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

Property Factors (Scotland) Act 2011, section 17(1)

The First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017, as amended ("the 2017 Regulations")

Chamber Ref: FTS/HPC/PF/18/3301

Property at 33 Cleveden Drive, Hyndland, Glasgow, G12 0SD ("The Property")

The Parties: -

Mr Thomas Laird, 48 Southbrae Gardens, Glasgow, G13 1UB ("the Homeowner")

James Gibb Property Management, 65 Greendyke Street, Glasgow, G1 5PX ("the Factor")

Tribunal Members: -

Maurice O'Carroll (Legal Member)
David Godfrey (Ordinary Member)

Decision of the Chamber

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal") unanimously determined that it has not been demonstrated that the Factor has failed to comply the Code of Conduct for Property Factors ("the Code") in terms of section 14(5) of the Property Factors (Scotland) Act 2011 ("the Act").

It further found that it has not been demonstrated that the Factor has failed to carry out the property factor duties as required by section 17(1)(a) of the Act in the respects detailed in the present decision.

Background

1. By application dated 10 December 2018, the Homeowner applied to the Tribunal for a determination on whether the Factor had failed to comply with the Code as imposed by section 14(5) of the Act. He also wished to complain that the Factor had failed to comply with various other duties not specifically provided for in the Code as detailed below.

2. The Application was insufficiently specific. Further detail was provided by the Homeowner in correspondence dated 4 January, 24 February, 26 February and

4, 8, 19 and 25 March 2019. A number of sections of the Code within sections 1 to 7 were cited by the Homeowner, as well as six non-Code factor duty issues.

3. By decision dated 25 March 2019, a Convenor on behalf of the President of the Tribunal (Housing and Property Chamber) decided to refer the application to a Tribunal for a hearing.

4. A Direction dated 29 April 2019 was issued by the Tribunal in order to ensure that the hearing set down for 24 May 2019 would run smoothly.

5. At the substantive hearing held on 24 May 2019, it was clear that the terms of the Direction had not been complied with and that evidence could not meaningfully be led. A further Direction was issued by the Tribunal on 28 May 2019 to ensure that a further meeting would proceed as efficiently as possible. In particular, a comprehensive, paginated bundle comprising all relevant documents was ordered to be produced by the Tribunal.

6. A hearing of the Tribunal was held at 10am on 1 July 2019 at the Glasgow Tribunal Centre, 20 York Street, Glasgow. A further joint bundle of documents was produced for use at that hearing. The Homeowner appeared on his own to give evidence. The Factor was represented by Debbie Rummins, Property Manager and Nic Mayall, a Director of the Factor, each of whom gave evidence to the Tribunal.

7. The Homeowner's concerns regarding the alleged failures in duty on the part of the Factor is contained at pages 89-95 of the joint bundle. They include many sections from Section 1 of the Code through to Section 7 of the Code. At the hearing, however, despite an invitation from the Tribunal to do so, the Homeowner declined to go through the parts of the Code mentioned and indicate in what way they had been breached.

8. Instead, the Homeowner's evidence consisted of a discussion of a number of issues which had arisen which he stated demonstrated a failure on the part of the Factor to comply with their factor duties under the Act. These are listed according to their subject-matter below.

9. The onus of demonstrating facts which support a complaint of failure to comply with property factor duties falls on the Homeowner as applicant. If the facts are demonstrated on the balance of probabilities, then the onus will have been satisfied and the facts will be held to have been proved.

Tribunal findings

The Tribunal makes the following general findings in fact pursuant to rule 26(4) of the 2017 Regulations:

10. The Homeowner owns three separate flats at the Property which is known as Balgray Court. The flats which he owns are numbered 1A, 6B and 8F, 33 Cleveden Drive.

11. The Property consists of a 9-floor block of 44 flats with two lifts, a basement with internal car park, and an external car park. It was developed approximately 45 years ago. It was formerly managed by Grant & Wilson, Property Managers. On 2 March 2015 the present Factors purchased the assets of Grant & Wilson and thereby took over as property factors for the Property.

