Decision and Statement of Reasons under Section 19 of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/21/1272

Re : 30/5 Eyre Crescent, Edinburgh EH3 5EU ("Property")

The Parties:-

Aylmer Millen, 5 Hillpark Grove, Edinburgh EH4 7AP ("Homeowner")

James Gibb Limited, 4 Atholl Place, Edinburgh EH3 8HT ("Factor")

Tribunal Members:

Joan Devine – Chairing and Legal Member
Colin Hepburn – Ordinary Member

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") unanimously determined that the Factor had not complied with the Code of Conduct for Property Factors as required by section 14 of the 2011 Act in that there had been a breach of the Code in terms of section 7.1. In all the circumstances the Tribunal proposes to make a Property Factor Enforcement Order ("PFEO"). The Tribunal's decision was unanimous.

Introduction

1. In this decision the Property Factors (Scotland) Act 2011 is referred to as the "2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as the "Code" and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as the "Rules"

2. Following on from the Homeowner's application to the Tribunal which comprised documents received on 26 May 2021 ("Application"), the Convener, with delegated powers under section 96 of the Housing (Scotland) Act 2014, referred the Application to the Tribunal on 10 June 2021. The Tribunal had available to it, and gave consideration to, the Application, Written Submissions and supporting documents lodged by the Homeowner; Productions provided by the Homeowner, Written Submissions lodged by the Factor and the oral submissions made by both Parties at the Hearing.

Hearing

3. A hearing took place by teleconference on 12 August 2021. The Homeowner was in attendance. The Factor was represented by Roger Bodden and Jeni Bole

4. The Tribunal noted that at section 7 of the Application, the Homeowner had said that the Application was proceeding under section 1, 2.1; 3; 6.4 and 7.1 of the Code.

Findings in Fact

1. The Homeowner is the proprietor of the Property.

2. The Property is a flat within a development of 23 at Eyre Crescent Edinburgh.

3. The Factor performs the role of the Property Factor of the development.

4. The Factor had provided to the Homeowner a Written Statement of Services ("WSS").

5. The Factor has a Development Schedule specific to the Development of which the Property forms part.

6. The WSS contains a written complaints resolution procedure.

7. The Homeowner submitted complaints to the Factor on 1 February and 22 March 2021.

Findings in Fact and Law

1. The Factor had not provided information to the Homeowner that was false or misleading.

2. The quarterly statements provided by the Factor to the Homeowner were sufficiently clear that the Homeowner would know what he was paying for.

3. The Factor did not require to have in place a planned programme of cyclical maintenance.

4. The failure to timeously reply to the Homeowner's complaint made on 22 March 2021 was a failure by the Factor to comply with its written complaints resolution procedure.

Summary of Submissions

The Property

5. The Tribunal asked Mr Millen about the Property. He said that it was a freestanding building which contained 23 flats. There were two stairwells. The development sits in its own grounds. Abutting the development is a doctors' surgery. There is a shared access to car parking on the site. Mr Millen said that the Property was on the first floor facing west. He said that he had owned the Property since it was built in 1991. He does not live in the Property and has a long term tenant in residence. He moved out of the Property 15 years ago. The Factor had been the Property Factor for approximately 7 years having acquired the previous property factor. Before that the development was factored by the developer.

Section 1 of the Code

6. As regards the complaint under Section 1, the Tribunal noted that Section 1 provides that a home owner is to be given a Written Statement of Services ("**WSS**"). Mr Millen said that his complaint was not that the Factor had failed to provide a WSS but that there was an overarching obligation in the Property Factors (Scotland) Act 2011 to comply with the Code of Conduct. Mr Millen referred to Section 17 of the 2011 Act. He said that the constituent parts of his complaint demonstrate that the Factor has failed to comply with the Code.

Section 2.1 of the Code

7. The Tribunal noted the wording of section 2.1 which relates to the provision of information which is misleading or false.

8. Mr Millen said that his contention is that he had withdrawn an earlier complaint. In doing so he believed that he had reached an understanding of the "ground rules" on which his relationship with the Factor would proceed. He wished to establish common ground rules. He said that the ground rules are as described in his email of 26 June 2020. This email referred to what Mr Millen described as ground rules numbered 1 to 7. He said that these were agreed by Miss Bole of the Factor as a basis for moving forward. On the contrary, however, Mr Millen said that the relationship had moved backwards. He said that it was misleading of the Factor to enter into a good faith agreement and then not deliver on it. Mr Millen said that the Factor had failed to deliver on numbers 1 to 7 of the "ground rules". The Tribunal asked Mr Millen to state specific instances which demonstrated that the Factor had provided information which was misleading or false.

