Decision of the of the First-tier Tribunal for Scotland Housing and Property Chamber
In an Application under section 17 of the Property Factors (Scotland) Act 2011

by

Ryan Grant, Flat 3, Bothwell House, The Furlongs, Hamilton ML3 0DQ ("the Applicant")

Turner Cunningham and Watt, 40 Carlton Place, Glasgow G5 9TS ("the Respondent")

Chamber Ref: HOHP/PF/16/0120

Re: Flat 3, Bothwell House, The Furlongs, Hamilton ML3 0DQ ("the Property")

Tribunal Members:

John McHugh (Chairman) and Susan Napier (Ordinary (Surveyor) 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 The Applicant is the owner and of a flat at 3 Bothwell House, Hamilton ("the Property").

2 The Property is located within a development known as The Furlongs ("the Development").

3 The Development includes five separate buildings and associated parking and common areas. The buildings were originally accommodation for a college but were converted into residential flats in the 1980s.

4 The buildings are known as Avon House, Bothwell House, Brandon House, Cadzow House and Clyde House.

5 Each building consists of three linked structures.

6 There are a total of 239 individual dwellings within the Development.

7 The Applicant is the owner of other flats within the Development.

8 In 2011, the Property was let by the Applicant to a tenant.

9 The Respondent commenced as factor of the Development in 1990 and has remained in place since.

10 A Deed of Conditions by Doonfoot Construction Company Limited recorded 21 February 1985 ("the Deed of Conditions") governs the arrangements which apply among the Respondent and homeowners within the Development including the Applicant.

11 The Deed of Conditions provides for management costs to be categorised as relating either to a specific block or to the whole Development. Such costs are then to be allocated among proprietors according to the rateable value of the individual flats.

12 The Respondent raised an action against the Applicant for recovery of management charges at Hamilton Sheriff Court. The action was defended and a counterclaim was presented by the Applicant. Decree as craved was pronounced in the principal action and absolvitor was granted in respect of the counterclaim on 30 March 2016.

13 The property factor's duties which apply to the Respondent arise from the Respondent's Written Statement of Services and the Deed of Conditions. The duties arose with effect from 1 October 2012.

14 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 (7 December 2012).

15 The Applicant has, by his representative's correspondence, including that of 15 September 2016 notified the Respondent of the reasons as to why he considers the Respondent has failed to carry out its property factor's duties and its obligations to comply with its duties under section 14 of the 2011 Act.

16 The Respondent has failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at Wellington House, Glasgow on 24 March 2017.

The Applicant was present at the hearing and was represented by Erica Young, Citizens Advice Bureau In-Court Adviser at Hamilton Sheriff Court.

The Respondent was represented at the hearing by its director, Neil Watt and its solicitor Michael Ritchie of Hardy MacPhail.

Neither party called additional witnesses.

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 7 December 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 a Deed of Conditions by Doonfoot Construction Company Limited recorded 21 February 1985 which we refer to as "the Deed of Conditions" and the Respondent's undated Statement of Services which we refer to as the "Written Statement of Services".

Incidental Matters

The Applicant applied to be allowed to lodge certain documents late. These were a letter by the Respondent to the Applicant relating to a collapsed drain, some photographs of water damaged areas of the Property and a report by Wise Property Care from 2011. These had been provided to the Tribunal and the Respondent on 22 March 2017. It was explained that the delay in their production arose because these were among certain papers which had been held by the Applicant's late mother and only recently discovered. The Committee considered the terms of Regulation 19 of the Regulations and determined that there had been good reason for the late lodging of the documents and that no unfairness would result from their being allowed to be received. Accordingly, the Tribunal decided to allow the documents to be lodged.

Preliminary Arguments

Res Judicata

The Respondent advances a preliminary argument that the matters which are the subject of the Application are *res judicata* because of the existence of the decree of the Sheriff dated 30 March 2016.

The legal principle of *res judicata* applies so that a matter which has already been decided between the same parties by one tribunal may not then be the subject of the decision of a second tribunal. Five criteria must be satisfied before res judicata may apply: A) there must have been an earlier determination by a competent court; B) the determination must have been granted in a contested action; C) the earlier determination must have been in respect of the same subject matter; D) the points of controversy must be the same; and E) the same parties must be involved.

