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

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

Chamber Ref: FTS/HPC/PF/19/1099

Flat 9, 50 East Fettes Avenue, Edinburgh, EH4 1RE ("the Property")

The Parties:-

Ms Nora Rundell, Flat 9, 50 East Fettes Avenue, Edinburgh EH4 1RE ("the Homeowner")

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

Tribunal Members:
Graham Harding (Legal Member)
Helen Barclay (Ordinary Member)

DECISION

The Factor has failed to carry out its property factor's duties.

The Factor 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 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"

The Factor became a Registered Property Factor on 23 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

1. By application dated 2 April 2019 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 2.1, 2.5, 3.1, 4.1 and 4.6 of the Code and also failed to carry out its Property Factor's duties. The Homeowner provided the Tribunal with written representations in support of her complaint.

2. By Notice of Acceptance dated 10 May 2019 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned.

3. Due to the non-availability of the parties the hearings arranged for 8 and 26 July 2019 were postponed and a further hearing arranged to take place on 21 August 2019.

4. By email dated 13 August 2019 the Factor submitted its written representations and Inventory of Productions to the Tribunal.

Hearing

5. A hearing took place at George House, Edinburgh on 21 August 2019. The Homeowner attended personally supported by Mr John Bratton. The Factor was represented by Ms Angela Kirkwood, Ms Jeni Bole and Mr David McCallister.

Summary of submissions

Section 2.1 of the Code

6. The Homeowner submitted that there were two examples where the Factor had provided information that was misleading or false. The first was in respect of the replacement of lighting in the garage. The owners had received a quote for the replacement of 130 lights but had been charged for replacing 150 lights. The Homeowner said she had initially been told that the lights in the bin store had not been included in the quote and had then been told that the number of lights had been miscounted. She said she felt she had not been given a correct explanation nor guarantees or background information. The Homeowner went on to say that a second example related to the replacement of extractor fans in the garage. She said that the owners received quotations for the replacement of smoke extractor fans that included connection to the fire control panel and also included cabling and testing but it transpired that after accepting the quote they incurred an additional cost of £3000.00. The Homeowner said that the explanation given by the Factor was that the fire panel was faulty but the Homeowner's position was that a large percentage of the work included in the additional charges had been included in the original cost. The Homeowner further submitted that the owners had also been told that the cost would include a connection into the main fire alarm system but it doesn't and the Homeowner had never received documentation to confirm certification of the installation.

7. For the Factor Ms Bole referred the Tribunal to Production 1.2 at 1.2. She explained that following the issue of the August 2018 Newsletter by the Fettes Rise Owners committee the Factor sent out a document to owners to provide clarity to owners. Ms Bole said that she had also responded to the

Homeowner in her complaint response (item 4.2 in the Inventory). Ms Bole confirmed that the original quotes had been for an inexact number of lights 128 or 130 but there were also more lights in the bin store and garage. Mr McCallister went on to say that the owners had made a decision to replace all the lights as there had been situations when they had been tripping and he referred the Tribunal to the photo of a burnt-out light fitting in the Factor's Report (Production 9). Mr McCallister said that he and the contractor had also arranged to have all the replacement lights numbered for ease of identification by putting stickers on them. The Tribunal noted that there appeared to be an error in the information sent to owners (Production 1.2) where it said at 1.2 that "Two phases have been completed to date with a total expenditure of £1944." Ms Kirkwood suggested that this was a typing error and the word "each" should be inserted.

8. For her part the Homeowner commented that the bin store was small in size and if there were concerns about the number of lights being replaced these were not brought back to the owners.

9. In response Mr McCallister said that the instructions he had received from the owners meeting was to replace all the lights with bulbs with a longer life span. Mr McCallister went on to say that with regards to the fire alarm system it had been noted that the fire sounding alarm in the garage was not connected to the venting system and it had been thought that this would be a sensible addition as had there been a fire in the garage the extractors would not ramp up. It made sense two have the two systems talking to each other. The quote obtained was prepared on that basis. However, before the project commenced the fire panel faulted. A contractor inspected the panel and said it needed to be replaced. Mr McCallister said that he also asked the contractor who had been instructed to carry out the other work to independently test the fire panel and they too confirmed it required replacement. In the circumstances the Factor instructed that contractor Witt & Sons to carry out the work as it would be cheaper than having two separate contractors working on the system. Ms Kirkwood explained that as this related to a Health and Safety issue the work had to be done immediately and without seeking approval from the owners. She confirmed that there was an element of cabling included in the original quote but the additional sum charged was for the cost of the replacement fire control panel and the additional smoke heads that had to be replaced.

