First-tier tribunal for Scotland (Housing and Property Chamber)

Decision on homeowner's application: Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/17/0059

Flat 3, 9 Church Hill, Paisley, PA1 2DG
("the property")

The Parties:-

MR ROSS LAFFERTY, Flat 3, 9 Church Hill, Paisley, PA1 2DG
("the Applicant")

SPIERS GUMLEY PROPERTY MANAGEMENT, 194 Bath Street, Glasgow, G2 4LE
("the Respondent")

Tribunal Members:
GRAHAM HARDING (Legal Member)
COLIN CAMPBELL (Ordinary Member)
("the tribunal")

DECISION

The Respondent has failed to carry out its Property Factor's duties in that it imposed charges upon the Applicant for work done to property that was not a Common Part. The Respondent has failed to comply with its duties under Section 14 (5) of the 2011 Act in that it did not comply with Section 2.5 of the code. The Decision is unanimous.

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 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.

Hearing

The tribunal heard oral evidence from the Applicant and from Mr Bryan McManus, Director, on behalf of the Respondent. The tribunal also took account of the written submissions received from both parties.

Summary of submissions

1. The Applicant submitted that the Respondent overstepped its authority by holding that repairs to the balconies in the block in which the Property is situated were common repairs when in fact the responsibility for the repairs lay with the owners of the balconies in question.

2. The Applicant referred the tribunal to the title plans forming production numbers 7a, 7b and 7c and to the titles forming productions 8a, 8b and 8c. The Applicant submitted that as the titles disclosed that ownership of these properties extended to include the balconies it followed that the owners of each property should be responsible for any repairs to the balconies.

3. The Applicant queried whether the Respondent could produce any precedent or evidence to support the Respondent's decision that the balconies in question could be both private and common.

4. The Applicant's position was that whilst the roofs of the properties which the property formed part were common, the balconies were not designed within the title deeds of the properties as being part of the roof and therefore were not common. The Applicant said that there was a full and extensive description of what would form common parts or were for common use. The balconies in question were not for common use but for the sole benefit of the owners of the flats in question. The Applicant referred to production 11 showing photos of the balconies from the lounge/dining area of flat 8 and flat 10. This according to the Applicant showed that the balconies were entirely for the private use of the owners of flat 8, 9 and 10.

5. The Applicant disputed that the balconies could be called a roof terrace which was the term used by the Respondent's Solicitor in production 4.

6. The Applicant suggested that the balconies may provide shelter to the properties below in the same way as other flats in the block would. The Applicant submitted that in the circumstances the Tenement (Scotland) Act 2004 section 8 (1) would apply. That sub-section specified that the owner of any part of a tenement building, being a part that provides, or is intended to provide, support or shelter to any other part, shall maintain the supporting or sheltering part so as to ensure that it provides support or shelter.

7. The Applicant accepted that it would be possible for sub-section (2) of section 8 to apply and that this would remove an owner's obligation to maintain any part of a tenement building but was of the view that given the age and the costs involved sub-section (2) would not apply in the present case.

8. The Applicant went on to refer to production 5 which was a property description of one of the flats in question which referred to the property featuring an l-shaped balcony. The Applicant saw this as being a key selling point of these properties.

9. The Applicant said that he first received correspondence from the Respondent dated 22 May 2015 which indicated that there was water ingress coming from the

balcony at flat 9. The Applicant stated he received a second letter dated 3 November 2015 that indicated that both flat 9/6 and 9/7 were affected by water ingress as a result of defective decking in flats 9/9 and 9/10. The Applicant said that he, through e-mail correspondence with the Respondent, disputed the charges and at that time no works were carried out. The Applicant said that he subsequently received a further letter dated 6 July 2016 and which formed production 20, which indicated that flat 9/5 was also affected and that it was intended to carry out further water tests.

