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

Decision on Homeowner's application: Property Factors (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: FTS/HPC/PF/19/3413

The Parties:-

Mrs Maureen Loy, 5 Shepherds Court, Banchory AB31 5TG ("the Homeowner")

The Property Management Company (Aberdeen) Ltd, Little Square, Old Meldrum AB51 0AY ("the Factor")

The Tribunal:-

Graham Harding (Legal Member)
Angus Anderson (Ordinary Member)

DECISION

The Factor has failed to carry out its property factor's duties.

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with section 6.9 of the Code.

The decision is unanimous

Introduction

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

The Factor became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By application dated 20 October 2019 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 1, 2, 5, 6 and 7 of the Code and had failed to carry out its Property Factor's duties.

2. Following correspondence with the Tribunal the Homeowner intimated her intention to apply to the Tribunal to the Factor in correspondence dated 20 November 2019. In said correspondence the Homeowner referred to alleged breaches of Sections 5.8 and 6.9 of the Code as well as alleged failure on the part of the Factor to carry out its Property Factor's duties.

3. By Notice of Acceptance dated 6 January 2020 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned to take place on 4 March 2020. This hearing was postponed and a further hearing assigned.

4. Both parties submitted written representations on various dates ahead of the postponed hearing and in response to Directions issued by the Tribunal dated 7 August 2020 and independently.

Hearing

5. A Hearing was held by teleconference on 16 September 2020. The Homeowner attended personally. The Factor was represented by Mr Neale Bissett.

6. Following the introductions, the Tribunal considered any preliminary matters. It noted the Factor had raised an issue with regards to jurisdiction on the grounds that the Homeowner had not complied with Section 17(3) of the 2011 Act in that she had not followed the Factor's complaints procedures before making her application to the Tribunal. The Tribunal explained to the parties that it had considered this matter in advance of the hearing and had determined that whilst it may have been the case that the Homeowner had not fully complied with the Factor's complaints procedures the 2011 Act made provision for an application to the Tribunal where there had been unreasonable delay in attempting to resolve the Homeowner's concerns. It appeared from the written representations that the issues in the application had been raised on a number of occasions without being resolved and therefore it was appropriate for the Tribunal to determine the application.

7. The Tribunal then considered the scope of the application as although the Homeowner had made reference to breaches of Sections 1, 2, 5, 6 and 7 of the Code as well as a failure to carry out its Property Factor's duties, the correspondence to the Factor intimating her intention to apply to the Tribunal only made reference to Sections 5.8 and 6.9 of the Code together with the failure to carry out its Property Factor's duties. The Tribunal therefore determined that as the correspondence to the Factor post dated the initial application to the Tribunal the issues should be restricted to those alone.

Summary of submissions

Section 5.8 of the Code

8. The Homeowner did not consider that the response submitted by the Factor with regards to the increase in the annual insurance premium adequately resolved her complaint. The Homeowner made reference to the letter from GS Group to Mr Bissett dated 26 November 2019 which explained the different types of cover available with different policies. The Homeowner went on to say that the Factor had applied a 4% increase in re-building cost from the previous year stating that had been in line with the RICS index. However, in December 2019 the index was in fact 3.1%. Furthermore, rebuilding costs were only a part of the total cost if one looked at the GS Group letter there were seven or eight other items in the policy to consider. The Homeowner went on to say that the increase in Insurance Premium Tax to 12% came into force in June 2017 and so would have taken effect in the previous policy and not just in the 2019/20 policy. The Homeowner also submitted that in addition to the insurance brokers claiming a fee the Factor also charged an administration fee over and above the premium. The Homeowner said she did accept that the previous premium had been in respect of a ten month period and not a full year.

9. Mr Bissett explained that the Factor had taken the decision on the renewal of the insurance for 2019 to apply an inflationary increase of 4% to the rebuilding cost as the company was not the first factor at the development and wanted to make sure that the sum insured was what it should be. The increase was largely led by the RICS index although they also discussed this with the brokers. Mr Bissett said that the buildings insurance was put out for tender every year. In response to a question from the Tribunal Mr Bissett advised that there was no record of a previous valuation of the development with any documents provided by the previous factors, Strutt and Parker. Mr Bissett also advised the Tribunal that the administration charge in respect of the insurance was included in the Block Buildings Insurance charge.

