Decision of the Homeowner Housing Committee
In an Application under section 17 of the Property Factors (Scotland) Act 2011
by

Michael Hickey, c/o Easylet Properties, 789 Shettleston Road, Glasgow G32 7NN ("the Applicant")

Ross & Liddell, 60 St Enoch Square, Glasgow G1 4AW ("the Respondent")

Reference No: HOHP/LM/14/0113

Re: Property at 66 Westmuir Street, Glasgow G31 5BJ. ("the Property")

Committee Members:

John McHugh (Chairman) and Ahsan Khan (Housing Member).

DECISION

The Respondent has not failed to carry out its property factor's duties.

The Respondent has not failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

1 The Applicant is the owner of a flat within 66 Westmuir Street, Glasgow G31 5BJ (hereinafter "the Property").
2 The Property is a tenement block.
3 The Respondent is the property factor appointed by the owners of the flats within the Property.
4 The Property includes a common close, stairway and back court.
5 There has been a history of drug users gaining access to the common close, stairway and back court.
6 Rubbish and drug taking materials have been dumped in the back court.
7 The Respondent resigned as factor of the Property with effect from 11 November 2014.
8 Weekly cleaning of the common close and stair was carried out.
9 Inspections of the Property were carried out by the Respondent in accordance with its obligations.
10 The property factor's duties which apply to the Respondent arise from the Statement of Services. The duties arose with effect from 1 October 2012.
11 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a Property Factor (13 August 2013).
12 The Applicant has, by his correspondence, including that of 22 August 2014, notified the Respondent of the reasons as to why he considers the Respondent has failed to carry out its property factor's duties and its obligations to comply with its duties under section 14 of the 2011 Act.

Hearing

A hearing was held at Europa House, 450 Argyle Street, Glasgow on 9 February 2015.

The Applicant was not present at the hearing, having confirmed his intention to rely upon written representations only.

The Respondent was represented by Brian Fulton, one of its directors and by its Property Manager with responsibility for the Property, Alistair Harkness. The Respondent led evidence from Alexander McDowall, the cleaner contracted by the Respondent to clean the common close and stairway.

As the Applicant was not represented at the hearing, the Committee took special care to ensure that the points raised in the Applicant's documents were considered and that questions based upon the content of those documents were put to the Respondent's representatives.

Introduction

In this decision we refer 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 Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 as "the 2012 Regulations".
The Respondent became a Registered Property Factor on 13 August 2013 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Committee had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent including the application form.

The documents before us included the Respondent's Written Statement of Services, consisting of the Respondent's letter of 23 August 2013 and a document entitled "Service Level Agreement", which we refer to as "the Statement of Services".

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of failure to carry out the property factor's duties.

The Applicant is vague as to the specific source of the property factor's duties upon which he relies although these appear to arise out of the Written Statement of Services.

The Code

The Applicant complains of failure to comply with paragraphs 4.1, 4.7 and 7.2 of the Code.

The elements of the Code relied upon in the application provide:

"...Section 4: Debt Recovery

... 4.1 You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts...

...4.7 You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs...

...Section 7: Complaints Resolution

7.2 When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel..."

The Factual Complaints

The factual matters underlying the complaint are:

1 The failure of the Respondent to adequately pursue debts owed by proprietors.
2 The application by the Respondent of debts owed by non-paying proprietors to paying proprietors such as the Applicant.
3 The failure of the Respondent to undertake adequate inspections, cleaning of the common close and maintenance of the back court.
4 The failure of the Respondent to address the Applicant's complaint in accordance with its complaints handling policy.

We deal with these issues below.

1 The failure of the Respondent to adequately pursue debts owed by proprietors.

The Applicant was concerned that the Respondent had failed to pursue adequate debt recovery measures against non-paying fellow proprietors.

In its response documentation the Respondent had identified three separate proprietors within the Property who had significant arrears. The first had a debt of c.£800, the second c.£4500 and the third c.£1500. The Respondent confirmed that Notices of Potential Liability had been lodged in respect of all three. In the case of one, the proprietor had been sequestrated, in another, court action had been threatened and was imminent. In a third, the proprietor had been making regular payments. The Respondent's representatives showed us template demand letters similar to those which had been issued. The respondent's representatives indicated that their debt recovery procedures had been followed.

We accepted the evidence of the Respondent on the matter of the recovery of debts. It appeared that reasonable steps had been pursued. The Applicant was understandably concerned about high levels of debt but there was no evidence from the Applicant to allow us to conclude that the pursuit of debt had been inadequate.

We find there to have been no breach of the property factor's duties or of the Code.

2 The application by the Respondent of debts owed by non-paying proprietors to paying proprietors such as the Applicant.

The Respondent's witnesses gave evidence that there was no provision in the Property's title deeds which enabled them at any stage to take the debt of any one proprietor and share it among the other proprietors. As a result, the Respondent's

view had always been, and remained, that it was not entitled to apportion debts in this way. The Respondent's witnesses advised that there had been no such apportionment.

