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

Decision on Homeowner's application: Property Factors (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: FTS/HPC/PF/21/1125

14 Maxwell Street, Morningside, Edinburgh EH10 5HU
("the Property")

The Parties:-

Mr George Millar, Flat 50, 14 Maxwell Street, Edinburgh EH10 5HU
("the Homeowner")

FirstPort Property Services Scotland Limited
("the Factor")

Tribunal Members:
Graham Harding (Legal Member)
Colin Campbell (Ordinary Member)

DECISION

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

The Factor has not failed to comply with its duties under section 14(5) of the 2011 Act.

The decision is unanimous

Introduction

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"

1. By application dated 11 May 2021 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 2.1, 2.2 and 3 of the Code and had failed to carry out its property factor's duties. The Homeowner provided the Tribunal with detailed written representations together with an Inventory of Productions in support of his complaint.

2. By notice of Acceptance dated 27 May 2021 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned.

3. By emails dated 23 June 2021 the Factor submitted a written response to the Homeowner's complaint.

4. By email dated 18 July 2021 the Homeowner submitted a further Inventory of Productions.

Hearing

5. A hearing was held by teleconference on 29 July 2021. The Homeowner attended in person. The Factor was represented by Ms Elaine Bauld, Regional Manager and Ms Carole Renton, Area Manager.

Summary of submissions

Section 2.1 of the Code

6. The Homeowner referred the Tribunal to his written submissions and suggested to the Tribunal that his complaint in respect of this section of the Code was mainly in relation to the new alarm system that was being installed at the development. The Homeowner explained that one of the reasons given by the Factor for replacing the existing system was that the current system used an analogue connection and would not function when the system was switched to a digital system by 2025. The Homeowner said that owners had been told that the new system could cope with both analogue and digital connections. The Homeowner referred the Tribunal to the Factor's Production Number 6a and suggested that it was significant that the communication from the Sales Representative at Tunstall Healthcare, Mr Queenan only referred to what the new system could do and not what the old system could do. The Homeowner went on to say that the development already has superfast broadband available and that would not be the case if there was only a copper connection. The Homeowner submitted that the Factor had therefore provided information which was misleading or false in breach of Section 2.1 of the Code. The Homeowner added that he thought the Factor had probably misunderstood the information supplied by the people who had supplied the new alarm system.

7. For the Factor Ms Bauld explained that the principal reason for upgrading the alarm system had been because the existing system had past its useful life and was obsolete. There were health and safety issues associated with its continued use and the fact that the telephone network was being digitalised by 2025 was a side issue. The fact that the new system would operate with both analogue and digital systems added additional comfort when making the choice to install it. Ms Bauld said that it was not being suggested that the new system had to be upgraded because of digitalisation. Ms Renton went on to explain that over the past few years there had been discussions with the Homeowner and perhaps there had been a misunderstanding on his part that the development was fully compatible with the digital system. This was not the case. Ms Renton advised the Tribunal that BT Open Reach had recently carried out an investigation at the property and had returned two weeks

previously to bring in a fibre optic supply so that every owner has the opportunity to connect to superfast broadband. Ms Renton said that she had been through this with BT at another development about fifteen months ago and it was entirely separate from the issue with the replacement of the alarm system. She explained that the old system had significant safety issues and when put to the owners they had voted to replace it. It had nothing to do with moving from an analogue to a digital system.

8. In response to a query from the Tribunal the Homeowner referred it to his Production number 30a as evidence that the Factor was forcing the owners to install a new system but the connection was digital already and was working. For the Factor Ms Bauld said that she could only reiterate what had already been said. BT Open Reach had confirmed that everything was not digital and that she had requested an email from Tunstall to confirm that the existing system was obsolete and that the new system would work with both analogue and digital connections. She explained that her main concern was that the old system was failing and owners were at risk as the system was not connecting to the development manager but had to go through to a call centre. There was therefore a delay of a few minutes before the manager could be contacted. Also, she said anyone coming to the front door was also redirected to the call centre. She felt this had been misunderstood by the Homeowner, the system had to be replaced because it had failed not because of digitalisation. Ms Bauld added that although the Homeowner claimed to have superfast broadband no exercise had been caried out to determine where the connection existed from.

