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/18/3536

53B Drip Road, Stirling Bridge, Stirling, FK8 1RN
("the property")

The Parties:-

Mr Thomas Rae, residing at the property ("the Homeowner and Applicant")

Newton Property Management Limited, 87 Port Dundas Road, Glasgow, G4 0HF ("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") determines unanimously that, in relation to the Homeowner's Application, the Factor has not complied with the Code of Conduct for Property Factors and has not 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 on/between 28 December 2018 and 18 July 2019, the Convenor with delegated powers of the Chamber President referred the application to a Tribunal on 15 October 2019.

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 Applicant 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 Applicant complains under reference to Sections 1, 2.1, 2.2, 2.4, 2.5, 3.3, 4.6, 4.7, 5.3, 6.1, 6.3, 6.6, 6.9 and 7 of the Code which are referred to for their terms.

Separately, the Applicant complains that the Respondent failed to carry out the property factor's duties.

Hearing

A hearing took place in STEP Stirling, Stirling Enterprise Park, John Player Building, Stirling on 15 October 2019.

The Applicant attended on his own behalf along with his supporter, Miss Kyle Pearson.

The Respondent was represented by Mr Martin Henderson, Executive Director of the Respondent, and Mr Scott Robertson, Senior Property Manager employed by the Respondent.

The Tribunal makes the following findings in fact:

- The Applicant is the owner of the property known as 53B Drip Road, Stirling.
- The Applicant owns this property jointly with his wife.
- The Respondent was the factor of the common parts of the building within which the property is situated from on or around October 2014 until its appointment was terminated with effect from 26 June 2019.
- 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.
- The Applicant has owned the property since it was built approximately nine years' ago.
- There are 28 flats in the block where the property is located.
- The development consists of 161 dwellings.

Breach of Section 1

The Applicant submitted that he had not received the Respondent's written statement of services (WSS) until February 2019. He submitted that the Respondent

had taken over the factoring of the property in 2014. He did not receive the WSS until this year. He received emails from the Respondent after it took over factoring but there was no WSS attached to this. The Applicant submitted that he did not receive a hard copy of the WSS by post with the first invoice he received from the Respondent.

Mr Henderson submitted that, after the Respondent had taken over the factoring of the business from the previous factor, the Respondent had issued a hard copy of the WSS with its first invoices to the owners in February 2015. He remembered the process well as it was a large undertaking to issue these by hard copy. The Respondent had decided to do this as it was unsure whether it held the correct email addresses for the owners. Mr Henderson could not explain why the Applicant had not received the WSS through the mail.

The Tribunal considered the evidence before it. Both parties gave their evidence in a clear and straightforward manner. The Tribunal considered that it did not require to prefer one version of events to the other. The Tribunal considered that, on the balance of probabilities, the Respondent did send by mail a copy of its WSS to the Applicant. However, the Tribunal determined that, on the balance of probabilities, the Applicant had not received this. The Respondent had sent by mail the WSS to the Applicant, whether or not this was received by the Applicant. In light of this, the Respondent had fulfilled the requirements of Section 1 of the Code.

Given this, the Tribunal found that the Respondent had not breached Section 1 of the Code.

Breach of Section 2.1

The Applicant submitted that he was not insisting on this part of the Code.

The Tribunal therefore did not require to make a determination in relation to this part of the Code.

Breach of Section 2.2

The Applicant initially referred to the email by the employee of the Respondent, Mr Nicholas Binning, of 19 December 2018, to found this alleged breach. However, the Applicant thereafter submitted that he no longer wished to insist on the alleged breach of this part of the Code.

The Tribunal noted, however, that the terms of the email of 19 December 2018, were somewhat unprofessional and unhelpful, a conclusion with which Mr Henderson also agreed.

The Tribunal therefore did not require to make a determination in relation to this part of the Code.

Breach of Section 2.4

The Applicant submitted that "core services" did not cover the roof repairs in question. He considered that this phrase only covered services which the Respondent had provided to the owners on a regular basis. However, he accepted that he did not have a copy of the WSS at the time he submitted his complaint. Having looked at the WSS, his opinion was that the roof repair did not fall into the core services provided by the Respondent.

Mr Henderson submitted that, in terms of the WSS, the roof repair was very much part of the core services provided by the Respondent.

Both parties referred to the letter from the Respondent to the Applicant of 22 June 2018 wherein the roof repair estimate was contained and wherein it advised the Applicant of the intention to undertake the roof repair.

The Applicant submitted that he had objected to the cost of the repair.

Mr Henderson submitted that no other owner out of the 28 owners objected to the repair.

It was a matter of agreement between the parties that there was no financial limit regarding repairs within the Deed of Conditions of the property.

The Tribunal noted that the WSS very clearly states at B(i) "…The property manager will instruct maintenance and repairs of communal parts of the property …..". The terms of the WSS are unequivocal on this point. The roof repairs undertaken fall within this service. The Tribunal determined that the roof repair was part of the core services. Given that, there was no requirement for the Respondent to consult with the owners prior to the repairs being undertaken

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

Breach of Section 2.5

Mr Rae submitted that, despite several attempts, he never received the information he asked for from the Respondent about the time sheets for the roof repairs. He made reference to the various emails he had submitted between himself and Mr Binning. The Applicant sought this information for a period of around four months but never received it as the contractor, Alexander Anderson Limited, ceased trading around four months after the repairs.

