Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber)
In an Application under section 17 of the Property Factors (Scotland) Act 2011

by

Alastair Thomson, 3/7 West Grange Gardens, Edinburgh EH9 2RA ("the Applicant")

James Gibb Property Management Ltd t/a James Gibb Residential Factors, 4 Atholl Place, Edinburgh EH3 8HT ("the Respondent")

Chamber Ref: FTS/HPC/PF/2556

Re: 3/7 West Grange Gardens, Edinburgh EH9 2RA ("the Property")

Tribunal Members:

John McHugh (Chairman) and Andrew Murray (Ordinary (Surveyor) Member).

DECISION

The Respondent has failed to comply with its duties under section 14 of the 2011 Act.

The Respondent has not failed to comply with its property factor's duties.

The decision is unanimous.

We make the following findings in fact:

1 The Applicant is the owner and occupier of a flat at Flat 3/7, West Grange Gardens, Edinburgh EH9 2RA ("the Property").

2 The Property is located within a Development of purpose built flats within multiple attached blocks ("the Development").

3 The Respondent has acted as the factor of the Development for around 16 years and continues to do so.

4 The Applicant is the Chair of the Owners Association relating to the Development.

5 The exterior woodwork in the Development has not been painted during the Respondent's period of appointment as factor.

6 In May 2016, the owners raised the desire to have the exterior painting carried out.

7 Communications took place between the Applicant and the Respondent with a view to having the exterior painting carried out.

8 By October 2018, the exterior painting works had neither commenced nor had the Respondent been able to confirm any start date or reason why the works could not begin.

9 The Respondent has not created a programme of maintenance works for the Development.

10 In August 2018, the Respondent issued invoices to owners which failed to give credit to owners for sums already paid and wrongly apportioned liability among the owners.

11 On or around 14 September 2018, the Applicant brought the billing errors to the attention of the Respondent.

12 After having been alerted to the billing errors, the Respondent issued reminders to the owners in respect of the erroneous invoices.

13 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a Property Factor.

14 The Applicant has, by his correspondence, including that of 27 November 2017 and 17 October 2018, notified the Respondent of the reasons as to why he considers the Respondent has failed to carry out its obligations to comply with its property factor's duties and its duties under section 14 of the 2011 Act.

15 The Respondent has failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at George House, Edinburgh on 25 June 2019.

The Applicant was present at the hearing.

The Respondent was represented at the hearing by its Legal Compliance Manager, Jeni Bole; its Operations Director, Angela Kirkwood and its Senior Property Manager, James Cherry.

Neither party called additional witnesses.

Introduction

In this decision we refer 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 (Procedure) Regulations 2017 as "the 2017 Regulations".

The Respondent became a Registered Property Factor on 23 November 2012 and its 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 documents lodged on behalf of the Applicant and the Respondent.

The documents before us included the Respondent's Written Statement of Services dated January 2018 which we refer to as the "Written Statement of Services".

Preliminary Matters

The Respondent sought by email dated 12 June 2019 to postpone the hearing. This was on the grounds that it was said that progress was being made to address the homeowner's concerns. The homeowner made representations that he wished the hearing to go ahead. Having regard to: the fact that the homeowner wished the hearing to proceed; that the Application had originally been made in October 2018; and that a hearing had previously been fixed for 5 February 2019 but had been postponed on the basis of similar representations that the homeowner's concerns were in the course of being addressed, the Tribunal decided to refuse the request for postponement.

At the hearing, the Applicant tendered some late documents being spreadsheets showing the history of communications between the parties as well as photographs showing the condition of the windows. The Respondent objected to these documents being considered given the absence of advance notice of them. Tribunal Procedure Rule 22 contained within Schedule 1 to the 2017 Regulations requires documents which are to be relied upon at a hearing to be lodged seven days in advance of the hearing, which had not happened in respect of these documents. The Tribunal identified no reasonable excuse as to why these documents were not lodged sooner and elected to refuse their late receipt.