10. The Applicant said that he protested against these repairs on the basis that the balconies were not common property. As a result he disputed the charges that had been levied. At that time the Applicant said he received no information from the Respondent that any of the charges related to repairs to the main roof of the block. He said that for the next 10 months the Respondent had argued with him that the charges were in respect of the repairs to the balconies which were common and that it was only very recently that the Respondent had said that part of the charges related to repairs to the main roof of the building. It was the Applicant's submission that the letter forming production 20 was misleading.

11. The Applicant stated that it had taken the Respondent from July 2016 to May 2017 to point out that the invoice of 2 August 2016 for £864.00 from Architectural Facades & Repairs Ltd related to the main roof and not the balconies. The Applicant had trouble simply accepting that after a period of 10 months, these charges were for roof repairs.

12. The Applicant stated that he had incurred some costs in obtaining copies of the titles lodged as productions and had spent a great deal of time researching the law in preparation for the Hearing.

13. Mr McManus on behalf of the Respondent started that the decision to treat all the balconies in the block as common had been accepted by the majority of owners and that the Applicant was the only owner to object to the balconies being treated in this way. There had been a subsequent meeting of owners to discuss the issue and the majority were in agreement.

14. Mr McManus also stated that the Respondent had obtained a legal opinion from BTO Solicitors, Glasgow, to the effect that the balcony was common and formed a roof terrace (production 4).

15. Mr McManus disputed that the Respondent had deliberately attempted to mislead or provide false information in breach of the Section 2.1 of the Code. The Respondent had investigated water ingress into the properties and was of the view that the repairs were common to all the properties. The Respondent had tried to clarify why, in its view, the repairs were common.

16. Mr McManus accepted that there were a couple of instances where the Respondent had failed to comply with their timescales in responding to queries made by the Applicant. Mr McManus also accepted that following on from his colleague, Rachael Malarkey's e-mail of 11 July 2016 it did not appear that there

had been a further communication to the Applicant as indicated in the e-mail (production 13).

17. Mr McManus accepted that there had been a delay of about 10 months between the invoice of 2 August 2016 (production 22) being sent and it being confirmed that this in fact related to repairs to the roof and not the balconies. Mr McManus believed that this had come about because the Respondent had always believed that all the repairs were common.

18. The Applicant confirmed that if the tribunal found that the balconies were common then he would make payment of his share of the cost of repair. He was prepared to make payment of £86.40 in respect of the original roof repair. He wished the tribunal to determine whether or not the balconies formed common property.

19. Mr McManus queried whether the Tribunal could in fact make such a determination in terms of its jurisdiction or whether the tribunal had to decide whether or not the Respondent had complied with the Code of Conduct.

20. The Applicant confirmed that he was no longer insisting on his complaint in respect of a breach of Section 3.3 of the Code.

Findings in Fact:

1. The Applicant is the homeowner of flat 3, 9 Church Hill, Paisley, PA1 2DG. ("the Property")

2. The block forming 9 Church Hill, Paisley, is factored by the Respondent. It is responsible for managing and maintaining the common areas of the block.

3. The Respondent managed 9 Church Hill, Paisley, in accordance with the Deed of Conditions by Oakshaw Developments Limited registered in the Land Register on 25 October 2002. This deed sets out the management arrangements for the common parts of the properties number inter alia the block forming 9 Church Hill, Paisley.

4. The Deed of Conditions sets out the proportion of liability for common repairs for each of the proprietors within the block. Each proprietor in the block is liable for a 1/10th share of the cost of common repairs.

5. The Respondent became a registered property factor on 1 November 2012. Their property factor registration number is PF0000160. The Respondent's duty under Section 14(5) of the Act to comply with the Code arises from that date.

6. The Respondent initially received complaints of water ingress affecting flats 9/6 and 9/7 and in July 2016 advised the Applicant that there was also water ingress affecting flat 9/5. These flats are all located underneath the top floor flats with balconies. The cost of the repairs to the balconies in question amounted to £345.60. A further invoice from Architectural Facades & Repairs Ltd dated 2 August 2016 related to repairs to the roof at a cost of £864.

