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

by

1. John and Dorcas Bainbridge, 52 Hawk Brae, Livingston, West Lothian EH54 6GE
2. Patricia Quin, 100 Hawk Brae, Livingston, West Lothian EH54 6GF ("the Applicants")

Be-Factored Ltd, 2a North Kirklands, Eaglesham Road, Glasgow G76 0NT ("the Respondent")

Reference Nos: HOHP/PF/15/0118 & 0119

Re: 52 and 100 Hawk Brae, Livingston, West Lothian ("the Properties")

Committee Members:

John McHugh (Chairman) and Susan Shone (Housing Member).

DECISION

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

The Respondent has 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 Both Ms Quin and Mr and Mrs Bainbridge are the owners of flats within the Apex Development, Hawk Brae (hereinafter "the Development").
2 Mr and Mrs Bainbridge own No. 52 Hawk Brae.
3 Ms Quin owns No. 100 Hawk Brae.
4 The Development consists of six blocks of flats.
5 The Development is approximately 12 years old.
6 Each block contains common areas.
7 The Development has common garden areas.
8 The Respondent assumed the role of property factor over ten years ago.
9 The Respondent ceased to be the factor on or around 31 May 2015.
10 A Deed of Conditions registered 23 August 2004 governs the arrangements for the management of, and sharing of costs relating to, common property within the Development among the proprietors of the flats within the Development.
11 Many of the flats within the Development are occupied by tenants of the owners.
12 The property factor's duties which apply to the Respondent arise from the Written Statement of Services and the Deeds of Conditions. The duties arose with effect from 1 October 2012.
13 The Respondent became a registered property factor on 7 December 2012.
14 The Respondent is under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration.
15 The Applicants have, by their correspondence (including letters of 19 June 2015 in the case of the Bainbridges and 27 July 2015 in the case of Ms Quin) notified the Respondent of the reasons why they consider the Respondent has failed to carry out its property factor's duties and/or its obligations to comply with its duties under section 14 of the 2011 Act.
16 The Respondent has unreasonably delayed in attempting to resolve the concerns raised by the Applicants.

Hearing

A hearing took place at George House, Edinburgh on 28 January 2016.

The Applicants were present at the hearing.

The Respondent was represented at the hearing by its Managing Director, Graeme McEwan.

No other witnesses were called by the parties.

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 changed its name from Property 2 Ltd to Be Factored Ltd on or around 30 June 2015.

The Respondent became a Registered Property Factor on 7 December 2012 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 Applicants. The Respondent had not lodged any documents at the hearing.

This Decision relates to two separate applications to the HOHP concerning the Development ("the Applications"). Although not identical, the Applications raise similar complaints and they have therefore been heard together.

The documents before us included a Deed of Conditions by G Dunbar & Sons (Builders) Limited registered 23 August 2004 in respect of No.100 Hawk Brae. We refer to this as "the Deeds of Conditions". We refer to the Respondent's Written Statement of Services, Revised December 2013 as "the Written Statement of Services". The Deed of Conditions also applies to No.52.

The Deed of Conditions was initially not available at the hearing, having not been lodged by the parties in advance. Ms Quin explained that she has lodged a copy of the Deed of Conditions with the office of the HOHP in a separate, earlier application and that she had expected the Deed of Conditions to be available to this Committee as a result. She observed that she had written to the office of the HOHP in those terms at an earlier stage in these proceedings and had therefore assumed, not having heard to the contrary, that the document would be available to this Committee. It was explained to the parties at the hearing that we did not have the Deed of Conditions. The parties agreed however that the Committee should, in making its decision, obtain a copy of the Deed of Conditions from the parties after the hearing and that the parties would be content for the Committee to refer to it in reaching its decision.

Mr McEwan volunteered to send a copy shortly after the hearing although the need to do this became superseded by the Committee's clerk making arrangements during the hearing for a copy of the Deed of Conditions to be emailed to her. Although the Deed of Conditions was therefore available to the Committee towards the end of the hearing, the parties agreed to proceed on the already agreed basis ie that the Committee should refer to the Deed of Conditions as part of reaching its decision in this case.