On 25 June 2019 (after the hearing), the office of the Tribunal received an email from the Applicant containing further representations. We propose to have no regard to that email in making the present decision. The parties were given ample opportunity to make all representations they wished at the hearing and did so fully. Only in the most exceptional circumstances would the Tribunal be prepared to consider submissions made after the date of the hearing. To give any effect to the email of 25 June 2019, the Tribunal would then have to seek further representations in response from the Respondent which would lead to further procedure and delay.

In reaching our conclusions in relation to: (a) the postponement request; (b) the request for the allowance of late documents and (c) the post hearing communication we have had regard to the overriding objective contained in Rule 2 of Schedule 1 to the 2017 Regulations and the need to avoid delay and to deal with the proceedings in a proportionate manner.

As regards the representations dated 25 June 2019 by the Applicant regarding any financial award which should be made by the Tribunal, we would however in addition observe that parties do have an opportunity to make further representations on the terms of the attached Proposed PFEO which could include representations as to whether any sum of money should be paid by the Respondent to the Applicant).

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of failure to carry out the property factor's duties.

The source of the duties relied upon is the Written Statement of Service.

The Code

The Applicant complains of failure to comply with Sections 2.2; 2.5; 4.9; 6.1 and 6.4 of the Code.

The elements of the Code relied upon in the Application provide:

" ...**SECTION 2: COMMUNICATION AND CONSULTATION...**

...2.2 You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action)...

...2.5 You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers)...

...**SECTION 4: DEBT RECOVERY...**

...4.9 When contacting debtors you, or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position...

...SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE...

...6.1 You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required...

... 6.4 If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works."

The Matters in Dispute

The factual matters complained of relate to:

(1) The failures of the Respondent to perform instructed works within a reasonable time.

(2) Failure to Communicate with the Applicant.

(3) Failures regarding Financial Matters.

We deal with these issues below.

(1) The failures of the Respondent to perform instructed works within a reasonable time

The Applicant complains that the Respondent has generally failed to advance works which have been agreed. While the Applicant believes this to be a general problem, this procedure is confined to those areas where the Applicant has produced evidence of failure on the part of the Respondent. The Applicant highlights his complaint by reference to external painting works.

The Applicant had produced a detailed history of events relating to this matter in a letter dated 17 October 2018. The Respondent accepted that the history narrated in that letter was accurate.

In broad terms, that history is that painting of the exterior windows and screens has not taken place in the past 16 years. The owners of properties within the Development raised the issue in May 2016 with a request that the factor bring forward proposals for painting at the next AGM. The Applicant has narrated a long and detailed history thereafter. The essence of this is that by the AGM of 24 November 2017 painting estimates were still not available and the Applicant complained to the Respondent's Chief Executive. Various communications took place thereafter. The Applicant pressed for progress and eventually met with the Respondent's representatives on 22 August 2018. The Applicant emailed further to that meeting seeking a response as to when the painting works were to begin but received no reply. The position remained that by 15 October 2018 the painting works had not begun and the Respondent had not provided information as to when the works would begin.

The Respondent accepted that there had been failings on its part which were a matter of regret but highlighted that there had been some complications which had hindered progress such as the need to involve individual

proprietors whose private window painting was being included within the works. The Respondent also highlighted that the painting works have now started.

We find the Respondent's failures in respect of the painting works to be a breach of Section 6.1 of the Code. The history reveals a failure by the Respondent to inform homeowners of the progress of the work, including timescales for completion.

We have identified no breaches of property factor's duties.

(2) Failure to Communicate with the Applicant

The Applicant complains that the Respondent failed to communicate adequately with the owners. In particular, he advises that in February 2015 the homeowners had asked the Respondent for a "roadmap of likely future repairs". The owners were concerned that, as the building aged, there would be a requirement for increased future maintenance and replacement of significant elements such as the Development's flat roofs.

The matter had been raised since and some works have been carried out to the roof but there remains, as far as the Applicant is aware, no plan or programme for maintenance works. Some roof condition survey reports have been produced by suppliers of roofing products.