7. The Respondent issued the Applicant with an invoice for £86.40 in respect of the Applicant's share of the repairs to the roof and £34.56 in respect of the repairs to the balconies. Between August 2016 and May 2017 the Respondent failed to clarify the position with the Applicant that the larger invoice related solely to roof repairs and not repairs to the balcony.

8. The title deeds to the properties in the block make no reference to the balconies being common. The Respondent took legal advice and were advised by BTO, Solicitors, Glasgow, that the balconies were indeed common. The majority of home owners in the block accepted that the balconies were common.

9. The title deeds make no reference to the balconies forming part of the roof of the block. The balconies form part of the title of the proprietors of flats 8, 9 and 10.

Reasons for Decision

The Applicant presented a clear and reasoned case. The title deeds to the block defines the common parts as being (a) the solum upon which the block is erected; (b) the foundations, outside walls, gables, roof, velux windows (but not the velux windows used in connection with any apartment which shall be owned exclusively by the proprietors thereof) and the windows in the stair walls; (c) the external steps, step walls and light attached thereto; (d) all sewers, drains, main supply water pipes, rhones, gutters, conductors, downpipes, aerials, gas and electric mains and any other pipes, ducts, wires and transmitters exclusively serving the block or any part thereof, including any television and/or telecommunications cabling equipment exclusively serving the block; (e) the entrance door and doorway, the entrance, entrance hall and staircase with the stairs, landings, corridors, passageways, stair railing and the walls and ceilings enclosing the same and the lights therein and the fire-doors located in the entrance hall and on the landings; (f) the door entry system and the smoke pressurisation system; (g) all other parts and pertinents, fixtures and fittings of or in connection with the block which are in common or mutual to exclusively the proprietors of the apartments in the block. There is no mention of the balconies being common.

Where the title deeds are inconclusive it is appropriate to consider the terms of the Tenement (Scotland) Act 2004. Section 8(1) of that Act specifies that subject to sub-section (2) the owner of any part of a tenement building, being a part that provides, or is intended to provide, support or shelter to any other part, shall maintain the supporting or sheltering part so as to ensure that is provides support or shelter. Sub-section (2) provides that an owner shall not by virtue of sub-section (1) above be obliged to maintain any part of a tenement building if it would not be reasonable to do so, having regard to all the circumstances (and including) (in particular) the age of the tenement building, its condition and likely cost of any maintenance.

Whilst the tribunal acknowledge that the Respondent took legal advice from BTO Solicitors, it would appear from the advice tendered that the Solicitors only reviewed the Deed of Conditions and did not take into account the provision of the Tenement (Scotland) Act 2004. Whilst the Deed of Conditions is intended to control the management of the

common parts, the Tenement (Scotland) Act does have a role to play when the title deeds are silent on a specific issue.

In the circumstances therefore the tribunal decided that the Respondent was incorrect in concluding that the balconies formed a common part of the block and therefore exceeded its authority in instructing common repairs in respect of the balconies and levying a share of the cost upon the Applicant.

The tribunal accepted that the Respondent did not wilfully or deliberately intend to mislead or provide false information to the Applicant. It relied upon legal advice and in the circumstances the tribunal found that the Respondent did not breach Section 2.1 of the Code.

Mr McManus on behalf of the Respondent admitted that there had been delays in responding to the Applicant's e-mail of 12 July 2016 and there was certainly a delay in clarifying that the invoice of 2 August 2016 did not relate to repairs to the balconies but repairs to the roof. The delay here was of the order of 9 months. The tribunal did not think that this was reasonable and upheld the Applicant's complaint in respect of section 2.5 of the Code.

Whilst the tribunal acknowledge that the remaining proprietors in the block were prepared to accept that the balconies be treated as common parts that in itself would be insufficient to amend the title deeds. Any such amendment would require an application to the Lands Tribunal for Scotland.

As the Applicant withdrew his complaint in respect of a breach of Section 3.3 of the Code, the tribunal did not require to determine this part of the complaint.

Proposed Property Factor Enforcement Order

The tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) Notice.

Appeals

A homeowner of property factor 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.

Graham Harding

_ Legal Member

27 June 2017

_____ Date