10. For her part the Homeowner said that despite the works that had been carried out the fire alarm was still not sounding in other parts of the building if the alarm sounded in the garage and the original quote did include replacing the smoke heads and did include interacting with the control panel. Also, the owners had not been given a breakdown of the costs incurred. In response Mr McCallister said that the Fire panel was showing a fault and had to be replaced. The contractor whilst on site had noticed that three additional smoke heads were faulty and required to be replaced at a cost of £364.00 plus VAT which was well within the Factor's delegated authority. Had the additional work not been done at the same time as the original work it would have

involved additional costs with the contractor having to come back to Edinburgh from Halifax on a separate occasion.

11. The Homeowner told the Tribunal that the owners had approved the report from Witt & Sons and their quote but had never received the certification. Ms Kirkwood advised the Tribunal that all the necessary certification was available and had been sent to Mr Britton in July. It would normally have been sent quite quickly but had not in this case. The Homeowner said that owners had only been advised of what was on the Factor's portal.

Section 2.5 of the Code

12. The Homeowner explained that following the issues last summer her concerns had started in October and she had commenced a formal complaint in January this year but had not received a response until 11 April.

13. Ms Bole said that the complaint that had been submitted by the Homeowner had listed a number of sections of the Code without providing any evidence to support them but that the element relating to delay had been upheld. Ms bole went on to say that there had been fairly significant issues that had required investigation and that as a result the Homeowner had been sent an email to advise that the usual response time would be exceeded. Ms Bole referred the Tribunal to Production 2 an email of 2 April 2019.

Section 3.1 of the Code

14. The Homeowner submitted that there were two issues in respect of her complaint. There had been a number of retrospective payments some dating back more than a year and some relating to a change of contractors that should have been submitted and had not been. She spoke of payment to an electrical contractor appearing to have been a duplicated payment and final invoices not being produced until long after the Factors contract had been terminated.

15. Ms Bole explained to the Tribunal that the Factor did a quarterly invoice run to owners at the end of February. All those charges paid on behalf of owners up to that date would be included in that invoice and be payable by owners. Some charges would not have been invoiced to the Factor before the invoice run in February and therefore these would be dealt with in a final accounting at the quarter end in May when owners' floats would be returned to them.

Sections 4.1 and 4.6 of the Code

16. The Homeowner said that her complaints here were that the Factor had not followed its procedures by pursuing her for the debt that she had disputed and that her debt had been distributed amongst the other owners and she had been named on their invoices.

17. Ms Bole explained that the Deed of Conditions affecting the property allowed the Factor to pursue owners who did not pay their debt. She said that at every

AGM a statement of debts due was provided by the Factor but people were not named under data protection regulations. They could only be named if it was a matter of public record. In the Homeowner's case, she had consistently retained a credit balance in her account until August 2018 when she had notified the Factor of a disputed invoice. Ms Bole explained that once the Factor had been notified that an invoice was disputed it was removed from the credit control process. This was stated on the back of the invoice (production 8). The Homeowner had paid the remaining charges on the invoice and she was not pursued by credit control for the disputed balance. Ms Bole went on to say the situation remained the same following the issue of the November invoice. However, once the Factor ceased to be instructed by the owners the debt collection procedures would no longer apply. Ms Bole submitted that the Factor would no longer have any authority to commence any debt collection procedure and therefore in order to clear the balance owed the Factor had written to the Homeowner on 24 April 2019 (Production 10) indicating that in the event of it ceasing to be Factor and to avoid being included in the "distribution of debt" procedure any outstanding balance had to be paid. Ms Bole confirmed that the balance of the float held by the Factor had been used to clear part of the sum due by the Homeowner and the balance distributed amongst the other owners in accordance with the provisions in the Written Statement of Services.

Property Factor's Duties

18. The Homeowner said that there had been a loss of professional trust between herself and other in the Factor that had led to there being a breakdown in the relationship. These were related to the issues narrated in connection with the breaches of the Code.

19. For the Factor Ms Kirkwood said that the Factor had been in ongoing communication with the owners over a period of time. Mr McCallister had made significant efforts to provide information. She explained that the Factor had managed the development for a number of years and in the previous year some committee members had resigned. The Factor had tried to work with the remaining members of the committee and there had been multiple communications. The Factors Managing Director and Ms Kirkwood had met with the committee and provided the lengthy response previously referred to (Production 1.2). However, the owners had decided to re-tender and the Factor had not been invited to tender and the owners decided to change factors. Ms Bole suggested that it was a challenging building to manage with some legacy issues but that the Factor had gone above and beyond in trying to rectify matters and she strenuously denied that the Factor had failed to carry out its Property Factor's duties. Ms Bole confirmed that there had been a change of property manager at the request of the committee. Ms Bole also wished to point out to the Tribunal that the Factor had suggested meeting with the Homeowner to try to resolve matters and referred the Tribunal to productions 11.1 and 11.2. In response the Homeowner pointed out that the offer of meeting had not come until after she had made an application to the Tribunal. She said she would otherwise have been prepared to mediate. Ms

Kirkwood pointed out that the Homeowner had ticked the box declining mediation in her Form C.