We have been provided with a copy of the Amended Certified Copy Record dated 9 February 2016 in an action with Court reference A430/14 at Hamilton Sheriff Court. In that action, the Respondent was pursuer and the Applicant the defender. The Respondent sought payment of the sum of £6257.89 in respect of unpaid management fees for the Property and other properties within the Development owned by the Applicant in respect of a period between 2011 and 2014.

The Applicant defended the action and counterclaimed in the sum of £17,016.02. The basis of the defence and counterclaim were that the Respondent had failed in its implied contractual obligation to carry out its duties to the standard of the reasonably competent managing agent acting with reasonable care. In particular, the Applicant complained of the Respondent's failure to adequately respond to a problem of water ingress in the common corridor of Bothwell House which began in 2010 and which is said to have recurred until 2015. The Applicant claimed damages including in respect of his loss of rent and repair costs.

On 30 March 2016, the Sheriff pronounced decree in favour of the Respondent in respect of the principal sum and expenses and granted decree of absolvitor in respect of the counterclaim. The interlocutor narrates that the decree was granted on the pursuer's motion of consent and that Miss Young and Mr Ritchie were present.

Having regard to criteria A) and E), there is no doubt that the Sheriff Court was a court of competent jurisdiction and that the same parties as in these proceedings were involved. As regards criterion B), the decree was pronounced after defences had been lodged and therefore is regarded as having been granted in a contested action.

As regards C) and D), we consider that there is substantial overlap between the subject matter and points of controversy of this application and the Sheriff Court action.

Miss Young advised us that the decree had been pronounced following upon an agreement reached at court between her and Mr Ritchie to the effect that the passing of the decree would have no effect upon the Applicant's right to pursue a subsequent application to the Tribunal (or, as it then was, the Homeowner Housing Panel). Mr Ritchie's recollection was different in that he believed that all he had indicated at the time was that the Applicant would be free after the granting of the decree to pursue whatever legal avenues were available to him. The Applicant himself was present in court but could offer no assistance to us as to precisely what had been agreed other than to state that he understood he would still be able to submit an application to the Tribunal.

We prefer Mr Ritchie's account of the conversation as it appears to us that the parties would have appreciated the likely effect of the granting of decree and that, if they had been trying to achieve an outcome where the same dispute would be taken instead to the Tribunal, they would not have agreed to decree passing in the way which it did. The parties might have been expected to have recorded their agreement on the matter in writing in a suitable Joint Minute, which they did not. They might instead have sisted the court action pending the making of an application to the Tribunal, and there is no evidence that that was considered or attempted.

Miss Young further argued that the subject matter and matters in controversy in the court action were completely different from those before us. In that respect, we can only agree in part. It appears to us that the court action did not (and could not have) addressed complaints against the Respondent in respect of duties arising under the 2011 Act (because that is a matter for this Tribunal). However, the question of the Respondent's breach of contract and the Applicant's resulting losses in respect of the water ingress in the period from 2011 to 2015 was the precise subject matter of the action and counterclaim and we regard the principle of *res judicata* as operating to prevent us considering those matters in these proceedings.

Pre-2012 Events

The Respondent makes a second preliminary argument that the Applicant's application in so far as it relates to the period prior to October 2012 may not be dealt with by the Tribunal. The Applicant makes extensive reference to events which took place during 2011. Our jurisdiction is determined by the 2011 Act. The section 14 (Code of Conduct) duties only apply to the Respondent from the date of its

registration as a property factor (7 December 2012) and we cannot consider any conduct before that date in determining a breach.

As regards property factor's duties, Regulation 31(2) of the 2016 Regulations permits us, when considering whether there has been a continuing failure, to take into account any circumstances arising before 1 October 2012.

Where we have identified *res judicata* or the existence of a pre-October 2012 complaint as being relevant to a factual head of complaint we have noted that below.

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 sources of the property factor's duties.

The Code

The Applicant complains of failure to comply with Sections 3.3; 6.1, 6.3, 6.4, 6.6, 6.7, 6.8, 6.9; 7.1 and 7.2 of the Code.

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

" SECTION 3: FINANCIAL OBLIGATIONS...