Section 6.9 of the Code

10. The Homeowner explained that the cleaning contract at the development had been awarded by the Factor to Proserv (Scotland) Limited and it appeared that either the Factor was not supervising the company to ensure it was meeting the specification set out in the Written Statement of Services or else Proserv was ignoring the specification. The Homeowner pointed out that the Factor and Proserv were private limited companies with Martin Rochfort being a director of both. The Homeowner went on to say there had been numerous Property Managers at the development and it appeared they did not pull up Proserv for failing to adhere to the specification either through ignorance or misunderstanding. The Homeowner thought there seemed to be no communication between the Factor and Proserv. The Homeowner accepted that cleaning was being undertaken on a regular basis but the quality of the work and failing to adhere to the specification was the issue. Cleaning of the doors, porches and front steps was not being done properly. The cleaner who

had attended on the morning of the hearing had used one bucket of water to clean all three blocks and always started on the same block every month. On the morning of the hearing only the floors had been wiped none of the rest had been done.

11. Mr Bissett responded by saying that the current cleaner has the specification to follow. With regards to only using one bucket of water it would be difficult to obtain warm water on site. However, the cleaners do carry out their work to the specification. There had been deep cleaning of the communal areas carried out following the complaint being raised by the Homeowner. Mr Bissett went on to say that there was supervision of the work done by the cleaners and the Property Manager inspects the development once a month although not always immediately after the cleaning has been carried out. In reply to a question from the Homeowner Mr Bissett said that although the Property Manager did not carry a copy of the specification, they would be aware of what was included in the specification. Mr Bissett also confirmed that each Property Manager was responsible for 1000 -1500 properties.

12. The Homeowner went on to say that she did not think either the Property Manager or the cleaners were picking up on what was required in terms of the specification. She also did not consider that there had been a deep clean of the development earlier in the year. There had not been a satisfactory cleaning as per the specification since the Factor had taken over the management of the development in October 2017 and dirt was ingrained.

13. For his part Mr Bissett referred the Tribunal to the photographs submitted with the written representations which he suggested showed the work had been done to a high standard and had made a big difference. He went on to say there may be quality issues with the current cleaners but the owners had not asked the Factor to obtain quotes from different cleaners. If asked then the Factor would do that.

14. With regards to the ground maintenance issues the Homeowner said that in her original application the contractor did not clear the flower beds or the paths into the flower beds and there had been no pruning of shrubs in the winter with the result that the parking numbers for the parking spaces had been hidden. The parking spaces had become overgrown and the shrubs had merged into one. The Homeowner went on to say that she had been confused as either the Factor or Proserv as a goodwill gesture had undertaken remedial works but at a cost to the Factor when if the contract was not completed to the specification there should be no charge for any remedial works. The Homeowner also made reference to the problem caused by excess gravel that had been laid on the common area without being bedded in. As a result, constant ruts were occurring and the areas where cars were parked at the time the new gravel was laid look unsightly. The Homeowner said the actual planning of the operation left a lot to be desired. She said the owners should have been informed that there would be no access to the parking area when the gravel was being laid. The Homeowner referred the Tribunal to the photographs submitted on 24 August showing the entrance to the car park which the Homeowner said was the only area about 20 feet long that had

formed ruts. She said that all that had been required was to fill in the ruts and bed it in. There was no need to lay more gravel which was just dumped around the parked cars and looked terrible. The Homeowner confirmed the issues with the shrubs had now been dealt with. She reiterated her point about the lack of communication between the Factor and Proserv which she found rather unsettling.

15. For his part Mr Bissett said that the Property Manager and the General Manager of Proserv had met to discuss the various issues that had been raised. Because of the passage of time there had been a lot of bare areas in the communal ground and the additional cost referred to by the Homeowner had been in respect of the gravel that had been laid not for work to be done under the specification. The gravel had not been spread on the parking bays as they were private spaces. The Tribunal queried whether this was in fact correct and referred Mr Bissett to the Deed of Conditions burdening the property and Clause TWENTIETH which states "The thirteen car-parking spaces……. shall remain part of the common curtilage." Mr Bissett said he had not been aware of that. Mr Bissett also said that he did not think the gravel needed bedded in. He went on to say that it would have normally been up to the owners to reach an agreement on re-gravelling the area but the Factor had undertaken the work at its own expense as a sign of commitment to the development.

16. In reply to a question from the Tribunal the Homeowner said that in an ideal world before the gravel was laid she and the other owners would have liked as had happened on a previous occasion when the common ground was renovated to have been given 7 days' notice to clear all cars from the car park and for the contractors to have laid new gravel over the whole area and bedded it in with a roller. The Homeowner went on to say she had not asked for gravel to be put down anywhere only for the ruts to be filled and they were roughly 6 feet long and three inches deep.

Property Factor's Duties

17. The Homeowner made reference to her written submissions and her earlier comments regarding the lack of supervision and the services undertaken by Proserv and considered this to be sufficient in this regard.