The Tribunal make the following findings in fact:

20. The Homeowner is the owner of Flat 9, 50 East Fettes Avenue, Edinburgh ("the Property")

21. The Property is a flat within the East Fettes Development (hereinafter "the Development").

22. The Development comprised of 72 properties

23. The Factor performed the role of the property factor of the Development until its contract terminated on 23 January 2019.

24. The owners of the development agreed to replace all the lights in the garage with longer life bulbs. The Homeowner understood the number to be replaced to be about 130.

25. The actual number replaced was 150 at an additional cost of £3878.94.

26. The Factor's authority to act for non-emergency repairs was £30.00 per flat.

27. The Factor did not seek additional consent from owners to incur the cost of replacing the lights not included in the contractor's quote.

28. The Fire Control Panel was operational at the time Witt & Sons quoted to replace the ventilation fans and other work.

29. The fire Control Panel and 3 smoke heads became defective prior to Witt & Sons commencing work.

30. There was a delay between the repair work being completed by Witt & Sons and certification documents being sent to owners.

31. There was confusion in the communication between the Factor and the homeowner as to which fire alarm systems would be inter-connected.

32. The replacement of the Fire Control Panel was an emergency repair that did not require the prior consent of the owners.

33. The Factor did not respond to communications from the Homeowner on 13 and 22 January 2019 and was in breach of its terms of its written Statement of Services.

34. The Factor apologised to the Homeowner for its failure to respond to the above correspondence in its letter to the Homeowner of 11 April 2019.

faith relied on the quotes provided by the two contractors the Tribunal was satisfied that this did not amount to a breach of this section of the Code.

44. With regards to the additional works involving the repairs to the Fire Control Panel the Tribunal was satisfied from the evidence that these constituted emergency repairs that had not been part of the original quote for the upgrading of the smoke ventilation system in the garage. As such the Factor was entitled to proceed to instruct Witt & sons to carry out the additional works without further recourse to the owners. The Tribunal did not consider that at the time of seeking the Homeowner's consent to instruct the upgrade to the ventilation system the Factor had produced any false or misleading information. Although the Homeowner believed the repairs would result in the fire alarm in the garage being connected to the fire alarm in the main building this may not have been part of the contract with Witt & Sons but whilst perhaps indicative of poor communication on the part of the Factor would not amount to a breach of this section of the Code.

45. In the Factor's document responding to the Fettes Rise Owner' Committee – August Newsletter (Production 1.2) the Factor in section 1.2 states in relation to replacing the stair lighting that two phases had been completed for a total cost of £1944. This was in fact incorrect as each phase had cost £1944.00. although the Factor's position at the hearing was that this was just a typing error and the word "each" had been omitted the Tribunal did not consider this to be the case. Had the Homeowner raised this as an example of the Factor being in breach of this section of the Code there is little doubt that the Tribunal would have found that to be the case but as it was not part of the Homeowner's application the Tribunal is unable to find that the Factor was in breach of this section of the Code although reference is made to this point with regards to the Property Factor's duties below.

Section 2.5 of the Code

46. The Tribunal noted that the Factor had acknowledged that it had breached this section of the Code and had offered an apology to the Homeowner for its failure to acknowledge or respond to her complaints in the communications of 13 and 22 January 2019. Subsequently the Tribunal was satisfied that the Factor dealt adequately with the Homeowner's complaint in terms of its procedures.

Section 3.1 of the Code

47. The Tribunal had some sympathy with the Homeowner with regards to the length of time it had taken to finalise the Factor's account on termination of the contract. The purpose of requiring to give the Factor three month's written notice of termination must be to allow the Factor time to prepare for the contract ending and the handing over of arrangements to the owners or to a new factor. It gives the Factor time to contact suppliers and contractors to ensure that all final bills are submitted by the end of the contract or as soon as possible thereafter. The Code makes provision for it taking a further three months after the end of the contract to finalise matters. Due to the Factor's

quarterly billing system it appears that it is unable to issue final bills out with the quarter ends. This has meant in the Homeowner's case that despite the contact ending on 23 January a final accounting was not prepared until the end of May and issued to the Homeowner in June. The Factor advised the Tribunal that its accounting system was unable to accommodate running an earlier invoice date in a termination situation. It appears to the Tribunal therefore that in other situations it would be possible for an owner to be waiting for even longer for a final accounting from the Factor. The Code requires there to be a good reason for not adhering to providing the required financial information within three months. With a very substantial degree of hesitation the Tribunal was prepared to accept that the failure of the Factor's invoicing system to produce accounts out with the quarter ends did on this occasion amount to a good reason but it would strongly suggest to the Factor that it consider reviewing its system to incorporate a procedure that will ensure that in the future owners can expect to receive a final account within the three months allowed for in this section of the Code.