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

Ms Quin complains of failure to carry out the property factor's duties. Mr and Mrs Bainbridge do not.

The Written Statement of Services and the Deeds of Conditions are relied upon by Ms Quin as sources of the property factor's duties.

The Code

Both Applicants complain of failure to comply with the Code.

There is substantial overlap among the sections of the Code relied upon by the the Applicants.

Ms Quin complains in relation to the following sections of the Code: 2.4; 2.5; 3.1; 4.1; 4.2; 4.6; 4.7; 4.8 and 5.3.

Mr and Mrs Bainbridge complain in relation to the same sections of the Code and also complain in relation to Code section 2.1. The Bainbridges had originally complained in relation to Section 1 of the Code but confirmed at the hearing that they were no longer insisting upon that section.

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

*"**SECTION 2: COMMUNICATION AND CONSULTATION...***

...2.1 You must not provide information which is misleading or false,...

…2.4 You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies)…

…2.5 You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers)…

*…**SECTION 3: FINANCIAL OBLIGATIONS…***

3.1 If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services)…

*…**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.

4.2 If a case relating to a disputed debt is accepted for investigation by the homeowner housing panel and referred to a homeowner housing committee, you must not apply any interest or late payment charges in respect of the disputed items during the period that the committee is considering the case…

…4.6 You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation).

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.

…4.8 You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention...

…SECTION 5: INSURANCE

…5.3 You must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider. You must also disclose any other charge you make for providing the insurance…"

The Matters in Dispute

Charges for Meeting Venue Hire

Both Ms Quin and the Bainbridges complain of a charge imposed by the Respondent upon them in respect of the hire of a local hall by the Respondent. The charge imposed was 13p per proprietor of property in the Development. The charge was for the booking of a room in the Newyearfield Community Farm and appeared on bills issued to the Applicants by the Respondent on 10 June 2015.

The Applicants complained that they could have obtained the hire of the same room free of charge as it is available for free use by local residents. Their position was that meeting facilities had never been charged for previously and that the Respondent was not entitled to impose such charges upon them. Mr McEwan's position was that the Respondent was entitled to impose these charges and had done so on previous occasions, without any difficulty arising. That suggestion was strongly refuted by the Applicants.

Ms Quin considers that provision of a meeting room is part of the Respondent's core services and should not be charged for. Mr McEwan says it is not a core service. We referred the parties to the Written Statement of Services (which Mr McEwan advised had recently been updated but not in a way material to the circumstances of this case). The Written Statement of Services makes no reference to the cost of meeting facilities but does refer to attendance at owners' meetings under "Other Services" as opposed to "Core Services", although it is not apparent how this affects the Respondent's entitlement to impose charges.

Ms Quin argues that the provision of meeting services is a core service which may not be charged for under the Deed of Conditions.

The Bainbridges consider that the Respondent is in breach of Code section 2.1 by making what they consider to be a false statement in its Written Statement that meeting facilities would be made available free of charge and by then charging for them.

We are unable to identify any statement in the Written Statement of Services or in the Deed of Conditions which prevents the Respondent from recovering from proprietors of properties on the Development any outlay reasonably incurred by the Respondent. Indeed, the Respondent's powers regarding recovery of costs under the Deed of Conditions is quite wide ranging.

Accordingly, we find there to have been no breach of either the property factor's duties or of the Code in this respect.

Failure to Respond to Communications

Both the Bainbridges and Ms Quin complain of a lack of response to communications by the Respondent.

There was no denial by the Respondent that the various letters referred to by the Applicants in their Applications had not been the subject of specific responses. Mr McEwan's explanation was that there was a lack of funding available to the Respondent because of non-payment of bills by some proprietors. The Respondent therefore did not have the resources to offer tailored responses to communications from proprietors.

