Housing and Property Chamber
First-tier Tribunal for Scotland

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/19/0691

22 and 24 Beauly Place, East Kilbride, G74 1DD
("the Property")

The Parties:-

Mrs Kathryn Forbes, residing at 32 Macdonald Avenue, East Kilbride, G74 4SN ("the Homeowner and Applicant"), represented by Mrs Eileen McCallum

South Lanarkshire Council, Factoring Services, Hamilton Business Unit, Pollock Avenue Hillhouse, Hamilton, ML3 9SZ ("the Factor and Respondent")

Tribunal Members:-

Patricia Anne Pryce	**-**	**Chairing and Legal Member**
David Godfrey	**-**	**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.

Following on from the Applicant's application to the First-tier Tribunal (Housing and Property Chamber), which comprised documents received on/between 5 March and 24 April, both 2019, the Convenor with delegated powers of the Chamber President referred the application to a tribunal on 20 May 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 2.4, 2.5, 4.8, 4.9, 6.1, 6.3 to 6.9 inclusive, 7.1 and 7.2 of the Code which are referred to for their terms.

Hearing

A hearing took place in the Glasgow Tribunals Centre, 20 York Street, Glasgow on 16 July 2019.

The Applicant attended on her own behalf and was represented as above.

The Respondent was represented by Mr Jerry Fawbert, Mr David Keane and Mr Brian Miller, all employees of the Respondent.

The tribunal makes the following findings in fact:

- The Applicant is the owner of the properties known as 22 and 24 Beauly Place, East Kilbride (hereinafter referred to jointly as "the property").
- The Respondent is the factor of the common parts of the building within which the property is situated.
- 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.
- On or about June 2013, the Respondent instructed works to be carried out to the bin shelter of the property pursuant to its powers in terms of Clause Seventeenth of the Deed of Declaration of Conditions ("DOC") by East Kilbride Development Corporation recorded on 18 August 1986 contained within the titles deeds of the property.
- There is no financial limit provided for in the titles deeds by which the Respondent must consult with the Applicant.
- There is no requirement in Clause Seventeenth for the Respondent to consult with the Applicant prior to carrying out any repairs.
- There are no stated timescales to respond to enquiries by homeowners stated within the Respondent's written statement of services ("WSS").
- The Applicant wrote to the Respondent on 1 October 2014 in connection with the repairs to the bin shelter to which the Respondent replied substantively on 14 April 2015, six and half months later.
- The cost of the bin shelter repair amounted to £335.08 per household after being reduced in June 2017.

- The bin shelter works were undertaken by Skyform, an external contractor instructed by the Respondent.
- The Respondent did not supply information to the Applicant about the appointment of this contractor as requested in the Applicant's letter in March 2019.
- There is no mention of the Respondent's complaints procedure within its WSS.
- The Respondent did not send a Stage 2 letter to the Applicant bringing her complaint to a conclusion.

Breach of Section 2.4

Mrs McCallum submitted that the Respondent had not consulted with the Applicant prior to the works being carried out to the bin shelter. It was accepted that the bin shelter was common property in terms of the title deeds. It was also accepted that the titles deeds allowed the Respondent to carry out repairs without consultation and without a financial limit. However, Mrs McCallum submitted that the lack of consultation amounted to a breach of the Code. In addition, she complained about the lack of billing for these repairs until July 2014, some 13 months later. Mrs McCallum submitted that she considered that the Code was a layer on top of the titles deeds but accepted that the Code did not change the deeds. She accepted that the Respondent now consulted with owners as a matter of course but that it still did not consider that it "required" to consult with owners. She further submitted that the repairs in question were costly and that consultation should have taken place.

Mr Keane submitted for the Respondent that the DOC allowed the Respondent to act as factor and to instruct repairs and maintenance without financial limit. He submitted that the terms of Clause Seventeenth were clear. In short, the Respondent had power to act without consultation in these situations. It was accepted that the Respondent had since changed its procedures and will try and issue letters of notification regarding repairs now.

The Tribunal noted that parties were in agreement as regards the terms of the DOC. Both accepted that this empowered the Respondent to carry out repairs without consultation. The issue was whether the Code could, in effect, override the terms of the title deeds. As a matter of law, the Tribunal considered that the terms of the title deeds could not be obviated by the Code. The terms of the titles deeds, however unsatisfactory they may be in the modern world, must remain. The Code cannot and does not change these.

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

Breach of Sections 2.5

Mrs McCallum submitted that there were no timescales in terms of responding to enquiries contained within the WSS. Further, the letter sent by the Applicant dated 1 October 2014, was not substantively replied to by the Respondent until 14 April 2015, 13 and a half months later. The Respondent also sent the letter of 14 September 2015 to the wrong address and handled this complaint with general gross

inefficiency. However, the Respondent's response times have improved dramatically.

Mr Keane fully accepted the 13 and a half month delay as noted above and apologised for this. In addition, he accepted that the WSS does not contain any timescales in terms of responding to enquiries and that, in terms of the Code, it should. He undertook to amend the WSS to include such timescales.

The Tribunal noted that the Respondent agreed that there had been a breach here. However, the delay was a one-time occurrence. The Tribunal considered that, almost seven years after the implementation of the Code, such timescales should have been included in the WSS by the date of the hearing.