9. Mr Millen referred to "ground rule" 3 which related to communication. He referred to an email dated 5 May 2020 which replied to his email of 18 April 2020. He said that this was an instance of a delay in communication. The time elapsed in replying to the email was longer than set out in the WSS. He referred to Section 6.1.1 of the WSS which referred to acknowledgements being provided within 5 working days.

10. Mr Millen then referred to an email from the Factor dated 12 February 2021 which was a response to his email of 15 January 2021. Again, the time scale was outwith that provided in the WSS.

11. Mr Millen then referred to "ground rule" 5. He said that what had happened was a "departure from the norm". Mr Millen said that what he meant from that was a requirement to account for expenditure which was other than routine. He said that expenditure was incurred by the Factor and simply not explained.

12. Mr Millen referred to the document entitled "Resurrection of Complaint" and dated 15 January 2021. He referred to page 2 of the document which set out an illustration of issues regarding quarterly accounts. Mr Millen said that the first that homeowners are aware of expenditure is when they receive a quarterly account. That meant that when something was outwith the normal expenditure, such as garden maintenance, the homeowner did not know about the additional expenditure until it had been incurred. Mr Millen said it was not unreasonable in his view to seek to enquire about that expenditure. Mr Millen referred to the recurring theme of confusion regarding electricity costs on the communal stairs. He said that was a major area of complaint.

13. Mr Millen said that the "ground rules" arose from extensive discussion with Ms Bole and exchanges of correspondence and Mr Millen's attempts to distil what had been agreed as common performance indicators. He said that his email of 26 June 2020 was a reminder of the email exchange on 4 and 8 November 2019 in which parties had agreed the "ground rules".

14. The Tribunal asked Mr Millen what document they should look at to evidence agreement by the Factor to the "ground rules". Mr Millen said that the Tribunal should look at the emails of 4 and 8 November and 9 December 2019.

15. Mr Millen then referred to Section 6 of the Development Schedule which refers to bimonthly inspections being carried out. He said that these are not carried out. He said that this was a departure from the agreed "ground rules".

16. On behalf of the Factor Mr Bodden said that he wished to make some opening remarks. He said that the fundamental basis of an application to the

Tribunal was that the Factor was aware of and had failed to resolve a complaint. Mr Bodden said that the Factor did not understand the complaint in this case despite having sought for it to be explained. He said that he was now in a difficult position of sitting in a hearing and only now beginning to understand the complaint.

17. As regards the complaint under Section 2.1 Mr Bodden said that the "ground rules" seemed to form the basis of the complaint. He said that these originated in an email of 4 November 2019. He said this was Mr Millen's view on the service provided by the Factor. He said that what was narrated was a series of complaints and observations, not rules. He said at no point had the Factor agreed to a set of "ground rules". He referred to the reply from the Factor of 8 November 2019.

18. As regards the examples cited of false and misleading information, he noted the reference to the first of a homeowner being aware of reactive repairs was when they received a bill. He said that Mr Millen may prefer that the Factor communicated in advance about repairs but Section 14 of the Deed of Conditions did not require that. Indeed it may be thought that one of the main reasons to have a factor was so that they would deal with repairs. Mr Bodden said that there was no evidence that the Factor had provided false and misleading information.

19. Mr Bodden referred to another example referenced which was routine inspections. He said that there was little recognition that the Factor had not carried out routine inspections for 18 months due to the pandemic but had communicated that throughout the organisation. He said that property inspections were carried out prior to the pandemic.

20. Fundamentally, Mr Bodden said that there was no agreement with the Homeowner on "ground rules".

21. As regards electricity bills, Mr Bodden said that the Factor had experienced significant problems with the energy provider which had made the process of invoicing difficult. He said that there had been amendment of accounts recently. He said their invoicing was based on the information provided by the electricity supplier.