Mr McEwan referred to the Respondent's letter of 23 July 2015. This was a letter issued by the Respondent's credit control department to all proprietors and indicated the scale of non-payment by proprietors. It requested that those proprietors who were in arrears should address the situation. It finished by advising: *"We will not be answering any further owners correspondence until such time as the development's finances are actioned in terms of the above."*

The Committee observed at the hearing that some of the communications which had been highlighted by the Applicants in their complaint pre-dated that letter by months and that accordingly, that letter could never represent any basis to fail to answer such communications.

The Committee consider that, in circumstances where an absence of funding makes it impossible for a property factor to respond to individual communications, it may be possible for a property factor to advise homeowners of the issue and indicate that it would be unable to deal with future communications. However, the matters being raised in correspondence post the letter of 23 July 2015 were connected to the (unresponded to) earlier communications. Therefore, it seems wholly inappropriate to attempt to rely on a general letter to all proprietors as a basis to purport to be relieved of any responsibility to respond in respect of discrete issues raised by proprietors such as the Applicants at an earlier stage.

Mr McEwan also sought to rely upon the content of general newsletters issued by the Respondent to all proprietors. The editions from October 2014 and January 2015 were made available to the Committee by the Applicants. Although these referred to the arrears situation, they made no mention of any intention by the Respondent not to respond to correspondence.

It is clear to the Committee that the Respondent's failure to respond to the Applicant's communications is a breach of its obligations under Code section 2.5. Ms Quin also complains that the failure to respond constitutes a breach of property factor's duties in respect that the Written Statement of Services provides time periods for responses which were not adhered to. We agree with that position and find, in relation to Ms Quin's case, that there has been a breach of the property factor's duties.

Financial Information

The Applicants complain that there has been a complete absence of information available to them or the property factors appointed by them to take over from the Respondent. They remain uncertain as to the overall financial picture at the Development. No final accounts, bank statements or records have been passed to proprietors or to the replacement factors.

Mr McEwan indicated that he had made records including contractors' invoices available for inspection at his office and that the Applicants had availed themselves of this service. The Applicants pointed out that access to those records did not, and could not be expected to, answer many of their long standing, unanswered questions and Mr McEwan accepted that that was true.

The Committee considers that there is a clear obligation under Clause 3.1 of the Code to make available to the Applicants "*all financial information that relates to their account*". There is no factual dispute that this has not happened. We accordingly find the Respondent to have breached section 3.1 of the Code.

Failures in relation to Debt Recovery

The Applicants have complained by reference to a number of sections of the Code. They complain of apportionment by the Respondent of the debt of non-paying owners to them without appropriate procedures having been followed. After discussion, the Applicants could not identify a relevant debt which had been apportioned inappropriately and this aspect of the complaints did not appear well founded. We have not identified a breach of Code section 4.1.

Ms Quin complains of the imposition of a late payment charge of £30 by the Respondent in its invoice of 10 June 2015. Ms Quin advises her position had always been that she was only withholding payment until satisfied on the points she had previously raised and had been clear that she was prepared to pay subject to receiving satisfactory answers. She had received no response.

An examination of the HOHP's records reveals that Ms Quin had raised an earlier complaint to the HOHP against the Respondent on 18 September 2014. That case had not been resolved until 7 October 2015. It therefore appears to us that the imposition of the late payment charge was a breach of the Respondent's obligation under Code section 4.2.

The Applicants had been concerned to receive a letter dated 9 June 2015 from the company which supplies electricity to the common areas of the Development, e-on. The letter indicated that e-on was proceeding to court to obtain a warrant to allow it to enter the premises and disconnect the power supply. The reason given was non-payment of e-on's invoices.

Although dated 9 June, the Bainbridges report that they first received the letter on Saturday 12 July 2015, which was two days before the court date mentioned in the

letter of Monday 14 July 2015. The Bainbridges were very upset by the letter and Mrs Bainbridge went to court herself and made representations which resulted in the warrant not being granted. The Bainbridges were concerned for the safety of elderly residents in their block if the electricity supply had been cut off as this would have affected the door entry system and the lighting.

