Decision of the First-tier Tribunal for Scotland Housing

Housing and Property Chamber
First-tier Tribunal for Scotland

and Property Chamber
In an Application under section 17 of the Property Factors (Scotland) Act 2011

By

Tom Gunion, Flat 0/1, 187 Knightswood Road, Glasgow G13 2EX ("the Applicant")

Speirs Gumley Property Management Ltd, Red Tree Magenta, 270 Glasgow Road, Glasgow G73 1UZ ("the Respondent")

Chamber Ref: FTS/HPC/PF/20/2149

Re: Flat 0/1, 187 Knightswood Road, Glasgow G13 2EX ("the Property")

Tribunal Members:

John McHugh (Chairman) and David Godfrey (Ordinary (Surveyor) 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 at Flat 0/1, 187 Knightswood Road, Glasgow G13 2EX ("the Property").

2 The Property is located within a modern tenement building (hereinafter "the Block").

3 There are 13 flats within the Block..

4 The Block is within a Development consisting of five blocks (known as 187 and 187A-D) and common amenity ground.

5 There are a total of 40 flats in the Development

6 The Development was built by Barratt Homes around 2008.

7 The Applicant bought his home new from Barratt on 23 December 2009.

8 The Respondent has acted as the factor of the Block since 19 May 2014 and continues as factor at present.

9 The property factor's duties which apply to the Respondent arise from the Respondent's Written Statement of Services and the Deed of Conditions by BDW Trading Ltd registered 6 February 2008.

10 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 (1 November 2012).

11 The Applicant requested on 25 February 2020 that an owners' meeting be called.

12 The Respondents did not call an owners' meeting.

13 All owners are entitled to follow the terms of the Deed of Conditions to call an owners' meeting.

14 The Respondent instructed Saltire Access to respond to reports of water ingress received from owners During January and February 2020.

15 The Respondent recommended to owners that a Construction Identification Survey (CIDS) be carried out.

16 The Respondent sought owners' views by its letters of 30 July and 17 August 2020.

17 38 owners expressed no view. One owner voted in favour. The Applicant voted against.

18 On 24 August 2020, the Respondent instructed that a CIDS be produced by Diamond & Co, Chartered Surveyors.

19 On 30 June 2020, the Respondent's Managing Director wrote to all owners at the Development explaining the history of complaints which had been raised by the Applicant but did not name him.

20 The Respondent instructed its solicitors to write to the Applicant on 4 September 2020 threatening that legal proceedings may follow if the Applicant repeated allegations that the Respondent's staff had been dishonest.

21 The Respondent failed to respond to the Applicant's emails of 16 November and 2 December 2020.

22 The Applicant has, by his correspondence, including his email of 14 December 2020, notified the Respondent of the reasons as to why he considers the Respondent has failed to carry out its obligations to comply with its duties under section 14 of the 2011 Act and its property factor's duties.

23 The Respondent in its letter of 18 January 2021 addressed in detail the complaints which had been made by the Applicant.

24 The Respondent has not failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place by teleconference on 30 April 2021.

The Applicant was present at the hearing.

The Respondent was represented by its Managing Director, Iain Friel, Ross Moffat, Associate Director and Ann Marie Connelly, Property Inspector.

There were no other witnesses called by either party.

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 First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 as “the 2016 Regulations”.

The Respondent became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Tribunal had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent.

The documents before us included the Respondent’s undated "Written Statement" which we refer to as the "Written Statement of Services" and the Deed of Conditions by BDW Trading Ltd registered 6 February 2008 which we refer to as "the Deed of Conditions".

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 Deed of Conditions and the Written Statement of Services are relied upon in the Application as the source of the property factor's duties.

The Code

The Applicant complains of failure to comply with Sections 2.1; 2.2; 2.4; 2.5; 6.3; 6.9 and 7.1 of the Code.

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

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

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

…2.2 You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action)…

…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 6: CARRYING OUT REPAIRS AND MAINTENANCE

This section of the Code covers the use of both in-house staff and external contractors…

…6.3 On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff…

…6.9 You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor…

…SECTION 7: COMPLAINTS RESOLUTION

7.1 You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors."

The Matters in Dispute

The factual matters complained of were:

(1) The Respondent's failure to call an owners meeting and other arrangements concerning repair works carried out in February/March 2020.