22. Ms Bole said that the position with the electricity supplier was a source of frustration. She said that the electricity provider had moved to Opus. There were issues around them providing invoices. There were also issues with the broker. She said that for some time no invoices at all were received and then there had been gaps, then there were a series of corrections, both debits and

credits were issued. She said that there was a disparity in the charges for the two stairwells. That was looked into. There was a higher rating for one stairwell over the other. In any event she said that all charges were split equally amongst all of the flats.

23. Mr Bodden said that the Homeowner had a liability for 1/ 23rd of the overall costs and it was therefore irrelevant if there was a difference in the charging for the two stairwells.

24. Mr Millen then commented on the reference to routine property inspections. He said that there were none prior to the pandemic. Mr Millen noted that there had been an inspection carried out in September 2020.

25. As regards electricity charges he said that the disparity between the charges for the two stairwells was relevant as it is a bill that he requires to pay. He said that the issue regarding the electricity charges had been ongoing for 4 years. That was unreasonable. He said that he had been disadvantaged. He said that he did not understand the accounts provided. He said that electricity bills are sometimes processed as notional bills so as not to build up a backlog.

26. Ms Bole told the Tribunal that there were no electricity charges for a period as invoices were not provided by the supplier. She said that the Factor had considered notional charges but had not implemented that. They had only charged homeowners based on physical bills received from the supplier.

27. As regards property inspections, Ms Bole said that there had been a few property managers for the development. Property inspections were recorded on paper, there was a tick box exercise. This was then scanned onto the system. She said that this has now integrated into the IT system and when a property inspection took place this was uploaded onto the portal. She said that the inspection in September 2020 took place when there had been some easing in restrictions during the pandemic. Inspections then had to be suspended again. She said that for the period prior to March 2020 she would need to check the system to see if property inspections were carried out.

28. Mr Bodden said that the activity on invoices in respect of repairs would show that inspections were taking place. He said that evidenced that inspections were being carried out.

29. Mr Millen said that there had been no routine inspections for 4 years. Prior to that it had been the custom for the Factor to advise homeowners when an inspection was being carried out so that they could raise issues.

30. The Tribunal asked the Factor if it was policy to provide notification to homeowners of inspections. Mr Bodden said that it was not.

Section 3 of the Code

31. The Tribunal noted that section 3 relates to financial obligations.

32. Mr Millen said that the headline obligation on the Factor in terms of section 3 was that homeowners should know what they were paying for. He said that none of the sub-paragraphs in Section 3 were specifically relevant but a homeowner should know what they were paying for. That was not, however, the case at the Property. Mr Millen said that his complaint was that when concerns were expressed the explanations provided were too prolonged and extensive.

33. Mr Millen said that relevant instances were summarised in his document entitled "Resurrection of Complaint". At page 2 he provided illustrations of concerns he had about quarterly accounts. This was relevant for quarterly accounts from the period December 2019 to December 2020 and up to the quarterly accounts provided on 8 June 2021. He said that homeowners did not know what they were paying for. He said that where charges were not material and the account indicated broadly what it was that was fine but if a charge was not explained the Property Factor should anticipate that and provide an explanation in advance.

34. The Tribunal asked if homeowners received backup invoices from the contractor with the quarterly account. Mr Millen said that they did not.

35. Mr Bodden said that he was struggling to understand the complaint under this heading. He said that the bills presented were straightforward. The bills explained what each charge was for. Mr Bodden said that he thought that the Homeowner was confused around the requirement on the Factor to notify charges in advance when they were above a certain level.

36. Mr Millen said that he did not require notification in advance. What he had discussed with Ms Bole was that a departure from routine expenditure that involved significant charges should be explained at the time of the invoice. Mr Millen said that correspondence responding to queries about invoices after the event was not helpful. He said it was reasonable to expect an explanation at the time of the invoice.

Section 6.4 of the Code

37. The Tribunal noted the terms of section 6.4 which relates to periodic property inspections and a planned programme of maintenance.

38. Mr Millen said that the Development Schedule includes a provision for periodic property inspections so there should be a programme of works. He said there was no evidence of a programme of works. He said that repairs undertaken were reactive. He said that there was no evidence of a process for maintenance of the development. He noted that the Development Schedule does not provide for planned maintenance, only routine inspections but he thought it was not unreasonable to expect planned maintenance.

39. The Tribunal noted that the Development Schedule contained no provision for a sinking fund. Reference was made to Section 9. The Tribunal noted that would usually be used for planned maintenance.