12. One of the flats within the Property owned by the Homeowner has been owned by him for a period of approximately 20 years. Accordingly, the Homeowner has a long-standing familiarity with the maintenance issues arising in respect of the Property. He has experience of how maintenance and property management has been carried out there from a period before the present Factors have been in charge of maintenance at the Property. He has been active and instrumental through those years in taking action to ensure that property maintenance issues have been reported to the Factor as they have arisen and has also taken an active part in resolving some of those issues personally.

13. The Factors employ a full-time caretaker to assist with management of the Property.

14. The Property has an elected Residents' Association in terms of the Title Deeds to the Property. Its Committee consists of five members and also has a role in directing maintenance issues as and when they arise in respect of the Property. The Homeowner is no longer a member of the Residents' Association Committee.

15. The Factor indicated that it in light of previous events, it now only accepts instruction in relation to maintenance issues from the Residents' Association and specifically not from the Homeowner. Hitherto that decision, it had allowed the Homeowner to take the lead in dealing with property maintenance issues and had attempted to co-operate with him further to actions he had undertaken.

Tribunal findings in relation to Factor duties

16. As noted above, these were discussed at the hearing held on 1 July 2019 under the following subject headings:
    - Communal electricity bills
    - Penthouse flats at the Property
    - Lightening conductor
    - Garage roof
    - Drainage issue
    - Pressure tank
    - Tarmacadam
    - Garage door
    - Emergency lighting
    - Replacement keys
    - Communal painting of the Property
    - Float payment and caretaker bonus

The facts in relation to each of these issues are narrated below in summary form. The summary is not intended to be comprehensive of all of the evidence led, but rather to serve as an aide memoire for what was discussed.

17. Communal electricity bills: The Homeowner gave evidence that communal electricity bills varied widely from £1,400 per to as much as £3,500 per quarter (according to the Homeowner's written complaint. The cause of this had been faulty metering. The Homeowner took up the issue himself with Scottish Power, the suppliers. He had been successful in obtaining a refund of approximately £27,000 in respect of overpayments which had been made for a period of 7 years. That reimbursement was placed back into the communal residents' fund.

18. The Tribunal considers that it is a duty on the part of the Factors to ensure that communal electricity is correctly charged. The issue referred to by the Homeowner has now been resolved. Reference is made to page 35 A/3 of the bundle. In any event, it was an issue which occurred under the previous management, Grant & Wilson. The Homeowner expressly stated that he wished only to make submissions in relation to the present Factor. Accordingly, no breach of this particular factor duty by the present Factor was established in evidence.

19. Penthouse flats: The Homeowner was concerned about the safety of the handrail on the flat roof where the penthouses were located. They had not been looked at in over 20 years and no certification of their safety had been provided. Separately, work on the cladding of the penthouses had been required at a cost of either £13,939 or £18,236 in terms of the Homeowner's written complaint. That work would have been unnecessary if proper maintenance had been carried out. Method statements were not produced by the contractors used to carry out that work.

20. The Factor gave evidence of the cladding issue being brought to its attention by one of the penthouse owners. Until that time, there had been no need for it to consider the issue of roof access. It accepted that the railing required to be made safe during 2016 and that was arranged. It pointed out that the contractor appointed by the Homeowner did not provide a method statement. Work was carried out to the value of £6,900 (according to page 5 of the Homeowner's complaint). It had been assumed that the responsibility for the cost was for the owner of the penthouse to bear. However, there were external elements to the work and therefore that was made a communal charge paid for by all of the homeowners within the Property.

21. The Factor acknowledged that the railing required to be made safe and that was done, although it did not fall within the core duties as set out at section 4.0 of the Written Statement of Services. It made the necessary arrangements and the work has now concluded. It will in future only use contractors which are on its approved list. Reference was made to pages 24A and 24B setting out scheduled maintenance tasks.

22. The Tribunal was satisfied that there is no ongoing issue in relation to the penthouse and that the Factor has not breached its duties in that regard.