(2) The procurement of a CIDS Survey by the Respondent.

(3) Intimidation and breach of confidentiality by the Respondent.

(4) Failure by the Respondent to respond to communications.

(1) The Respondent's failure to call an owners meeting and other arrangements concerning repair works carried out in February/March 2020.

History

The Applicant reports that water ingress has been an issue at the Development at least as far back as 2016. He attributes the water ingress to poor construction and/or design for which he considers the original constructors, Barratt Homes, to be responsible.

Barratt have not accepted liability for the water ingress but have, on a goodwill basis, agreed to carry out certain repairs at their own cost. The Applicant considers that this is an indication that Barratt are responsible for the issue.

Meeting

An owner reported to the Respondent that he was experiencing water ingress into his flat in January 2020. The Respondents appointed a contractor, Saltire Access, (i) to investigate and (ii) if the contractor identified that the issue was capable of being remedied without great expense, to remedy it.

On becoming aware of this situation, the Applicant raised his concerns with the Respondent. In particular, he was concerned about whether the cost should properly be borne by Barratt rather than the owners and, if borne by the owners, how the repair cost should be apportioned among them. He requested that an owners' meeting be called by the Respondent. He wrote to Barratt about the water ingress issue himself.

The Applicant first requested on 25 February 2020 that an owners' meeting be called. The Respondents' Ann Marie Connelly replied on the same day. She suggested that the calling of the meeting should be delayed until there had been a response by Barratt to the Applicant's communication to Barratt in which he had raised the issue of their responsibility for the water ingress.

On 10 March 2020, the Applicant had met a contractor from Saltire Access on site and realised that the repairs were being carried out at the owners' expense. He repeated his request for a meeting to be called. On 12 March, the Respondent's John Neill responded to the Applicant to advise that Ms Connelly would discuss the request with her manager, Ross Moffat, upon his return from holiday.

The Respondent advises that it issued a communication on 16 March 2020 to all of its customers advising them of special arrangements which would apply to their provision of services because of the COVID-19 outbreak.

The Applicant's position is that he did not receive that communication and he is aware of other customers who also did not receive it.

We do not identify a breach of the Code or of property factor's duties in this respect. Whether or not the 16 March communication reached the Applicant, the COVID outbreak was well within the contemplation of businesses by mid-March 2020.

Businesses and individuals were changing their practices to avoid unnecessary contacts. In those circumstances, it would have been entirely reasonable for the Respondents not to attempt to call an owners' meeting. Although it might have been legally possible to have called the meeting (the legal imposition of lockdown not coming until 23 March 2020), it would have been highly impractical and potentially irresponsible to have done so. The Respondent would have to have given notice to the owners; booked a venue and sent its staff. All of those steps made it unlikely that a meeting could have been called at the time.

In any event, the Applicant's complaint that the Respondent "denied" him his right to call an owners' meeting is misconceived. The Applicant himself always had that right in terms of the Deed of Conditions. We appreciate that the practice was that the Respondents would deal with the organisation and calling of such meetings and that the Applicant may not have had readily available contact details of his fellow owners. That said, he had the right to call an owners' meeting but did not do so.

Decision to Instruct Repairs

The Applicant complains that the Respondent appointed contractors, Saltire Access, to deal with the repairs rather than referring the matter to Barratt. The Applicant considers that the Respondent should first have consulted with the owners before instructing the contractors and should have put the repairs out to competitive tender.

The Respondent's response is that upon receiving reports of water ingress, in order to meet its responsibilities to the affected owners, it was appropriate to instruct a contractor to investigate and remedy without delay. The Respondent observes that at the time there was no indication that Barratt would accept any liability or carry out any repair. The Respondent would not normally tender for such a relatively small job and was not obliged to. Saltire Access was a contractor known to the Respondent as having the appropriate experience.

The Respondent indicated that it first made contact with Barratt regarding the matter on 18 March 2021.

The Applicant observed that there had been a number of weeks between the initial reports of water ingress and the appointed contractor's attendances on site. It was accepted by the Respondent that the works were not instructed as an emergency.

