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/18/2322

Flat 0/2, 70 Finlay Drive, Dennistoun, Glasgow, G31 2QX ("the Property")

The Parties:-

Miss Marion Litster and Mr William McLean, residing at the Property ("the Homeowners and Applicants")

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

Tribunal Members:-

Patricia Anne Pryce	**-**	**Chairing and Legal Member**
Carol Jones	**-**	**Ordinary Member (Surveyor)**

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") and whether the Factor has carried out its duties, determines unanimously that, in relation to the Homeowners' 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 12 September to 9 October, both 2018, the Convenor with delegated powers under Section 18A of the 2011 Act referred the application to a tribunal on 17 October 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 Applicants 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 Applicants complain under reference to Sections 2.3, 2.4, 2.5, 3.3, 4.8, 6.1, 6.2, 6.3, 6.4, 6.6, 6.9 and 7.2 of the Code which are referred to for their terms.

Separately, the Applicants complain 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 28 February 2019. The previous hearing on 18 December 2018 had been adjourned.

The Applicants both attended.

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

The tribunal makes the following findings in fact:

- The Applicants are the owners of the property known as Flat 0/2, 70 Finlay Drive, Glasgow.
- The Respondent was the factor of the common parts of the building within which the property is situated from January 2017 until 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.

Breach of Section 2.3

Mr McLean submitted that he and Ms Litster had received a welcome pack from the Respondent. However, there were no details within that pack of emergency out of hours contact details. They only became aware of that when they were billed for an emergency plumber invoice and this was part of the debt recovery action raised against them by the Respondent.

Mr Cowan submitted that the emergency contact sheet which is located within the second inventory of productions is normally part of the welcome pack which is sent

to owners. If this is missed out by mistake, an owner can always ask for this information. He could not say for definite that the Applicants had received this.

The tribunal noted that the Applicants were clear in their evidence that they had not received this. They were not even aware that such a service was offered by the Respondent until they received an invoice for it. Mr Cowan could not confirm that this information was sent to the Applicants. On balance, the tribunal preferred the evidence of the Applicants.

Given this, the tribunal found that the Respondent had breached Section 2.3 of the Code.

Breach of Section 2.4

Ms Litster accepted that the Respondent had written to owners about the need for a roof repair and the Abatement Notice in connection with this which had been served by the local authority. The Respondent sent out an estimate of how much this would cost. Mr McLean had requested a report from the Respondent asking why this work required to be done. He has never received a copy of an inspection report. They did not approve these works.

Mr Cowan submitted that the Respondent normally obtained three quotes for repairs such as the roof repair in question. The procedure is to send out a letter and a mandate to owners. Owners then send back the mandate or simply pay their portion of the estimated costs. He explained that it was normally only the most competitive quote which was sent to the owners. Mr Cowan explained that most of the owners had paid for the roof repair when asked.

Although not a very robust system, the tribunal noted that the Respondent did have a procedure in place as required by Section 2.4. The Applicants acknowledged that they had been written to as part of that procedure.

Given this, the tribunal found that the Respondent had not breached Section 2.4 of the Code.

Breach of Section 2.5

Mr McLean complained that the phone calls he and Ms Litster made were not returned. Their complaints were not answered. Specifically, their letter of complaint of 16 February 2017 had never been answered. Their letter of complaint of 21 February 2017 had not been answered. Both letters had been produced.

Mr Cowan conceded that the letter of 16 February 2017 had not been answered. However, he submitted that the Respondent had never received the letter of 21 February 2017. He referred to mail logs which he had produced. He accepted that these appeared incomplete but explained that cheques received had not been recorded in the log until later.

However, the tribunal noted that the mail log was not only incomplete, it did not cover the relevant period in time in relation to both of these letters. Mr Cowan accepted

not having replied to the letter of 16 February 2017. This letter remains unanswered as does the letter of 21 February 2017.

Given this, the tribunal found that the Respondent had breached Section 2.5 of the Code.

Breach of Section 3.3

Mr McLean complained that they had never received an annual breakdown of the charges. He also complained that by email dated 3 February 2018, which was produced, he had written to the Respondent requesting further information about the roof repair. He had asked for before and after photographs of the roof repairs. He had also asked for a breakdown of the costs, in particular, how much was being charged for scaffolding as there was no scaffolding erected when the roof repairs were carried out. Ms Litster confirmed this as she was present in the property when the repairs were done. She submitted that the repairs were completed in around two hours. However, the owners were being charged around £3,500 (inclusive of VAT) for this repair.

Mr Cowan conceded that no photographs were ever sent out despite the requests. He confirmed that the Respondent had these photographs but did not provide them to the Applicants. He could not provide an explanation for this. Mr Cowan also confirmed that the Respondent never investigated with the roof repair contractor the claims by the owners that no scaffolding had been used in this repair. The Respondent simply took the contractors word as being accurate. Mrs Bakhshea stated that scaffolding was used but confirmed that she had not attended the property.