...3.3 You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance...

...SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE

6.1 You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required...

...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.

6.4 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...

...6.6 If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance.

6.7 You must disclose to homeowners, in writing, any commission, fee or other payment or benefit that you receive from a contractor appointed by you.

6.8 You must disclose to homeowners, in writing, any financial or other interests that you have with any contractors appointed.

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

Section 17 of the Act allows homeowners to make an application to the homeowner housing panel for a determination of whether their property factor has failed to carry out their factoring duties, or failed to comply with the Code.

To take a complaint to the homeowner housing panel, homeowners must first notify their property factor in writing of the reasons why they consider that the factor has failed to carry out their duties, or failed to comply with the Code. The property factor must also have refused to resolve the homeowner's concerns, or have unreasonably delayed attempting to resolve them.

It is a requirement of Section 1 (Written statement of services) of this Code that you provide homeowners with a copy of your in-house complaints procedure and how they make an application to the homeowner housing panel.

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.

7.2 When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel..."

The Matters in Dispute

The factual matters complained of relate to:

(1) Water Damage to the Property and common areas

(2) Failure to provide information to the Applicant

(3) Failure to Respond to Complaints

(4) Misallocation of Charges

We deal with these issues below.

(1) Water Damage to the Property and common areas

The Applicant complains that the Respondent failed to deal adequately with the ingress of water to the common corridor at Bothwell House. The ingress of water is said to have caused damage to common areas and to the Property. The matter was first reported by the Applicant's mother to the Respondent in November 2010. The Applicant was dissatisfied with the Respondent's response and instructed, at his own cost, investigations and remedial works. The problem is said to have continued until January 2015 and the Applicant complains that he was unable to let the Property as a result.

The problem is said to relate to persistently choked drains.

All of the correspondence provided on this matter pre-dates 1 October 2012 and almost the entire focus of the letter of 15 September 2016 intimating this application to the Respondent is upon a period prior to 1 October 2012. The Applicant advises that he could not say what correspondence, if any, exists on this matter after that date.

It appears to us that the events complained of pre-date October 2012 and, therefore, that we may make no finding in respect of alleged breaches of the Code (for the reasons explained above). Although we were urged by Miss Young to employ Regulation 31(2) to consider events prior to October 2012, we are not prepared to do so as we do not consider that a continuing breach of property factor's duties has been evidenced.

Even if the position were different in respect of the relevant dates, as regards *res judicata* we consider that that would have had no application to the complaint of the breach of the Code (for the reasons noted above). However, we consider the alleged breach of property factor's duties to be *res judicata* as a result of the decree of 30 March 2016.

(2) Failure to provide information to the Applicant

The Applicant complained of a failure to provide information regarding the rateable values which had been employed by the Respondent to share costs relating to the management of the estate among the proprietors.

This information had been requested in Miss Young's letter of 8 April 2016. Code section 3.3 relates to provision of financial information by property factors and provides: "*In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying.*"

The Respondent considers that its quarterly invoices provide sufficient financial information to enable it to meet its obligations, although it is the case that the rateable value information is not included on such invoices. The Respondent's solicitor had responded to the Applicant's representative's letter of 15 September 2016 complaining of a breach of Code section 3.3 by letter of 28 (sometimes referred to in these proceedings as 29) September 2016, stating that the rateable values were publicly available information and could be obtained by the Applicant from the local authority. In the same letter the Respondent's solicitor enquired what further documentation was sought by the Applicant and now seeks to place reliance upon that question in defence of the claim of a breach of Code Section 3.3.

However, the letter of 28 September 2016 constituted the answer to the request for the rateable values and the Respondent's solicitor's question does not seem to us to be an invitation to re-open that question.

It appears to us that the Applicant's request was a reasonable one as the rateable value information would be required to enable a proprietor such as the Applicant to ascertain and verify the basis upon which charges were being imposed upon him. We consider the Respondent's failure to provide this information to constitute a breach of Code Section 3.3. We identify no breach of property factor's duties in this respect.