40. Mr Bodden said that Section 6.4 of the Code talks about property inspections and planned programme of works. He said that a planned programme of works was not required by the Development Schedule. There was no sinking fund so there had been no agreement to cyclical maintenance. In those circumstances there had been no breach of Section 6.4. The Homeowner may prefer if there was planned maintenance but that was perhaps not the view of the majority of homeowners at the development.

41. Mr Millen asked if Mr Bodden knew what other homeowners wanted. Mr Bodden said that no other homeowner had expressed a desire for planned maintenance.

Section 7.1 of the Code

42. The Tribunal noted the terms of section 7.1 which relates to the requirement for a written complaints resolution procedure.

43. Mr Millen said that the Factor must follow the complaints resolution procedure. He referred to Section 7 of the WSS. It set out stages for the complaints procedure. He said that the Factor had not followed its own complaints procedure in response to his complaint.

44. The Tribunal asked Mr Millen to identify the initial complaint. He referred to his emails of 1 February to 9 April 2021. The email of 1 February referred to "attached correspondence". Mr Millen said that this was the summary of complaint document dated 18 June 2019 and the resurrection of complaint document dated 15 January 2021. Mr Millen noted that he had emailed the email address provided for complaints. This was then picked up by Ms Flanagan who said that she could not register the complaint due to its historical context. Mr Millen referred to her email of 1 February 2021. Mr Millen said that he persisted but then paused the complaint to allow Ms Bole to intervene. That did not resolve matters so he escalated the complaint to

Ms Kirkwood who was the local operations director. He said that he received an acknowledgement from her but no other response. He was then told that Ms Kirkwood was on sick leave.

45. Mr Bodden said that the Factor had a complaints procedure in the WSS. He said it was possible that Mr Millen did not receive a timely response to his emails but that was because of the way in which the complaint was presented. He said it had been confused. He said a historic complaint had been presented. He said that there was a disparity between the documents provided such as the resurrection of complaint and the addendum to complaint and what was being discussed at the Tribunal today. Mr Bodden questioned whether the Factor had been provided with a comprehensive complaint to which they could respond or had they simply been presented with a series of documents?

46. Mr Millen said that the resurrection of complaint document summarises and describes the basis on which he was complaining. He said it was clear from the documents provided the nature of the complaint. He said he did not understand how the Factor could now say there was a disparity in the documents.

Property Factor Duties

47. Mr Millen said that in his view there had been a failure to comply with the Property Factor duties to a reasonable standard. Underlying that was the failure to execute duties to a reasonable standard. He said that the Factor had failed to deliver core services to a reasonable standard with no expectation of immediate and sustained improvement.

48. Mr Bodden said that he was happy for the Tribunal to take a view on what was reasonable. He said that Mr Millen had made multiple applications to the First-tier Tribunal and clearly sought a standard which exceeded that which was considered reasonable by other homeowners at the development.

Remedy Sought

49. Mr Millen said that he sought an apology at an executive level and an undertaking to comply with the WSS and Code. He said that he also sought compensation.

50. Mr Bodden said he had nothing to add. He would accept the decision of the Tribunal. He did not know what the Factor required to apologise for and if there was a requirement to pay compensation he would want to understand why.

The Code

51. Section 2.1 of the Code states:

"*You must not provide information which is misleading or false.*"

52. Section 3 of the Code provided in the preamble:

"…*Homeowners should know what it is they are paying for*….."

53. Section 6.4 of the Code states :

"*If the core service agreed with homeowners includes periodic property inspections and / or a planned programme of cyclical maintenance, then you must prepare a programme of works"*

54. Section 7.1 of the Code states :

"*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."*

Tribunal Findings and Reasons for Decision

55. The Tribunal determined that there had been no breach of the Code under section 2.1.

56. The Homeowner's basis for complaint under Section 2.1 related to "ground rules" which he said had been agreed with the Factor. However the Tribunal found that it had not been established that "ground rules" had been agreed to by the Factor. The Tribunal had been presented with no evidence of the Factor providing information which was misleading or false.