23. Lightning conductor: The Homeowner pointed out that this is a matter which also requires certification and maintenance. Maintenance of the lightning conductor forms part of the maintenance schedule at page 24A. Accordingly, the Tribunal finds that there has been no breach of the Factor's duties in this regard.

24. Garage roof: The Homeowner gave evidence that the car park had been pooling water for a number of years. The work instructed by the Factor had been done by an inadequately qualified contractor. The Homeowner took on the repair, appointed an appropriate contractor with the result that the garage is now "as dry as a bone."

25. The Factor disputes that its contractor was insufficiently qualified. It had obtained two or three quotes and chose a contractor from those. It is not for the Factor to dictate exactly how work should be carried out.

26. Given that there is admittedly no longer an issue, the Tribunal finds that there is no failure in duty on the part of the Factor under this heading.

27. Drainage issue: There was a drainage problem in the plant room at the Property. This required to be swept out regularly by the caretaker. Nothing had been done about the problem by the Factor. The issue was resolved by the Homeowner at a cost of only £2,700. The Weir pumps were also damaged and the repair required to be undertaken by the Homeowner at a cost of £7,500 plus VAT which was reimbursed from communal funds by the Factor. The Factor ought to have taken care of this issue at the outset also.

28. The Factor stated that the drainage issue was brought to its attention by the Homeowner and the caretaker, by which time they had already taken it upon themselves to investigate the issue. It accepted that for a time there was a fault in relation to the prevailing culture within the Factor's organisation at the time whereby it permitted the Homeowner to take it upon himself to undertake the instruction of maintenance and sought to co-operate with him afterwards. This approach has now been changed as discussed above.

29. Again, there appears to no longer be an issue. Accordingly, the Tribunal finds that there is no failure in duty on the part of the Factor under this heading.

30. Pressure tank and tarmacadam: These were two issues which the Homeowner confirmed that he had undertaken himself without reference to the Factor and which had now been resolved. Accordingly, there was no breach in duty by the Factor.

31. Garage door: The Homeowner gave evidence that the garage door had not worked since the Factor took over property management. Again, this is an issue which the Homeowner has undertaken himself without reference to the Factor. Accordingly, there is no breach of duty on the part of the Factor.

32. Emergency Lighting: The Homeowner gave evidence that the emergency lighting at the Property had not been seen to in 20 years. There are no emergency lighting certificates and no hard wiring certificates. He instructed a contractor and received an estimate for £11,000. The Residents' Association was provided with three other quotes by the Factor which were for £2,500, £3,500 and £7,000. He wanted to see the basis of the quotes and relevant method statement so that they could be examined and compared. After a long delay they were produced. However, he has decided to withhold payment of any share of the costs until such time as he has had sight of the relevant Certificates of Completion for those works, the invoices and quotations received and the qualifications of the tradesmen involved. The Homeowner stated that he requires to see who is in the Property and what they are doing.

33. The Factor explained that there was no relevant certificate when it took over management of the Property. Prior to that, it was the caretaker who carried out all of the necessary testing. However, at the instigation of the Homeowner, they undertook to obtain the necessary certificate. This in turn required the electrical system to be upgraded in order to be certified. The Factors have a certificate to show testing has been carried out.

34. The Factor has a duty to ensure that emergency lighting is operational and regularly tested to ensure that it is functioning correctly. It also has a duty to allow the Homeowner to inspect documentation which it has and which is relevant to any tendering process on request, free of charge (although a reasonable charge may be made for any copies). This is a factor duty which is reflected at section 6.6 of the Code of Practice.

35. On the evidence, it did not appear to the Tribunal that the Factor had failed to ensure certification of the emergency lighting. Further, it had provided the Homeowner with documentation which he requested, albeit after a delay. It appears that the works had not concluded as at the date of the hearing. There was no evidence that the Homeowner had requested sight of any further documentation and that this had been refused.

36. Accordingly, the Tribunal did not find that there had been a breach of any factor duty under this heading.

37. Replacement keys: The Homeowner gave evidence that there was a break in to the Property which meant that all of the locks and keys required to be changed. This resulted in a charge to the residents totalling £4,500 rather than being the subject of an insurance claim. Also, there was another incident where a resident's key was snapped in the lock which required £400 to be paid by the body of homeowners.