Section 2.2 of the Code

9. The Homeowner explained that the Factor had accused him of spreading rumours and referred the Tribunal to an email from Carole Renton dated 16 December 2019 (Homeowner's Production 11a). The Homeowner said that he considered that the email was abusive. He said he had sent the Factor reasoned arguments with regards to the Deed of Conditions and the heating of the corridors backed up with facts and had been annoyed at the response given that he had he thought contributed quite a lot to the development over the past two years. He said that even if he had been wrong in his interpretation of the Deed of Conditions his arguments were still not unreasoned or unsubstantiated. The Homeowner went on to say that the email could be interpreted to suggest that he was a dictator and that would be abusive.

10. Ms Bauld explained that Ms Renton's email had been in response to a suggestion by the Homeowner that the Factor had been submitting accounts that were improper, incorrect or dishonest. She explained that the company had been the factor at the development since 1997 and the accounts were properly presented. The Homeowner's comments had been entirely subjective. She said Ms Renton's response was not abusive. She explained that owners democratically vote and the reference to a dictatorship could equally apply to the Factor as anyone else. Ms Bauld acknowledged that anyone was entitled to express an opinion about the Factor and its handling of

the accounts and to dispute elements of the account but that expressing such opinion was going too far when extended to posting accusations on noticeboards. Ms Bauld also pointed out that the majority of other owners did not support the Homeowner's views.

Section 3 of the Code

11. The Homeowner submitted that the development accounts were wrong and again referred the Tribunal to his written representations. Essentially it was the Homeowner's position that the heating of the corridors should not be a common charge notwithstanding the terms of the Deed of Conditions as the temperature to which the corridors should be heated is not specified. He submitted that the cost of heating the common parts had resulted in extravagant practices in heating the corridors at significant cost. The Homeowner suggested that another method of charging owners for heating the corridors should be found but did not suggest how the cost should be apportioned. The Homeowner pointed out that the Heaters in the corridors were not thermostatically controlled. They heated the corridors in the early morning when no-one was about and individual owners were able to turn the heaters up in their corridor if they wished and he recalled that one owner who had now left the development had his corridor very hot indeed.

12. The Tribunal queried how the Factor would deal with a request from a majority of owners to not heat the corridors. Ms Renton explained that as the Factor had a dual duty to manage the development as well as factor it they would be very cautious about people's health. She went on to say that the heaters in the corridors were turned off in the summer and came back on in autumn and winter. Their use in the autumn and spring was monitored with only as many heaters as necessary being switched on depending on the weather. She said a common-sense approach was adopted. She thought the system that was in place was fair and reasonable. Some residents used the corridors for exercise and they should be at a reasonable temperature.

13. Ms Bauld said that the Factor rejected the Homeowner's submission that heating the corridors should not be a common charge. She explained that there were 53 flats at the development located over three floors. The Factor could not prevent individual owners from turning heaters up or down. The Deed of Conditions was clear in its terms at Clause First (9)(i).

14. The Homeowner re-iterated his position that the heating should not be a common charge. He also said that the corridors were transitory zones and that no-one benefited from them being heated. He said he frequently went round them and never saw people in the corridors.

15. Ms Bauld said it was her interpretation of the Homeowner's complaint that the corridors were being overheated as a result of the behaviour of other residents. Whilst she recognised the issue this was not something the Factor had control over. It would be for owners to agree a policy over the use of the heaters and the Factor would then implement that policy. She explained that thermostatic control may be an option and the Factor was looking into the

availability of grant funding. The Factor also recognised that the current heating system was not the most efficient and again would take on board to look at alternatives if instructed by the owners.

16. The Homeowner submitted that the use of the contingency fund to meet the cost of pest control was a misuse of the fund as it should not be used for small sums. There had been a payment of £480.00 in 2018 and another in 2019 for the same amount. Ms Renton explained that there had been a single contract for pest control in 2018 for £960.00 that was paid in two instalments, one that appeared in the 2018 accounts and one in the 2019 accounts. She said it was not a recurring contract.