18. For the Factor Mr Bissett submitted that the inspection undertaken once per month by the Property Manager going into the stairwells and communal areas and flagging up any issues was indicative of the Factor carrying out its duties. There had been issues with regards to the pruning of the shrubs but this had been attended to. The Property Manager could review with the owners how frequently any cleaning was carried out if owners wished. He thought there had been adequate supervision of the contractor Proserv. The Property Manager had met with the General Manager on site. As the cleaning was being done monthly it did not always give a true reflection of what the cleaning had been like. Mr Bissett confirmed in response to a query from the Homeowner that he was responsible overseeing the Property Managers and dealing with level 2 complaints. Mr Bissett also thought that there were a few

issues that the Factor could look at to fine tune and would be more than happy if the majority of owners were in favour to make changes to the contractor or the specification.

19. For her part the Homeowner thought that the Factor needed to improve its organisation and methods. The gesture made by the Factor to right the wrong carried out by Proserv should have been by gravelling the whole car park and not dumping the excess in the middle.

20. With regards to the Homeowner's comment on organisation and methods Mr Bissett pointed out that there had been changes in the company in the summer and the Factor was making its own internal changes to its structure and would look into that in the year ahead.

The Tribunal make the following findings in fact:

21. The Homeowner is the owner of 5 Shepherds Court, Banchory ("the Property")

22. The Property is a flat within the Shepherds Court Development (hereinafter "the Development").

23. The Factor performed the role of the property factor of the Development.

24. The Factor instructed GS Group, Insurance Brokers to conduct a tendering exercise for buildings insurance cover on an annual basis following its appointment in 2017.

25. The buildings insurance premium charged to owners for the period October 2017 to October 2018 amounted to £2446.06 but covered a ten-month period as the previous Factor Strutt and Parker had paid two months of the premium.

26. The premium charged to owners included an administration fee paid to the Factor amounting in the Homeowner's case to £1.16 per month.

27. The Factor applied an inflationary increase of 4% when re-tendering for the buildings insurance for the years 2018/19 and 2019/20

28. The RICS inflation index at December 2019 was 3.1%.

29. The Factor did not have any previous valuations of the development for insurance purposes.

30. The Factor did not seek instructions from the owners to carry out a revaluation exercise.

31. The insurance premium for the year 2019/20 charged to owners amounted to £3270.30.

32. The Insurance Premium Tax in both years was 12%.

33. The Factor employed Proserv (Scotland) Limited as its approved contractor to carry out cleaning and ground maintenance at the development.

34. Martin Rochfort was a director of both the Factor and Proserv (Scotland) Limited.

35. The cleaning undertaken by Proserv (Scotland) Limited at the Development was inadequate and did not comply with the specification contained in the Factor's Written Statement of Services.

36. The Factor arranged for additional cleaning of the development following the Homeowner's application to the Tribunal.

37. The monthly inspections of the development by the Factor's property manager do not coincide with Proserv (Scotland) Limited cleaning day.

38. The overgrown shrubs and bushes referred to in the Homeowner's application have been pruned back to an acceptable level.

39. The Factor at its own expense provided 4 tonnes of gravel to be spread on the communal driveway at the development. The gravel was not spread over the whole communal area including the parking bays.

40. The combination of new gravel in some parts of the communal area and old gravel in other parts is unsightly.

41. The supervision of the Factor's approved contractor Proserv (Scotland) Limited to ensure compliance with the terms of the specification in the Written Statement of Services has been inadequate.

Reasons for Decision

Section 5.8 of the Code

42. It appeared to the Tribunal that the Homeowner's primary concern was the apparent 33% increase in the annual buildings insurance premium rather than the fact that an inflationary 4% increase had been applied to the rebuilding cost by the Factor. After taking account of the apportioning of the premium over 10 months in 2018 the actual increase for the year falls to about 11.4% before taking account of any inflationary increase. As the Homeowner in her evidence pointed out and as was referred to in the letter from GS Group to the Factor there are a number of factors to be taken into account when deciding on the most appropriate insurance policy and price may not always be determinative.