The Respondent is required by Code Section 6.4 where the arrangement with the homeowners "includes periodic property inspections and/or a planned programme of cyclical maintenance" (which the Respondent agrees applies in this case), "to prepare a programme of works". The Respondent's answer to this is that it carries our regular inspections and recommends work on the basis of these. In addition, it has contracts with suppliers for regular maintenance of items such as the lifts. It does not maintain any document in hard or electronic form which sets out planned or long term maintenance of the Development. Evidently, such a programme of works would be desirable in the management of the Development and would assist the owners in budgeting for larger items.

The Respondent's failure to produce a programme of works constitute a breach of Code Section 6.4.

The Applicant further complains by reference to Code Section 2.5. He requested the "roadmap" in February 2015, and again in August 2015. The matter was again raised in the Applicant's letter of complaint dated 27 November 2017 but no programme of work s has been produced in

response nor any explanation for its absence. We therefore find there to have been a breach of Code Section 2.5 in this respect.

We have identified no breaches of property factor's duties under this heading.

(3) Failure to deal with Financial Matters

Sinking Fund Amount

The Applicant complains that there was an error in the amount of the sinking fund reported by the Respondent to the owners at the 2017 AGM whereby the level of the fund was understated by £2600.

The Respondent explains that a mistake had been made. This was the result of a change of bank on the part of the Respondent. We do not identify any breach of the Code or of property factor's duties in this respect.

Sinking Fund Contributions

The Applicant further complains that a decision was made at the 2018 AGM to increase contributions to the sinking fund with effect from February 2019 but that the Respondent failed to implement the change until May 2019. This may have constituted a breach of property factor's duties by reference to Clause 5.4.2 of the Written Statement of Services. However, it is not clear to us from the papers available that this particular aspect falls within the Application since it does not seem to have been specifically mentioned in the Application or supporting correspondence. Section 17(3) of the 2011 Act requires that no Application can be made to the Tribunal unless

" (a) the homeowner has notified the property factor in writing as to why the homeowner considers 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, and

(b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern."

There is no evidence that that has happened here and so the Tribunal makes no finding in respect of this head of complaint.

Roof Repair Charges

The Applicant also complains that the Respondent both wrongly charged double and wrongly apportioned charges for roof repairs in its quarterly charges of 29 August 2018. The Respondent explained that the repairs were supposed to appear on the bills for all owners but that a credit should also have appeared on the bills of those owners who had paid in advance. In error, this had been omitted. There had also been an error of apportionment where some charges had been split among all owners although the costs were only due to be charged to some of them. One of the Respondent's managers had been on leave, so the steps to stop reminders being issued had not been taken promptly.

The Applicant had raised the issue by email to the Respondent on 14 September 2018. The Respondent replied to confirm that the billing errors would be rectified. Despite that, two sets of reminders were then sent to owners threatening referral of the matter to debt collectors in the event of continuing non-payment. The Applicant complains by reference to Code Section 2.2 and 4.9. However, we do not consider that the Respondent's threats (albeit misguided) in relation to debt recovery were abusive or intimidating but simply typical correspondence typical of the kind issued in the pursuit of debts. That said, Code Section 4.9 also requires that the Respondent must not carelessly misrepresent its authority or the correct legal position. While there may have been an initial error once this had been brought to the attention of the Respondent we consider that the Respondent's actions in sending out two further reminder letters to owners representing that sums were due when they were not in fact due, was a careless misrepresentation of the true legal position. We find there to have been a breach of Code Section 4.9 in this respect. We do not consider there to have been any breach of property factor's duties in respect of this aspect.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

We have a wide discretion as to the terms of the PFEO we may make. In this case we consider it appropriate to order the Respondent to take steps to address the issues with poor communication; the condition of the roof; and the absence of a maintenance programme.

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.

J McHugh

JOHN M MCHUGH

CHAIRMAN

DATE: 2 July 2019