17. The Homeowner referred the Tribunal to Clause Third(m) of the Deed of Conditions in support of his contention that the contingency fund should not have been used to meet the cost of the pest control. However, the Tribunal pointed out that in addition to being used for costs of major items of capital expenditure it was also to be used for meeting the cost and expenditure incurred less frequently than once in each year.

18. The Homeowner referred the Tribunal to his written representations regarding common charges being applied for the replacement of locks to owners' front doors at the development and submitted that these were not appropriate charges.

19. Ms Renton explained that on a couple of occasions it had been necessary to purchase replacement keys for guest rooms at the development. She explained that over time the barrels on the locks became worn and needed to be replaced. In that case they would be a common charge. Where it was an owners own door and the had lost a key or the barrel needed replaced then as the Factor had to source the key or barrel the initial charge had in the past been put through the common charge account and then the cost recovered from the individual owner and credited back to the account.

20. Ms Bauld accepted that this had been confusing and difficult to follow in an audit trail. Going forward a new system was being implemented where the payment by the owner for the new lock or key would be shown clearly in the accounts along with the purchase of the item so there would be a clear audit trail.

21. The use of the contingency fund to meet the cost of the new front doors. The Tribunal queried with the Homeowner if he accepted the Factor's submission that there was a difference between "Major Works" as defined in Clause First (14) of the Deed of conditions and "major items of capital expenditure" as stated in Clause Third(m) of the deed. The Homeowner acknowledged that he did.

Property Factor's Duties

22. The Homeowner referred the Tribunal to his comments in his application in this regard and confirmed that his complaint was that the Factor had failed in

its duties by failing to properly interpret the Deed of Conditions and by breaching the above sections of the Code.

The Tribunal make the following findings in fact and law:

23. The Homeowner is the owner of Flat 50, 14 Maxwell Street, Morningside, Edinburgh EH10 5HU ("the Property")

24. The Property is a flat within 14 Maxwell Street, Morningside, Edinburgh EH10 5HU (hereinafter "the Development").

25. The Factor performed the role of the property factor of the Development.

26. The alarm system at the Development had reached the end of its useful life, was obsolete and spare parts were no longer obtainable and the system required to be replaced.

27. The old system no longer allowed residents to contact the Development manager direct and calls were directed through to a call centre as were callers to the front door of the Development.

28. The replacement system installed at the Development is compatible with both analogue and digital telephone connections.

29. The email from Ms Renton to the Homeowner dated 16 December 2019 was neither abusive, intimidating, or threatening.

30. The heaters in the corridors at the Development were installed by the developers McCarthy & Stone (Development) Limited who were responsible for drafting and registering the Deed of Conditions burdening the Development.

31. The corridors of the Development are part of the common parts.

32. The cost of heating the corridors is included in the cost of heating the common parts.

33. It is a matter for the owners to determine the level, type and frequency of heating the corridors by majority vote.

34. The cost of pest control in 2018 and 2019 arose from a single year’s contract spread over two accounting years. It was not a recurring contract and was therefore correctly charged to the contingency fund.

35. The Factor’s accounting for replacement locks and keys did not provide a clear audit trail although it generally appeared that individual owners were charged for replacing the locks at their own properties.

36. The Factor has introduced a new method of accounting for replacement locks and keys to provide a clear audit trail in the future.

37. The cost of new front doors at the Development was properly charged to the contingency fund.

Reasons for Decision

Section 2.1 of the Code

38. The Tribunal was satisfied that the principal reason for the Factor recommending that the alarm system be replaced was that the original system had outlived its useful life. Replacement parts were no longer available and the system was obsolete. There were obvious safety concerns given that residents, some of whom may be elderly and vulnerable were unable to contact the Development manger directly in an emergency and were instead directed to a call centre.

39. The Tribunal noted that the Homeowner had access to superfast broadband and that there was an advert for it on a BT cabinet on the street outside the Development. The Tribunal also noted that BT Open Reach had attended at the Development with a view to installing fibreoptic connections to each property within the Development. The Tribunal is aware that currently consumers are offered FTTC (Fibre to the Cabinet) and FTTP (Fibre to the Property) connections for broadband. The Tribunal was not presented with any evidence from the Homeowner as to what type of connection he had. Given the recent investigations carried out by BT it seems likely that they are in the process of installing an FTTP connection but that has not been confirmed by the Factor.