43. The issue to be considered by the Tribunal is whether Section 5.8 of the Code refers to annual inflationary increases such as those instructed by the Factor or to a more detailed revaluation to be carried out by a firm of Chartered Surveyors at a cost to the owners. The Factor sets out in its Key Factor Booklet that it will apply annually an inflation index linked increase to the sum insured. It also states that it would upon instruction from a majority of owners arrange a revaluation of the reinstatement costs by a suitably qualified surveyor. It is clearly important that owners are not under insured and although the RICS index in December 2019 might be 3.1% a prudent person may well take the view that an increase in the estimated building cost of the development at 4% is not unreasonable particularly when there was no previous valuation to rely on. In all the circumstances the Tribunal is of the view that the Factor was entitled to apply a 4% increase to the reinstatement cost having previously made owners aware of its intentions in the Key Factor Booklet. The Tribunal is therefore satisfied that there has not been a breach of this section of the Code. The Tribunal does think that the Factor should consider approaching the owners to ascertain if they wish to instruct a revaluation of the reinstatement cost of the development in advance of the next tendering exercise as if approved this would put the amount to be insured beyond doubt.

Section 6.9 of the Code

44. The Tribunal noted from the documents submitted by the Homeowner along with her application that her concerns regarding the services being provided by Proserv (Scotland) Limited had been ongoing since her meeting with the Factor's representatives in January 2018. There was an acceptance by Mr Bissett that on occasions the service provided by the cleaners and ground maintenance workers had fallen short of that which could be expected by the owners. The Tribunal acknowledged that the Factor had taken steps since the raising of these proceedings to remedy the issues complained of by the Homeowner and that the shrubs had now all been pruned and were no longer a concern. The Tribunal also noted that the Factor had arranged for some additional cleaning at the development and it did appear that this had improved the internal appearance however the Tribunal also accepted the evidence of the Homeowner to the effect that the cleaning being carried out at the property on a monthly basis was still not to an adequate standard and in accordance with the specification in the Written Statement of Services. The Tribunal found the Homeowner to be a credible and reliable witness and had no reason to doubt her evidence that the cleaner was using one bucket of water to clean all three blocks and that was clearly inadequate. It also appeared from the photographs submitted by the Homeowner that doors were not being washed down as per the specification.

45. The Tribunal accepted that the Factor had as a goodwill gesture and at no cost to owners laid new gravel in the communal ground at the rear of the property. However, in so doing the result has been an unsightly mix of new and old gravel left on the communal area. The explanation provided by Mr Bissett that the parking spaces were private to individual owners was incorrect as the Deed of Conditions burdening the property specifically states that the

parking bays remain communal ground. Whilst not wishing to criticise the Factor for making a goodwill gesture as a sign of its commitment to the development it ought to have realised that only covering part of the communal area with new gravel would be ill advised. If it wished to only contribute to the cost of re-gravelling the whole communal area it should have contacted all the owners with a proposal to share the cost and sought approval from the owners to meet some of the cost. Alternatively, as the Homeowner's complaint was restricted to the ruts at the entrance to the car park the Factor could have simply arranged to have these filled.

46. It did appear to the Tribunal from the Development Monthly Inspection Checklist provided by the Homeowner that issues regarding the standard of cleaning and the pruning of the shrubs had been noted by the property managers and were to be taken up with Proserv but from the lack of progress over a prolonged period it did not appear to the Tribunal that the Factor was adequately pursuing the contractor to remedy the defects in their work and service. The Tribunal was therefore satisfied that the Factor was in breach of this section of the Code.

Property Factor's Duties

47. The Tribunal noted that there had been significant delays in resolving the issues raised by the Homeowner between January 2018 and October 2019 when the Homeowner submitted her application to the Tribunal. The Tribunal also noted that because of the significant connection between the management of Factor and the management of Proserv (Scotland) Limited an owner could certainly have the impression that any inadequate service by the contractor was not being dealt with appropriately by the Factor. It was difficult to say for certain that this was indeed the case but the Tribunal was satisfied that by failing to resolve the Homeowners legitimate concerns and by failing to adequately supervise and take action against the contractor when its work and services were inadequate the Factor was failing in its duties.

48. The Tribunal noted that there had been significant changes in the management of the Factor and also noted Mr Bissett's willingness to work actively in the future with the Homeowner and the other owners at the development. The Tribunal also acknowledged the steps thus far taken by the Factor in order to try to remedy past failings.

49. Having carefully considered all the evidence and the written representations submitted by both parties the Tribunal was satisfied that as there had been a breach of Section 6.9 of the Code and a failure to carry out its property factor's duties it was appropriate to make a proposed Property Factor Enforcement Order. The Tribunal considered whether any such order should include a financial payment to the Homeowner but determined that in all the circumstances that it would be more appropriate to ensure that there was a proper deep clean at the development and that the re-gravelling of the communal ground was properly completed.

Proposed Property Factor Enforcement Order

50. The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

Appeals

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.

Graham Harding Legal Member and Chair

23 September 2020 Date