We do not consider any failure to report the matter to Barratt or any delay in reporting to Barratt to be significant nor do we identify any breach of the Code or of property factor's duties. We do not consider that there was any duty in the circumstances upon the Respondent to consult with owners or to obtain a competitive tender before instructing Saltire Access. The Respondent had the owners' delegated authority as factor in terms of the Deed of Conditions to instruct

the investigations and repairs and the relative urgency and minor nature of the works mean that prior consultation and tendering were neither necessary nor appropriate.

Apportionment of Charges

By June 2020, the Respondent had informed all owners of the repairs and charged them to the owners as common repairs. The cost was a total of £1272. The Respondent objected on the basis that, firstly, he considered the repairs to be private in nature as they related to windows of individual flats and, secondly, that the apportionment was incorrect as they should be charged on a block by block basis and not to all owners within the Development. After receiving a complaint by the Applicant, the Respondent reallocated its charges so that the repairs were instead charged only to the affected blocks. In relation to the repair relating to the Applicant's block, the Respondent credited his account with the sum of £3 which, after consultation with its contractor, it estimated was the private (ie non-communal) element of the repair.

The Applicant is correct that flat windows are not noted in the Deed of Conditions as common parts of the Block and appear to be the private property of each owner with the effect that the Respondent as factor has no obligations or rights in respect of them. We accept Mr Friel's evidence, however, that when an owner reports water ingress, it is often not apparent where the water is coming from, whether the repair is likely to be private, common or partly one and partly the other. The position may not become apparent until after the contractor has visited. The Respondent takes the view that the proper and reasonable course is to assist affected owners quickly. The Respondent accepts that it had been incorrect to apportion the repair costs across all of the blocks and had remedied that. It considers that it has used its best endeavours to apportion the costs relating to the Applicant's block between costs appearing to be private and those appearing to be common.

We accept the Respondent's explanation and, the issue of the apportionment having been corrected when raised (albeit not in the way which the Applicant would consider appropriate), we consider that there is no breach of the Code or of property factor's duties.

The Applicant has also complained that the Respondent has not provided copies of documents requested by him. The Respondent's position is that it has provided copies of all relevant documents apart from an internal memo. In the absence of any evidence that documents which should have been produced have been withheld, we find there to have been no breach of the Code or of property factor's duties.

(2) The procurement of a Construction Identification Survey (CIDS) by the Respondent.

On 30 July 2020, the Respondents wrote to owners in the Development recommending the instruction of a CIDS for the Development and explaining the background to that recommendation.

On 17 August 2020, the Respondents indicated that it would instruct the CIDS by 24 August if there was no objection from a majority of owners. The letter by the Respondent to the owners proposed an owners' vote by correspondence. The result of the "vote" was that, of 40 owners, one voted in favour, one against (the Applicant) and 38 did not cast a vote. The Respondents took this as a basis to proceed. On 24 August 2020, the Respondents instructed the carrying out of a CIDS by Diamond & Co, Chartered Surveyors. The survey cost £1800 which was then billed to all 40 owners as a common charge.

The Applicant objects that the vote was invalid since it did not follow the procedures for decision making in the Deed of Conditions (which require a meeting). The Applicant is also concerned that the CIDS is of no practical value to the owners as he believes that an alternative type of survey, an EWS1, which is carried out on an individual property basis, is the only type of survey (if any) which owners may require to obtain. He complains that no tender process was followed in selecting Diamond & Co.

The Respondent has indicated that it considers that its actions were within its delegated authority as factors. Mr Friel explained that the Respondent had been approached by an owner who wished to re-mortgage. He required to satisfy his lender as to the Development's construction type.

By this time, in the light of the Grenfell fire, there had been widespread concerns on the part of owners, lenders and potential buyers that modern properties might have been constructed using flammable or unsuitable materials. This has meant that some owners of properties elsewhere have been unable to sell or re-mortgage their properties. Some such properties have been given a notional nil value because of the risk of the need for expensive remedial works.

Mr Friel made extensive enquiries as to the availability of suitable surveys. He identified that carrying out EWS1 surveys would be prohibitively expensive. He identified the existence of the CIDS type of survey. He identified that very few surveyors could offer this service with appropriate Professional Indemnity insurance backing. He identified Diamond & Co as one of those few. He considered that obtaining the CIDS from them would assist the owner who sought to re-mortgage and the body of owners generally since they would all have a similar interest in the matter. He believed that the CIDS would be given to lenders and might satisfy them. It might assist any surveyor instructed to carry out an EWS1 survey of an individual flat. He believed it offered reassurance to owners concerned to know about the construction type of the Development.

