursue the neighbours if they wished.

The homeowner confirmed in his letter of 4 November 2016 that he had now received the quotations for internal fabric repairs, but stated that this did not excuse such a long delay. It would have been easy to find quotes from another company when the contractor the property factors were waiting for did not respond to the request for a quote.

In a letter to the homeowner dated 5 January 2017, the property factors confirmed their view that they had comprehensively responded to all of the points raised under previous correspondence and added that the homeowner had acknowledged that he had received a copy of their written Statement of Services, so his allegation that they had failed to send him a copy of their complaints procedure was factually incorrect.

THE HEARING

A hearing took place at Glasgow Tribunals Centre, 20 York Street, Glasgow on the morning of 27 June 2018. Neither party was present or represented at the hearing. The Tribunal considered that it had sufficient material before it to make a decision in the absence of the parties and proceeded to determine the application in terms of Rule 29 of the 2017 Regulations.

The Tribunal makes the following findings of fact:

- The homeowner is the owner of the property.
- The property forms part of a tenement stair of 8 flats, Numbers 72 Clincart Road, Mount Florida, Glasgow.
- The property factors, in the course of their business, managed the common parts of the development of which the Property forms part. The property factors, therefore, fall within the definition of "property factor" set out in Section 2 (1) (a) of the Property Factors (Scotland) Act 2011 ("the Act").
- The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- The date of Registration of the property factors was 7 December 2012.
- The homeowner has notified the property factors in writing as to why he considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
- The homeowner made an application to the Housing and Property Chamber of the First-tier Tribunal for Scotland ("the Tribunal") dated 27 November 2016 under Section 17(1) of the Act.
- The concerns set out in the application have not been addressed to the homeowner's satisfaction.
- On 27 February 2018, the Housing and Property Chamber intimated to the parties a decision by the President of the Chamber to refer the application to a tribunal for determination.

Reasons for the Decision

The Tribunal upheld the homeowner's complaint that the property factors had failed to comply with Section 1.1a.B.c of the Code of Conduct. The property factors' written Statement of Services stated that "A general inspection of the property by our representative would normally be carried out by prior arrangement, particularly where access was restricted by a door entry system". The view of the Tribunal was that this sentence referred to the procedure to be followed when such an inspection was carried out, rather than, as the property factors had suggested, implying that a periodic inspection would only be carried out if the owners requested it. The Tribunal was of the view that, whilst the provision was poorly worded, the written Statement of Services envisaged that general inspections would be carried out as part of the core service. Accordingly, the written Statement of Services should have included a clause setting out the frequency of property inspections. The Tribunal further held that the property factors' contention that they saw the building each day as they walked to and from their offices could not on any objective view satisfy the test of a periodic inspection. The view of the Tribunal was that the property factors should review the terms of their written Statement of Services to clarify the position regarding their obligation to carry out periodic inspections and to prepare a programme of works in order to comply with the Code of Conduct.

The Tribunal upheld the homeowner's complaint that the property factors had failed to comply with Section 2.1 of the Code of Conduct. The Tribunal found no evidence that the property factors had raised awareness of the homeowner of the fact that the cost of the repair to the fire party wall should be shared with the owners of the adjoining tenement. The written Statement of Services provides that "Where the proposed repair is mutual to an adjoining building, the Factor will attempt to negotiate with the adjoining owners or Factor and endeavour to ensure that the...adjoining owners pay their share of the costs. Such work would not be instructed without authority to do so by the Factor's own clients". The property factors had made no attempt to contact the adjoining owners, so the Tribunal held that the consent obtained by the owners of 70-72, including the homeowner, was not informed consent and the information they had provided to the homeowner when seeking his consent had been misleading. The property factors may well have thought that the consent of the adjoining owners would not be forthcoming, but they had a clear duty to try and obtain that consent and to inform the homeowner that it had not been obtained.

The Tribunal could not, however, speculate on whether or not an approach to the adjoining owners would have resulted in their agreeing to meet their share of the work, so determined that it would not be in a position to make any Order for compensation to the homeowner, as he had not incurred any quantifiable loss as a result of the property factors' failure to comply with Section 2.1 of the Code of Conduct.

The Tribunal upheld in part the homeowner's complaint that the property factors had failed to comply with Section 2.5 of the Code of Conduct. The homeowner had stated that the property factors had failed to respond, within the timescales set out in their written Statement of Services, to emails, but the Tribunal noted the response of the property factors that the pattern of communication between them tended to be an acknowledgement of an email followed by a verbal discussion at their offices. The Tribunal had not seen any of the emails referred to or any of the acknowledgements, so was unable to prefer one version of events over another and, accordingly, did not uphold this element of the complaint insofar as it related to communication in general.

The homeowner had also complained that he had requested three times by email and twice by visiting the property factors' office, that an invoice be corrected and that the property factors had sent an email on 22 September 2016, stating that it would be corrected by the end of that day (a Thursday) or at latest by the following Tuesday. As at 8 October 2016, the homeowner was still waiting for the invoice to be corrected. The property factors did not contest this evidence in their written representations and the Tribunal held that they had failed to respond to the homeowner's enquiries on this specific matter within prompt timescales. Accordingly, the Tribunal upheld this element of the complaint under Section 2.5 of the Code of Conduct. The Tribunal noted, however, that the invoice had now been corrected and that the homeowner had not at any time been out of pocket as a consequence of the property factors' failure to comply with Section 2.5 of the Code of Conduct, so the Tribunal would not be making any Order for compensation to the homeowner.

The Tribunal did not uphold the homeowner's complaint under Section 7 of the Code of Conduct. The Tribunal noted the terms of the homeowner's letter to the property factors of 8 October 2016, in which he confirmed that he already had a copy of the written Statement of Services. It contains the in-house complaints procedure and, whilst the property factors do not appear to have drawn the homeowner's attention to this in a reply to his letter, they had met their obligation under Section 7 of the Code of Conduct to provide the homeowner with a copy of their in-house complaints procedure and how the homeowner might make an application to the Tribunal. Accordingly, the Tribunal did not uphold this element of the complaint. The Tribunal would, however, advise the property factors, if they have not already done so, to update their complaints procedure to replace the reference to the Homeowner Housing Panel with a reference to the Housing and Property Chamber First Tier Tribunal for Scotland.

The Tribunal did not have to determine the homeowner's complaint that the property factors had failed to obtain a third estimate for works, as the homeowner had, prior to the hearing, withdrawn the element of his complaint that related to property factors' duties, but the Tribunal would have upheld this element of the complaint had it not been withdrawn.

Property Factor Enforcement Order

The Tribunal does not propose to make a Property Factor Enforcement Order, as detailed in the accompanying Section 19(2) Notice. The Tribunal determined, for the reasons set out in their Decision, that no Order for compensation was appropriate in respect of the failures of the property factors to comply with Sections 2.1 and 2.5 of the Code of Conduct and that, whilst it had suggested revisions to the property factors' written Statement of Services, it was not necessary to incorporate these in a Property Factor Enforcement Order.

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.

George Clark

Signature of Legal Chair .... Date 18 July 2018