Sections 4.1 and 4.6 of the Code

48. Although it would be unusual for an owner to complain that a Factor had failed to exhaust the remedies open to it to pursue that owner through the courts to recover an alleged debt owed by that owner the Tribunal did understand the basis on which the Homeowner included this section of the Code in her application. The problem that arose was primarily because having disputed the debt was due there had been no resolution prior to the termination of the Factor's contract. The Factor quite rightly in the Tribunal's view did not pursue the debt because it was in dispute. That was in accordance with the Factor's written terms. The Tribunal accepted the Factor's argument that once its contract had been terminated it had no locus to pursue a debt said to be due by an owner. It was no longer instructed by the owners and it would be a debt due to the owners. The issue therefore was what should happen to the Homeowner's alleged debt? Clause 10.4 of the Factor's Written Statement of Services says that any outstanding "development" debt will be distributed as a cost between all homeowners in the development. This cost will appear on the final invoice. In the circumstances the Tribunal was persuaded therefore that the Factor had not breached Section 4.1 of the Code.

49. It was clearly of concern to the Homeowner that she and others in a similar position had been named and shamed on the final invoices issued to owners when the previously disputed debt had been distributed amongst the other owners. The issue here for the Tribunal to consider was whether by naming the Homeowner the Factor exceeded its authority in terms of data protection regulations. It was acknowledged by the Factor in its general Written Statement of Services at section 5.9.5 that: "Details of the development debt position can be provided at each owner's association meeting or AGM. Details will provide the number of debtors along with the size and status of each debt (i.e. debt recovery, legal action etc). Names of individual debtors whose debt is at the legal action stage may be passed on if requested." Therefore, should the Factor have kept the name and address of the Homeowner to itself until it

received a request for identification? The situation is complicated by the Factor's tenure coming to an end. Once the Factor was no longer instructed by the Homeowners it would no longer have any right or obligations in respect of debt recovery. It therefore follows that its obligations under Section 4.6 of the Code would come to an end. However, the Tribunal considered that even although the Factor was no longer instructed by the owners it had a duty to follow its written terms and the data protection legislation and it ought not to have disclosed the Homeowner's name and address on the final invoice issued to owners without first making it quite clear to the Homeowner that was its intention. Had the Factor indicated in its letter of 24 April to the Homeowner that it intended to disclose the Homeowner's personal details to other owners that would have given the Homeowner proper warning. Simply to sat that her property would be included in the "distribution of debt" process was not sufficiently specific. The Factor was therefore in breach of its property factors duties in this regard.

Property Factor's Duties

50. It appeared to the Tribunal that the breakdown in the relationship between the Homeowner and the Factor occurred not from a single incident but from a gradual discontentment with the acting of the Factor's property manager Mr McCallister that ultimately led to him being replaced with Ms Ramsay. Although the owners may have wished all the lighting in the garage to be replaced, given the extent of the additional cost involved it would have been prudent for the Factor to have gone back to the Homeowner for consent before incurring additional cost beyond the £30.00 of authorised expenditure.

51. The Homeowner's concerns regarding the apparent double charging of Lothian Electrics bill for the emergency/stair lighting was addressed by the Factor in tits response to the Homeowners complaint but nevertheless the Factor had provided the Homeowner with misleading information in its response to the Owners Association newsletter by saying that two phases had been completed at a total cost of £1944.00 when this was not the case.

52. There was a significant delay in providing owners with the certification documentation relating to the works carried out by Witt & Sons although it appeared that some information had been put on the portal other information was not sent out until July.

53. It did appear that there was a lack of communication between the Factor and the Homeowner at times. There was confusion over which fire alarm systems were to be inter-connected. The disputed debts ought to have been resolved between the Factor and the Homeowner before the Factor's contract was ended so that the Homeowner knew where she stood and it ought to have been made quite clear to the homeowner in the letter of 24 April that her name and address would be disclosed to the other owners as part of the re-distribution of debt process

54. Although in some respects the Tribunal was satisfied the Factor had carried out its duties given the above examples and the overall breakdown in trust it

did appear looking at matters as a whole there had been a failure on the part of the Factor to carry out its property factor's duties.

55. As the Factor's contract has been terminated the Tribunal concluded that the only appropriate way to reflect the Factor's breaches of the Code and its failure to carry out its property factor's duties was to make an award of a payment to the Homeowner to reflect the worry, trouble and inconvenience suffered by her in this matter.

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) (a) Notice.

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

16 October 2019 Date