The tribunal was very concerned that owners had raised with the Respondent real concerns about being overcharged for roof repairs, in particular, being charged for scaffolding. The owners were not provided with a figure for the cost of the scaffolding but were simply invoiced for a total amount of around £3,500. It was of concern that the Respondent did not consider that this should be investigated. The Applicants had sought supporting documentation in respect of the roof repairs and have never received this.

Given this, the tribunal found that the Respondent had breached Section 3.3 of the Code.

Breach of Section 4.8

Mr McLean submitted that the debt recovery action raised against them at Glasgow Sheriff Court was wrong given that he and Ms Litster had queried and disputed the amounts which were now being sought through this court action. He explained that he had queried these amounts in various letters, all of which remained unanswered. Even when they received a reply from the Respondent, the reply would simply demand payment of outstanding sums but would not address any of the questions which they had raised about the amounts in question. He referred to the various letters and emails he had sent and produced. The main concern about general maintenance was that the cleaning of the close was either not being done as often

as was claimed or was being done to a very poor standard. This was the same position with the litter picking and the landscaping work to the backcourt. Mr McLean and Ms Litster had complained about the poor standard of this cleaning and referred the tribunal to photographs they had produced showing a snapshot in time in 2017. These showed the state of the back court before and after it was alleged to have been cleaned. There was clear evidence of rubbish which remained in the backcourt. They asked for copies of work logs but only received these when they submitted the present application.

Mr Cowan submitted that the Respondent's position was that the Respondent's employees did carry out this work. He advised that all of the other owners in the close had paid. The Applicants have only paid £40 to the Respondent in total.

Mr Cowan submitted that even if the Applicants were not satisfied with the standard of the work, this did not justify non-payment for a year, hence the raising of the court action.

The tribunal noted that the Respondent never replied to the Applicants' substantive complaints regarding the standard of work which had been undertaken. The Applicants had disputed the charges invoiced by the Respondent. Despite the continuing dispute, the Respondent appears to have ignored this, not answered in any substantive way the concerns of the Applicants and raised a debt recovery action for amounts which the Respondent knew to be in dispute. In light of the foregoing, the tribunal considers that the Respondent did not take reasonable steps to resolve matters.

Given this, the tribunal found that the Respondent had breached Section 4.8 of the Code.

Breach of Section 6.1

Mr McLean advised that he and Ms Litster were not kept informed of the roof repair progress. He submitted that the first they knew that the repair was taking place was when a workman came to their door and sought water for his bucket. This was a concern as these repairs were meant to require scaffolding and they live in a ground floor flat with a garden.

Mr Cowan submitted that the Respondent would normally not be advised about progress of repairs if external access could be easily achieved. Given that, he accepted that the Respondent had not advised the Applicants that the contractor was coming out to do the roof repair.

Given this, the tribunal found that the Respondent had breached Section 6.1 of the Code.

Breach of Sections 6.2, 6.3, 6.6 and 6.9

The Applicants submitted that they no longer wished to insist on these alleged breaches as they were not relevant to their case. The Respondent was content with that.

Breach of Section 6.4

The Applicants had nothing further to add to their application on this point.

Mr Cowan submitted that periodic inspections were included in the WSS. These took place quarterly. However, no programme of works was ever prepared as no repairs, other than the roof repair, were ever required.

While the tribunal notes the above, the Code is clear. If inspections are carried out, the factor "**must**" prepare a programme of works, even if this is a "nil return".

Given this, the tribunal found that the Respondent had breached Section 6.4 of the Code.

Breach of Section 7.2

Mr McLean submitted that they did not get the chance to exhaust the in-house complaints procedure as the Respondent had simply failed to address their complaints at all. Their letters remained unanswered. They never received a final letter about their complaints nor did they receive details of how to contact the tribunal. Their complaining phone calls were never returned. Their complaints about the state of the back court and the close were never dealt with. The Respondent did not follow its own complaints procedure.

Mr Cowan accepted that the complaints letter of 16 February 2017 had remained unanswered. He submitted that there was no trace of any other letters being received. Mrs Bakshea submitted that the Applicants may not have sent these other letters, copies of which they had produced to the tribunal.

By admission, their own complaints procedure was not followed.

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

Failure to carry out the property factor's duties

Mr McLean submitted that the Respondent had not provided the service as contained in their own WSS. The close and stairs were not cleaned properly. The owners were billed for landscaping and litter picking when these had obviously not been done. Reference was made to the time sheets which the Respondent had produced. These were cross-referenced with the invoices which had been produced. It was clear that the owners were invoiced for litter picking and landscaping when this did not appear in the timesheets. In addition, the Respondent had failed to communicate within the timescales in their WSS and failed to comply with their own complaints procedure.