Mr Henderson submitted that, as the roof repairs were conducted as a result of an estimate, he would not expect to receive timesheets from a contractor. The owners were billed for the same amount as the estimate. Mr Henderson would only expect time sheets if there had been additional work required. However, despite this, the Respondent continued to try and obtain the time sheets which the Applicant sought. The contractor ceased trading and the time sheets were not made available to the Respondent. The Respondent wrote to the contractor to chase up the time sheets but without success.

It was a matter of agreement between parties that the roof repair has, to date, proved to be successful as there have been no further reports of water ingress from the roof.

The Tribunal noted that the Respondent had replied to all of the Applicant's emails. Although the Applicant had not received the further information he had requested, the Respondent had made attempts to source this further information. It appeared to the Tribunal that the Respondent had replied to the Applicant's correspondence in a timeous manner.

Given this, the Tribunal found that the Respondent had not breached Section 2.5 of the Code.

Breach of Section 3.3

The Applicant submitted that he was not insisting on his alleged breach of the Code.

The Tribunal therefore did not require to make a determination in relation to this part of the Code.

Breach of Section 4.6

The Applicant submitted that it was only when the owners voted to replace the Respondent as factor that they all received a letter dated 8 April 2019 from the Respondent which narrated that there were three major debtors who had incurred a debt of around £5,500. In short, the Respondent had failed to keep the owners informed of this situation. This was the first time that the Applicant had been made aware of this despite the Respondent being the factor for three and a half years.

Mr Henderson accepted that this letter was the first notification that the owners had received about the debt incurred by these three owners. However, he submitted that the Respondent had inherited some of this from the previous factor. He explained that majority of the figure is owed by one owner against whom the Respondent obtained an instalment decree. The owner defaulted in relation to the instalments. The Respondent attempted a wages arrestment. The Respondent registered a Notice of Potential Liability (NOPL) against this owner's title. The owner then entered a Debt Arrangement Scheme. However, Mr Henderson submitted that the Respondent had not informed the owners of the existence of this debt until April 2019. Mr Henderson admitted that the Respondent did not have any criteria it applied to decide when it should inform owners of a debt such as this. He submitted that this was something he would take back and look at in terms of the Respondent going forward. The Respondent does not tell the owners about such debts at any kind of regular basis.

The Tribunal determined that the Respondent could, and should, have advised the owners of the accruing debt in the three and a half years of the appointment. The Respondent had no method in place by which it decided when owners should be advised. As a result of this lack of process or policy, the Respondent had failed, in the present case, to keep the owners informed.

Given the above, the Tribunal determined that the Respondent had breached Section 4.6 of the Code.

Breach of Section 4.7

The Applicant insisted on this alleged breach of the Code as he submitted that the Respondent had not demonstrated to him that any of the legal processes had been implemented to tackle the debt problem.

Mr Henderson reiterated the remarks he made in relation to the Section 4.6 breach.

The Tribunal saw no reason to doubt Mr Henderson's evidence. The Respondent had taken various forms of legal action to try and recover the sums due by one owner.

Given the above, the Tribunal determined that the Respondent had not breached section 4.7 of the Code.

Breach of Section 5.3

The Applicant did not insist on this breach of the code.

The Tribunal therefore did not require to make a determination in relation to this part of the Code.

Breach of Section 6.1

The Applicant did not insist on this breach of the Code.

The Tribunal therefore did not require to make a determination in relation to this part of the Code.

Breach of Section 6.3

The Applicant did not insist on this breach of the Code.

The Tribunal therefore did not require to make a determination in relation to this part of the Code.

Breach of Sections 6.6, 6.9 and 7

The Applicant had not intimated these alleged breaches to the Code prior to the application being made.

Given the above, the Tribunal could not consider these alleged breaches as they had not been intimated on the Respondent as required by section 17 of the 2011 Act.

Failure to carry out the property factor's duties

The Applicant had not intimated these alleged failures prior to the application being made.

Given the above, the Tribunal could not consider these alleged failures as they had not been intimated on the Respondent as required by section 17 of the 2011 Act.

Final Submissions of Parties

The Applicant submitted that Mr Henderson had generally been helpful to him when trying to resolve their issues. The Applicant was concerned that he had been charged for the roof repairs despite this being a matter of dispute.

However, Mr Henderson submitted that the Applicant was not being charged interest or late payment fees as it was noted that this amount was subject to dispute.

Reasons for Decisions

The Tribunal noted that both parties gave their evidence without exaggeration and in a straightforward and honest way. The Applicant sought, as part of his application, to have the cost of the repair to the roof refunded, albeit he has not paid for it yet. The Tribunal considered that this was ill-founded. The repair has proved to be sound. There has been no more water ingress suffered at the property.

The Applicant also sought to have his management fees refunded. However, it appeared to the Tribunal that the Respondent provided property factoring services to the Applicant. The Tribunal could see no justification for return of these fees to the Applicant. The Respondent properly instructed the roof repair in terms of its authority and as part of its core services.

However, the Respondent breached Section 4.6 of the Code. It failed, over a three and a half year period, to inform the Applicant of the accruing debt at the property. The Applicant was, understandably, upset about this. The Respondent accepted that this is a matter upon which it could improve.

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.

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 Applicant the sum of £100.

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.

…….. Chairing Member
15 October 2019
……. Date