57. The Tribunal determined that there had been no breach of the Code under section 3. The Homeowner's basis for complaint under section 3 was that the invoices provided did not allow him to understand what he was paying for. The Tribunal noted that the Factor did not supply homeowners with copy invoices from contractors when items appeared on invoices which were for non-routine payments. The Tribunal determined that this did not amount to a breach of the Code but was of the view that it would assist homeowners if such invoices were provided at the time of issuing quarterly bills. Alternatively, they could be uploaded to the portal referred to by the Factor. It would also be helpful if contracts for routine maintenance were also available on the portal.

58. The Tribunal determined that there had been no breach of the Code under section 6.4. The Homeowner's basis for complaint under section 6.4 was that the Development Schedule provided for periodic property inspections. In those circumstances there should be a programme of works. The Tribunal noted that there was no provision in the Development Schedule for a sinking fund which would usually be used for cyclical maintenance. The Development Schedule did not oblige the Factor to put in place a planned programme of cyclical maintenance. The Tribunal noted that the Deed of Conditions produced by the Homeowner provided for proprietors approving spend for major works (as defined in the deed). In all the circumstances the Tribunal was of the view that the Factor did not require to put in place a programme of works.

59. The Tribunal determined that there had been a breach of the Code under section 7.1. The Homeowner's basis for complaint under section 7.1 was that the Factor had not followed the complaints resolution procedure set out in the WSS. Section 7 of the WSS dealt with complaints. It provided at 7.4 that formal complaints should be sent to a designated email address. At 7.5 The WSS provided that acknowledgement of receipt of a complaint would be issued within 5 working days. If a complaint was accepted it would be registered and allocated a unique number. If it was rejected the homeowner would be advised within 5 working days along with reasons for the rejection. At 7.6 the WSS provided that formal complaints would be investigated and the conclusions would be reviewed and approved by a senior manager. It states that the investigation process should take no longer than 25 working days.

60. The Tribunal noted that The Homeowner sent an email to the designated email address for complaints on 1 February 2021 at 08.22. The email was headed "FORMAL COMPLAINT". Ms Flanagan replied the same day saying she was unable to register the complaint. She said she was unable to resurrect a complaint which had been through the final complaints stages. She asked the Homeowner to submit his complaint with specific references to subsequent issues which had not been resolved. The Homeowner replied the same day at 15.09 attaching a document headed "summary of complaint" dated 18 June 2019 and another headed "resurrection of complaint" which was dated 15 January 2021. On 22 March 2021 at 10.01 the Homeowner sent an email to the designated email address for complaints. The email was headed "FORMAL COMPLAINT". He said that in the circumstances his complaint was resumed and re-submitted. No reply was received. The Homeowner sent an email following this up on 9 April 2021 at 9.53. He sent a further follow up email on 10 May 2021 at 8.10 to Angela Kirkwood. He received a reply from Suzanne Cameron on 10 May 2021 at 8.35 saying that

Ms Kirkwood was absent due to ill health. The Homeowner replied to Ms Cameron the same day noting that his emails of 9 April and 22 March expressed his complaint. The Homeowner received a lengthy reply from Jeni Bole on 14 May 2021 at 20.00. In the email Ms Bole expressed her sincere apologies for the late response.

61. The Tribunal noted that the complaint of 1 February 2021 had received a reply the same day which rejected the complaint. However the Homeowner did not receive a reply to the complaint made by email of 22 March 2021. He followed up on 9 April and 10 May 2021 and only then received a reply. The Tribunal determined that the Factor had failed to follow the complaints resolution procedure set out in the WSS.

62. Having determined that there had been a breach of the Code the Tribunal went on to consider whether an award of compensation should be made. Had the Factor engaged with the Homeowner following the submission of the complaint on 22 March 2021, the application to the Tribunal may not have been necessary. Having considered the facts and circumstances the Tribunal determined that a figure of £250 in respect of compensation would be appropriate.

Property Factor Duties

63. The Tribunal determined that the failure to comply with the Code as outlined in this Decision was a breach of the Property Factor Duties.

Property Factor Enforcement Order

64. The Tribunal proposes to make a Property Factor Enforcement Order ("PFEO") the terms of which are set out in the attached Notice in terms of section 19(2) of the 2011 Act.

65. The Parties will be allowed to make representations on the proposed PFEO.

Appeals

66. In terms of section 46 of the Tribunals (Scotland) Act 2014 a homeowner or 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.

Signed Date : 23 August 2021
Joan Devine, Legal Member