38. The Factor was unable to provide any further information on this issue. In the absence of any correspondence between the parties in relation to this issue, (e.g. where the Homeowner had contested the claim on the residents and demanded that the communal insurers be approached) the Tribunal was unable

to come to any conclusion in relation to this issue. Accordingly, it finds no breach.

39. Communal painting of the Property: The Homeowner provided evidence that he had instructed a contractor he knew to carry out painting work to the Property. The Factor had paid an initial amount but had advised the Residents' Association to withhold the balancing payment. The result of that was that the second coat had not been carried out as the painter would not return until he was paid.

40. The Factor gave evidence that the dispute was in fact between the Homeowner, the Chair of the Committee and the painter. Some residents had objected to the colour chosen by the Homeowner without reference to them. The issue in reality arose because of the Homeowner's insistence on instructing works himself, rather than asking the Factor to carry out works and allowing it to then carry them out by using its own list of preferred contractors. Since the Homeowner has been prevented from acting in this way, factoring arrangements have operated more smoothly.

41. The Tribunal agrees that the difficulty has arisen for the reason stated by the Factor. It has now taken steps to prevent a recurrence. Private issues as between the Homeowner and members of the Residents' Association are not the responsibility of the Factor. Accordingly, the Tribunal found there to have been no breach under this heading.

42. Float payment and caretaker bonus: The Factor requires a float of £350 to be paid by all residents within the Property. The Homeowner considers that this requirement came out of the blue, is too much and is not justified. The previous factor did not require such a payment.

43. Separately, he objects to a decision to award a bonus of £1500 to the caretaker. This decision was made at the Residents' Association AGM in November 2018.

44. The Tribunal considers that it is normal industry practice for a float to be required of residents in factored properties. The purpose of it was explained at the hearing. If a majority of homeowners consider that it is an unreasonable requirement, it is open to them to seek an alternative factor. In any event, the Tribunal did not find the Factor to be in breach of its duties by requiring a float to be paid.

45. The bonus paid to the caretaker appears to the Tribunal to be a matter decided upon by the elected representatives of the Residents' Association. It therefore does not consider this to be a matter for the Factor. It accordingly found no breach of factor duties under either of these headings.

Decision

46. The Tribunal finds that the Homeowner has failed to establish that the Factor has breached its duty to comply with any part of the Code in terms of section 14(5) and 17(1)(b) of the 2011 Act.

47. It further finds that the Homeowner has failed to establish that the Factor has acted in breach of its factor duties in terms of section 17(1)(a) of the 2011 Act in relation to any of the headings narrated above.

48. Accordingly, the Tribunal has decided not to issue a Property Factor Enforcement Order in respect of this application.

49. The Tribunal would observe, however, that it would have been of assistance to the Homeowner if the Factor had taken the time to provide the Homeowner with a comprehensive letter from time to time dealing with his various concerns. There is an example of this at page 17B in the form of an email sent to the Homeowner by Sharon Cosgrove on 29 August 2017. In it, she dealt with a number of concerns in a comprehensive manner. It is disappointing that there was no evidence presented to the Tribunal that any further such attempts at dealing with the various issues raised by the Homeowner had been dealt with in a similar manner. Sharon Cosgrove has now left the Factor with the result that her replacement required to restart considerations of the various issues raised from scratch.

50. It thus appears that the concerns of the Homeowner have effectively been thwarted by turnover of staff within the Factor's organisation. The Tribunal observes that the investment of a certain amount of time might have avoided the application being made to the Tribunal with the attendant time and effort required by that process. It would also make reference to the observations made by the Tribunal in application reference FTS/HPC/PF/17/0336 concerning Sturgeon v CWL which is available to view on the HPC website.

Appeals

51. 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 within 30 days of the date the decision was sent to

M O'Carroll

M O'Carroll Date: 22 July 2019

Chairman