The Applicant considers the CIDS to be of no practical value to owners.

We agree with the Applicant that the voting procedure followed by the Respondent has no basis in the Deed of Conditions. At best, it was an indicative vote. Mr Friel accepted this but said it was common practice for factors to seek the views of owners in this way. It was not practical to hold meetings and votes on all issues or to expect positive votes in favour of all actions given that owner participation can often be low.

We accept that the Respondent had delegated authority under the Deed of Conditions as the owners' appointed factor to instruct the CIDS. We note that there was little evidence of the owners being concerned that the exercise was of no value (the Applicant being the only one to "vote" against the proposal). We also accept that in instructing the report, the Respondent had adopted a considered approach in relation to the likely value of obtaining this particular survey from this particular supplier at this particular time.

We do not consider there to have been a breach of the Code or of property factor's duties.

(3) Intimidation and breach of confidentiality by the Respondent.

Intimidation

The intimidation was said to consist of the instruction by the Respondent of a letter addressed to the Applicant by the Respondent's solicitors, BTO dated 4 September 2020.

The intimidation was also said to exist in the form of a threat to withdraw as a factor of the Development.

Mr Friel explained that he was upset by the Respondent's accusations that he and his staff had lied. He felt that it was within the Applicant's rights to make complaints but that neither he nor his staff should be subjected to accusations that they had behaved dishonestly. He was concerned that those allegations were made to third parties and would affect the reputation of the Respondent and its staff. He felt that he had a responsibility to protect the Respondent and its staff by withdrawing as factors of the Development. That was not something which the Respondent wanted to do but in the circumstances Mr Friel had felt it appropriate to indicate that this may be the outcome of the Applicant's actions.

The Applicant explained that he had not intended to imply that Mr Friel himself had been dishonest but rather those comments had been directed against a particular member of the Respondent's staff. He had only copied the correspondence to an Evening Times journalist because he owned a flat within the Development and the

other recipients of the Applicant's communications were elected representatives who he had thought might be able to assist.

We do not consider that the Respondent behaved in a way which intimidated the Applicant by instructing its solicitors to write to him in the terms which they did. Equally, while it might have been concerning for the Applicant for the Respondent to threaten to withdraw its services as factor of the Development, we consider that that was only threatened after careful and measured consideration and was not intended to serve as intimidation.

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

Confidentiality

The Applicant refers to the content of the Written Statement of Services, the Complaints Procedure section of which indicates that complaints will be dealt with "in confidence". He complains that the Respondent has revealed the content of his correspondence to other owners including mentioning the threat of litigation against the Applicant. This seems to have been by way of Mr Friel's letter to all owners dated 30 June 2020. Mr Friel's letter set out the history of the complaints and the Respondent's response. We note that that letter does not name the Applicant although recipients might have been able to deduce that the anonymous owner referred to in the letter was the Applicant.

We consider that the Respondent was entitled to communicate with the other owners in the way which it did. The Respondent was entitled, if not obliged, to make the other owners aware of the concerns which the Applicant had raised and of the ways in which it had sought to address those concerns. We consider that there has been no breach of property factor's duties or of the Code.

(4) Failure by the Respondent to respond to communications.

The Applicant has complained that the Respondent failed to respond to certain of his correspondence. The Respondent accepts that it is accurate that it failed to respond to the Applicant's emails of 16 November and 2 December 2020. The Respondent accepted and apologised for these failures in its letter of 18 January 2021.

The Tribunal notes that there was a very significant volume of correspondence between the parties over a period of months. The Respondent generally appears to have replied to communications received from the Applicant in a detailed fashion. In the circumstances, we consider that the isolated failings identified are not sufficient to constitute a breach of the Code or of property factor's duties.

PROPERTY FACTOR ENFORCEMENT ORDER

As we have identified no relevant breach of the Code or of property factor's duties, no property factor enforcement order ("PFEO") will be made.

APPEALS

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.

JOHN M MCHUGH

CHAIRMAN

DATE: 4 May 2021