(3) Failure to Respond to Complaints

It was stated by the Applicant that there was a history of failure by the Respondent to respond to complaints. It was said that the Applicant's late mother had begun making telephone complaints to the Respondent before 2012 and that she had received no acceptable responses. As those events appear to pre-date October 2012 and no detailed evidence could be offered on the matter, we are unable to make any finding in this respect.

Secondly, the Applicant complained that there had been no response by the Respondent to the Applicant's representative's letter of 18 April 2016. The Respondent accepted that this was correct and that the Respondent had overlooked responding to this particular letter.

In the circumstances, we find the failure to respond to have been a breach of Code Section 7.1 in respect of the Respondent's failure to follow its own complaints procedure (the letter of 18 April 2016 was headed "formal complaint"). It also constitutes a breach of property factor's duties in respect that the Respondent failed to follow the terms of the Complaints Procedure detailed in the Written Statement of Services.

(4) Misallocation of Charges

The Applicant complains that the Respondent has misallocated charges among the proprietors of properties within the Development. The arrangements which apply are set out in the Deed of Conditions. The Respondent advises that although a method of allocation is set out within the Deed, it was thought to be complex and expensive to administer and that the proprietors agreed on their appointment as property factors in 1990 that a different method of allocation would be used. That method was to allocate costs within three categories: whole estate; block; or stairwell.

The stairwell category was thought potentially appropriate having regard to the design of the buildings. Each building (such as Bothwell House) consists of three defined, linked structures each with its own stairwell. This led to ambiguity as to whether it was the whole building or the single structure forming a third of the building which was to be regarded as a "block" in terms of the Deed of Conditions.

Since the matter was the subject of complaint, the Respondent has revised its charging allocation method and has abandoned the category known as "stairwell" entirely as it accepts that this category has no basis in terms of the title deeds. That change of practice led to discontent on the part of some

proprietors and the matter was referred by two other proprietors within the Development for determination by arbitration in terms of the Deed of Conditions. The arbitrator appointed determined that each whole building such as Bothwell House was to be regarded as a block in terms of the Deed of Conditions and his decision, therefore, confirmed the new practice adopted by the Respondent.

The Applicant is concerned that, because he has a larger property within his stairwell within Bothwell House, he may have been disadvantaged by the practice of stairwell charging eg if a charge which should have been allocated on a wider basis is split on a stairwell basis he would find himself paying a larger proportion than he might otherwise. He has performed an indicative calculation that the practice followed may, over a period of nine years, have cost him an extra £2351.13. He accepted, however, that that calculation makes no allowance for other factors in that the charging bases employed by the Respondent may have been beneficial in other respects and that the only way to analyse the true position would be a complete reconciliation of all charges in respect of all properties over the relevant period.

That would be an exercise that would be time consuming and expensive and the Applicant had, understandably, never attempted it and did not have all of the necessary information which would be required.

The Respondent considered that it had acted reasonably in its approach and believed that it would be an extremely difficult, if not impossible, exercise to go back through all of the historic charges, to identify their nature and to reallocate them and then attempt to impose further charges or to make refunds to proprietors many of whom may have eg moved in the interim. It was estimated that the amounts involved would be relatively small. We accept what the Respondent says in this respect although we do consider that the Respondent has breached its property factor's duties in respect that it has employed a method of charging inconsistent with the Deed of Conditions. We have identified no breach of the Code.

Observations

The arbitrator appointed to determine the question of the definition of "block" under the Deed of Conditions was Professor Rennie, Emeritus Professor of Conveyancing at the University of Glasgow. Professor Rennie was, at the time of the hearing of this application, a part-time Partner in the law firm of which our Chairman is also a partner. This matter was brought to the attention of the parties at the time of the hearing and they indicated that this caused them no difficulty. For the avoidance of doubt, our Chairman has had no involvement in or knowledge of any kind of the arbitration process and identified no potential conflict of interest such as to justify recusing himself.

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.

Having regard to the failures of the Respondent which we have identified, we have decided that the Respondent should be ordered to pay to the Applicant the total sum of £200.

Section 20 of the 2011 Act provides the Committee with a wide discretion as to the terms of any PFEO. In particular, section 20(2) allows us to award such sum as we consider to be reasonable. In all the circumstances of this case, we consider payment of the sum of £200 to be reasonable.

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: 26 April 2017