Mr Cowan submitted that this was simply an oversight and that reference to "cleaning" would also include litter picking, despite the fact that these were referred to as separate jobs in further entries within the time sheets. He submitted that these

terms were interchangeable but accepted that there should be clarity when people were being asked to pay for a service. Mr Cowan accepted that the Respondent had failed to reply to the letter of 16 February 2017 and had not dealt with this in terms of their own time limits and complaints procedure.

Given this, the tribunal found that the Respondent had failed to carry out its property factor duties. The Respondent had not implemented the terms of its own WSS. It had not replied to correspondence. It had not communicated within reasonable timescales. It had failed to address in a substantive way the complaints which the Applicants had raised.

Final Submissions of Parties

Mr McLean submitted that this whole process of dealing with the Respondent had caused him a great deal of stress. He suffers from severe COPD. The stress of dealing with the Respondent has had a negative impact on his health.

Ms Litster submitted that she has found the Respondent difficult to deal with. She has been stressed. Her neighbours have only paid the Respondent as they have found this extremely stressful.

Both Applicants submitted that they have found the Respondent's refusal to deal with their complaints frustrating and stressful. Rather than answering their queries, the Respondent has raised a debt recovery action against them. Mr McLean submitted that he accepted that the Respondent may be due some money from them but certainly not the huge sums they are seeking. The Respondent has added on late payment fees and debt action fees along with a very questionable invoice for a roof repair. This amounts to almost £1,000 of the money the Respondent is seeking by way of the court action. The Applicants submitted that the Respondent should not be adding late payment fees when the amounts are in dispute and the Respondent has failed to address this dispute.

Mrs Bakshea submitted that this was stressful for her too and that this cost the Respondent a lot of money.

Observations

The tribunal noted the final submissions by parties. It was of some concern to the tribunal that the Respondent had raised a debt recovery action against the Applicants without even attempting to address the concerns of the Applicants. The Applicants had made clear their areas of dispute. Despite this, the Respondent ignored the issues raised by the Applicants.

The tribunal was extremely concerned that the Applicants and their fellow owners had been invoiced around £3,500 for a roof repair which had claimed to involve scaffolding. The Applicants were clear that no scaffolding was ever used and that the work involved only two hours of time. Despite raising their concerns with the Respondent, the Respondent simply ignored this and failed to investigate this or interrogate the invoice from the contractor in question. It is even more concerning that this sum of money is now included in a debt recovery action at the Sheriff Court.

The tribunal had no hesitation in accepting the evidence of the Applicants. They gave their evidence in a straightforward way without embellishing. Indeed, they accepted when they were wrong, did not insist on irrelevant grounds and even accepted that they may owe the Respondent some money.

In contrast, the tribunal was not persuaded by the argument of Mrs Bakshea that scaffolding had been erected. She was strong in this view, yet accepted that she had not personally attended to see it. Nor was the tribunal persuaded by the position of Mrs Bakshea that, if there was an entry in a timesheet, then the work must have been carried out by her employees. It was clear from the photographic evidence provided by the Applicants that the state of back court was poor, and any landscaping or litter picking which may have been undertaken was done so in a very poor manner, if at all. A time sheet entry is simply that: it does not prove that work was carried out in a proper fashion.

The tribunal noted that the Applicants accepted that they had only paid £40 to account in respect of the invoices they had received from the Respondent. However, they had raised genuine queries and disputes which had remained unanswered. Rather than dealing with these appropriately, the Respondent chose to raise debt recovery action against the Applicants. The debt recovery action is, of course, a matter for the jurisdiction of the Sheriff Court. However, the tribunal is concerned that the sums sought in that action appear to comprise payments where the actual work carried out is in dispute. In addition, late payment fees have been added and, apparently, continued to be added. The tribunal considers that these late payment fees are inappropriate in the circumstances when the principal sums sought were queried at the earliest opportunity by the Applicants. These queries were never answered by the Respondent in a substantive way. It is also of concern that the Respondent appears to be seeking as part of the principal sum at court an amount which relates to expenses. As these matters have been raised at court, then it is properly a matter for that court to consider.

The tribunal opined that the sum of £1,000 is a fair and reasonable sum which the Respondent should be required to pay to the Applicants by way of compensation for the stress and unreasonable legal action. As the Applicants had not paid any sums to the Respondent in terms of the questionable invoices, the tribunal did not consider that it should make any further order in respect of that.

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. Pay to the Applicants the sum of £1,000 .
2. 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.

P Pryce

…….. Chairing Member

28 February 2019
……. Date