Although the Applicant evidently believes that such apportionment has occurred, there is no evidence of the practice being applied and we accept the evidence of the Respondent on this matter.

We find there to have been no breach of the property factor's duties or of the Code.

3 The failure of the Respondent to undertake adequate inspections, cleaning of the common close and maintenance of the back court.

The Respondent accepts that the back court has in recent times been in need of attention. The Respondent's evidence, which seems to be a matter of agreement between the parties, is that the Property is affected badly by anti-social behaviour. This has taken the form of litter and other items being dumped both by residents of the Property and by visitors. Mr Harkness and Mr McDowall both gave evidence that there is a problem with drug abuse in the common areas of the Property.

Mr McDowall's activities are confined to a weekly clean of the common close and stair but he spoke of finding the close in a very bad state of cleanliness each week. He had observed the poor condition of the back court on his regular visits but had no duties in respect of the cleaning of that area. We accepted Mr MacDowall's evidence supported by invoices that he had performed a weekly clean of the common close and stair.

The Respondent's Statement of Services provides for only two inspections per year. We accepted the evidence of Mr Harkness on behalf of the Respondent that inspections had taken place on 20 January; 17 February; 3 March; 25 May and 18 August 2014.

The Applicant seems to infer from the poor condition of the back court that the Respondent had not carried out inspections (presumably on the basis that if it had inspected, the Respondent would have become aware of the condition of the back court and addressed it). However, we do not draw the same inference. The Respondent appears to have been aware of the problems in the back court.

The Respondent has produced evidence of clean ups having taken place in May and December 2013.

On 17 December 2013, the Respondent wrote to the proprietors of flats within the Property (including the Applicant) about the poor condition of the back court and indicated that it would only instruct a clear up if the cost was paid in advance. It

suggested that the local authority should be asked for assistance if the proprietors themselves would not fund the exercise.

On 7 April 2014, the Respondent wrote to all proprietors of flats within the Property and advised them that it was unable to carry out its full duties at the Property because of high levels of debt. This was against a background that certain building repairs were required but the Respondent had been unable to achieve payment from the body of proprietors of flats within the Property.

In June 2014, the Applicant's letting agent complained on the Applicant's behalf about the condition of common areas including of the back court. The Respondent again explained by letter of 4 July 2014 that it did not have the funding to address the back court without advance payment from the proprietors. Estimates for the carrying out of the clear up were sought and obtained by the Respondent but the Applicant believed they were excessive.

We find there to have been no breach of the property factor's duties or of the Code.

5 The failure of the Respondent to address the Applicant's complaint in accordance with its complaints handling policy.

On 22 July 2014, the Applicant's letting agent had written to the Respondent referring to an intention to raise a complaint to the HOHP.

Mr Harkness responded on 29 July 2014.

On 22 August 2014, the Applicant's letting agent set out in two letters its complaints by reference to property factor's duties and the Code.

By letter of 2 September, Mr Harkness responded fully to the matters of complaint. He referred the Applicant's letting agent to the Respondent's Complaints Procedure and advised that he did not consider that that procedure had been exhausted.

The Applicant's letting agent responded by letter of 10 September 2014 and Mr Harkness responded in turn by his letter of 17 September 2014. These letters were a continuation of the correspondence which had caused Mr Harkness to suggest use of the Respondent's Complaints Procedure yet neither the Applicant nor the Respondent seem to have made any attempt to apply the procedure. The intention to resign as factors was the next communication contained in Mr Harkness's email of 2 October 2014.

We do not consider there to have been a breach of the property factor's duties or of Section 7.2 of the Code. The Respondent does seem to have responded fully and promptly to the matters which were the subject of complaint.

We would observe, however, that it is incumbent upon a property factor to be aware of the terms of the Code and of its own complaints procedures. In circumstances where there is repeated correspondence from a homeowner on a matter where the homeowner remains dissatisfied, a property factor is likely to be well advised to apply its complaints procedure whether or not the homeowner makes specific reference to it. In this case, we had to give careful consideration to whether there had been any failure by the Respondent (particularly in the context that Mr Harkness had not overtly escalated the matter to senior management nor referred it into the Complaints Procedure) but decided that, on balance, there had been no breach of the property factor's duties nor of the Code.

Observations

We found Mr McDowall, Mr Harkness and Mr Fulton to be credible and reliable witnesses.

APPEALS

The parties' attention is drawn to the terms of section 22 of the 2011 Act regarding their right to appeal and the time limit for doing so. It provides:

> "...(1) An appeal on a point of law only may be made by summary application to the sheriff against a decision of the president of the homeowner housing panel or a homeowner housing committee.
>
> (2) An appeal under subsection (1) must be made within the period of 21 days beginning with the day on which the decision appealed against is made..."

JOHN M MCHUGH

CHAIRMAN

DATE: 19 February 2015