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

Breach of Sections 4.8 and 4.9

Mrs McCallum submitted that the Respondent had referred this matter to a debt collector prior to the complaints procedure being exhausted. There had been an on-site meeting on 8 June 2017 after which the Respondent had agreed to reduce the sum sought in respect of the repairs. This proved that the Respondent had referred this to a debt collector too quickly. Mrs Forbes owned six properties and was self-employed and this could have seriously impacted her credit rating which would have had a huge impact on her life. Mrs Forbes had understood that the reduction in the amount sought for the repairs was because it was accepted by the Respondent that she had been overcharged. She did not agree that it was a gesture of goodwill.

Mr Keane submitted that after the initial response, the account was placed on hold. However, the letter referring the matter to the debt collection agency was sent out on 6 July 2015, some two months after the Respondent had sent a substantive response to the Applicant on 14 April 2015 to which the Respondent had received no reply. Mr Fawbert submitted that the reduction in the cost after the meeting in June 2017 was done as a gesture of goodwill and in the belief that the debt would be paid. He was not present at the meeting. Mr Miller was present at the meeting but could not remember why the reduction was offered.

The Tribunal noted that there was a two month period of silence after the Respondent had sent its letter dated 14 April 2015 in which it had attempted to reply in detail to the Applicant's concerns. In all the circumstances, the Tribunal considered that the terms of the Respondent's letter were not unreasonable.

Given this, the tribunal found that the Respondent had not breached Sections 4.8 and 4.9 of the Code.

Breaches of Sections 6.1, 6.4 to 6.9 inclusive

Mrs McCallum submitted that the Applicant was no longer insisting on these breaches.

The Tribunal considered these alleged breaches to have been withdrawn.

Given the above, the Tribunal did not require to make a finding in respect of these breaches.

Section 6.3

Mrs McCallum submitted that she had not been provided with the information about the tender despite requesting this. In addition, the Applicant had been provided with misleading information which suggested that the contractor used was Skyform then Direct Works Department of the Respondent. In short, she had been provided with conflicting information.

Mr Fawbert accepted that this information had not been provided. He submitted that it was the normal tendering process of the local authority which had been used. He accepted that conflicting information had been provided to the Applicant and apologised for this. This was due to a misunderstanding on the part of the Respondent.

The Tribunal noted that the Respondent conceded this matter. The Tribunal noted that the Respondent had not deliberately misled the Applicant nor refused to provide the information. This breach appeared to have arisen as the result of a misunderstanding.

Given this, the tribunal found that the Respondent had breached Section 6.3 of the Code.

Section 7.1

Mrs McCallum submitted that Section 9 of the WSS dealing with complaints does not contain clear timescales nor clear stages as to how a complaint should be dealt with.

Mr Keane accepted that there were no timescales contained within the WSS. Although there is reference made to where timescales can be found, there is no reference in the WSS as to where the complaints procedure can be found. He explained that it is the generic complaints procedure for the local authority which is used for factoring complaints. He accepted that the WSS required to be amended to include a reference to where the complaints procedure could be located.

The Tribunal noted that the Respondent conceded this breach.

Given the foregoing, the Tribunal found that the Respondent had breached Section 7.1 of the Code.

Section 7.2

Mrs McCallum submitted that from 2014 when the Applicant first questioned the repairs until 2019, the Applicant simply did not know whether or not her complaint had come to an end. The Applicant did not know if the complaints procedure had

been exhausted. The Applicant submitted that she never received a letter stating that the complaints procedure had been exhausted and that if she wished to proceed she should make an application to the Tribunal.

Mr Keane submitted that a Stage 2 letter concluding the complaints procedure had been sent to the Applicant. However, he accepted that he had not produced this to the Tribunal. The Stage 1 letter had been sent on 4 January 2018. Nothing had been produced to the Tribunal regarding a Stage 2 letter. The Tribunal noted that there was no further reference to the Stage 2 letter in any other subsequent correspondence sent by the respondent. The Tribunal also noted that there was no correspondence submitted which showed that the respondent considered the complaints procedure to have been exhausted and advising the Applicant to make an application to the Tribunal.

The Tribunal considered, on the balance of probabilities, that this part of the Code had been breached. The Applicant was clear that she had not received a Stage 2 letter. The Applicant was clear that she simply did not know if the complaints procedure had been exhausted.

Given the above, the Tribunal found that the Respondent had breached Section 7.2 of the Code.

Final Submissions of Parties

The Applicant accepted the amount of the costs of the repairs as they now stood. She further accepted that, apart from the issue with the bin shelter, she was quite content with the Respondent's services. However, this had dragged on for almost six years. It took 13 months for her to receive a bill in respect of these repairs. She accepted that the condition of the bin shelter had improved as a result of the repairs.

Mr Fawbert submitted that the Respondent's customer service had improved since 2013. It now, as a matter of good practice, sends out notification letters to owners where repairs are being carried out. In short, it has tightened up its processes.

Observations

The Tribunal noted the final submissions by the parties. The Tribunal would commend both parties for conducting themselves in a professional and straightforward manner. They gave their evidence in a credible and straightforward way.

The tribunal opined that the sum of £500 is a fair and reasonable sum which the Respondent should be required to pay to the Applicant which sum represents approximately half of the management fees which the Applicant has paid to the Respondent during this lengthy period of dispute.

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 Applicant the sum of £500.
2. Amend its written statement of services (WSS) as follows:-
   (i) To include timescales in respect of which the Respondent will respond to enquiries.
   (ii) To make reference to its complaints procedure together with where this can be found.
3. 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.

Patricia Anne Pryce

…….. Chairing Member

16 July 2019

…… Date

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