The Applicants indicated that they had received no notice from the Respondent that the electricity bills were not being paid and that disconnection was threatened.

Mr McEwan considered that there was never any real prospect of the supply being cut off as, in his experience, suppliers were not keen to cut off residential supplies. He explained that the Respondent had been paying small portions of the outstanding bills as funds allowed with a view to keeping the suppliers happy. There was insufficient funding to pay all the bills in full.

No evidence was presented that the Respondent had brought the seriousness of the situation to the attention of the Applicants.

We consider there to have been a breach of section 4.6 of the Code in respect of the failure to inform the Applicants of the consequences of non-payment in respect of the situation with the electricity supplier.

The Applicants have a general concern that there may have been a failure by the Respondent to pursue non-paying proprietors appropriately or to explain the level of non-payment which they consider to be high and to fluctuate considerably. Mr Bainbridge reported having been present in court when an action by the Respondent for recovery of factoring charges against another proprietor had been dismissed by the court by reason of non-attendance of any party.

Mr McEwan considers the non-payment levels to be high but offered assurances that the Respondent followed its debt recovery procedures. It has issued demand letters and instructed Sheriff Officers. It has lodged Notices of Potential Liabilities, it has instructed solicitors and taken their advice.

In relation to the particular case identified by Mr Bainbridge as having been disposed of by the court because of the absence of attendance, Mr McEwan insists that that evidence is wrong and that his solicitors have advised him that the action remains sisted (temporarily suspended). This is because there is an absence of available funds to pursue the action.

We do not consider there to be evidence that there has been a breach of Code sections 4.7 or 4.8.

Insurance

The Applicants complained that the Respondent had obtained credit facilities to meet insurance costs. That information had not been shared with them.

Mr McEwan explained that when premiums were obtained from insurers they could either be paid for on a "one off" basis or spread over the year on a monthly basis. Because there were insufficient funds available to pay the annual premium in a single payment, the Respondent had taken the monthly payment option. The insurers charged an additional sum for this.

The Applicants are aggrieved that they were invoiced, and paid, for their insurance in a single invoice yet were having to pay the finance costs associated with monthly payment. The Committee put to them that while they might have paid their factoring bills, including insurance, promptly but others appeared not to have done so. Against that background, it seemed appropriate for the Respondent to have followed the course it did. The Applicants' view was that the float ought to have been used to cover any shortfall.

While it may be less than ideal that there were insufficient funds to cover the payment of the annual premium in a single payment, in the circumstances where funds were not available, we do not consider the Respondent to have behaved unreasonably.

The Applicants complained by reference to section 5.3 of the Code. We do not consider that the circumstances of section 5.3 of the Code are relevant to the matters complained of. Accordingly, we do not find there to have been a breach of section 5.3 of the Code.

Other Matters

The Bainbridges spoke of their concerns that the garden ground had not been maintained properly. They had had to carry out maintenance work themselves. Mr McEwan accepts this is the case but explained that the non-payment levels were such that funds were not available to pay for the appropriate levels of maintenance. While the Bainbridges were, understandably, concerned about the situation, we do not consider that their Application covers this matter and we do not make any formal finding.

Breaches of the Code/Property Factors Duties

We have indicated by reference to each of the factual areas of dispute above where we consider it to have been established that there has been a breach of the property factor's duties or of the Code. Any other duties or sections of the Code which may have been referred to in the Applications but which are not specifically mentioned above, are not considered relevant to the factual disputes. Accordingly, we have not found there to be breaches of those duties or Code sections.

Observations

There had been no written response or documents lodged on behalf of the Respondent in advance of the hearing. Mr McEwan found himself unable to deal with the detail of many of the points raised by the Applicants and the Committee at the hearing. In some cases he did not have specific answers and was only able to make general observations. It was unhelpful that the Respondent chose not to produce any documentation in support of its arguments.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

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: 4 February 2016