40. It was not entirely clear from the email from Tunstall Healthcare that the original system would not be compatible with an entirely fibreoptic system although that seemed to be implied but in any event given that the system itself was obsolete the Tribunal accepted that compatibility with digitalisation was as Ms Bauld submitted very much a side issue and the Tribunal was satisfied that the Factor had not provided the Homeowner with false or misleading information or even if it had it was not in any way deliberate or wilful to the extent that it would have any impact on the decision making process as regards replacing the original alarm system.

41. The Tribunal was therefore satisfied that the Factor was not in breach of this section of the Code.

Section 2.2 of the Code

42. The Tribunal carefully considered the Homeowner's submissions with regards to the email of 16 December 2019 being abusive, intimidating or threatening. Whilst the Tribunal accepted that the Homeowner might not have liked the content of the letter as he may well have felt he was in the right as regards his interpretation of the Deed of Conditions and the submissions he

had made regarding the accounts, the Tribunal was completely satisfied that the email contained nothing that could even remotely be said to be abusive, threatening or intimidating. There was in the Tribunal's view no suggestion on the part of Ms Renton that the Homeowner was a "dictator" but rather that she was stressing the importance of working things out democratically through discussion.

43. The Tribunal was satisfied that the Factor was not in breach of this section of the Code.

Section 3 of the Code

44. The Tribunal was satisfied that the Deed of Conditions was quite clear in its terms and required to be construed strictly. It was not open to interpretation in the manner suggested by the Homeowner. It was perhaps unfortunate that a more efficient and better controlled heating system had not been installed by the developers but that was not the fault of the Factor. It would be open to the owners to decide to replace the existing heating system with a more efficient thermostatically controlled system should a majority of owners consider this to be a worthwhile exercise. In the meantime, it is quite apparent that the cost of heating the corridors falls to be met as a common charge. The Homeowner's submissions as regards them not forming part of the common charge are to put it bluntly entirely untenable.

45. It was apparent that the Homeowner had misunderstood the terms of Clause Third (m) of the Deed of Conditions. The Contingency fund was not only there to be used for payment of major items of capital expenditure but also for meeting the cost of expenditure incurred less frequently than once in each year. In the case of the pest control contract although payment had been made over two accounting years the actual contract was for a single year. It was not a recurring contract and therefore was not included in the annual budget but correctly charged to the contingency fund.

46. The Tribunal had a concern that the way in which the Factor had previously shown the allocation of the cost of replacement locks and keys in the common charge account and the income subsequently received from individual owners did not disclose a clear audit trail. The Tribunal understood why the Homeowner had expressed concerns in this regard. However, given the explanation provided, the Tribunal was satisfied that owners were not being asked to meet the cost of the replacement of other owners' door locks and that payment was received for the cost of replacement locks. The Tribunal was also satisfied that going forward the Factor had acknowledged that a more transparent system was necessary and they had taken steps to provide a clear audit trail in the future.

47. With regards to meeting the cost of the replacement front doors from the contingency fund the Tribunal noted that the Homeowner had accepted that there was a difference between the definition of "Major Works" in Clause First (14) of the Deed of Conditions and "major items of capital expenditure "in Clause Third(m). It follows therefore that the concerns raised by the

Homeowner with regards the use of the contingency fund to meet the cost of the replacement front doors was unsubstantiated as the Factor was correct in using the contingency fund for this purpose.

48. The Tribunal was satisfied that the Factor had correctly interpreted the Deed of Conditions and had properly charged items either as common charges or drawn payment from the contingency fund when appropriate. The Tribunal was therefore not persuaded that the Factor had failed to carry out its property factor's duties.

49. Having carefully considered all the written representations of both parties together with the oral submissions the Tribunal has determined that the Homeowner's complaints cannot be upheld and that the Factor has not failed to comply with its duties under section 14(5) of the 2011 Act and has not failed to carry out its property factor's duties.

50. The decision of the Tribunal is unanimous.

Appeals

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.

Graham Harding Legal Member and Chair

9 August 2021 Date