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

Housing (Scotland) Act 2006, Section 17

The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 ("the 2016 Regulations")

Chamber Ref: HOHP/PF/16/0131

Flat 8, 112 Hillpark Grove, Edinburgh, EH4 7EF ("The Property")

The Parties:-

Mr Michael Sturgeon, residing at the Property ("the Homeowner")

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD ("the Factor")

Tribunal Chamber Members

Maurice O'Carroll (Legal Member)
John Blackwood (Ordinary Member)

Decision of the Chamber

The First-tier Tribunal (Housing and Property Chamber) unanimously determined that the Factor has failed to comply with section 2.1 of the Code of Conduct for Property Factors ("the Code") in terms of section 17(1)(b) of the Property Factors (Scotland) Act ("the Act") as required by section 14(5) of the Act.

Background

1. By application dated 8 September 2016, the Homeowner applied to the Homeowner Housing Panel for a determination on whether the Factor had failed to comply with sections 2.1 and 6.3 of the Code as imposed by section 14(5) of the Act. By letter dated 26 September 2016, the Homeowner also confirmed that he wished to complain that the Factor had failed in its duty to timeously procure a new maintenance provider for the communal lift serving the Property.

2. By decision dated 24 October 2016, a Convenor on behalf of the President of the Homeowner Panel decided to refer the application to a Homeowner Housing Committee. By operation of regulation 3 of the First-tier Tribunal for Scotland (Transfer of Functions of the Homeowner Housing Panel) Regulations

2016, the application was considered by the Housing and Property Chamber of the First-tier Tribunal for Scotland ("the Tribunal").

3. A hearing of the Tribunal was held on 16 December 2016 at George House, 126 George Street, Edinburgh. The Homeowner appear on his own to give evidence. The Factor was represented by Karen Jenkins, Team Leader and Fraser McIntosh, Property Manager, both of whom gave evidence.

4. The parties had previously been the subject of a decision of the Homeowner Housing Panel under reference HOHP/PF/15/0003 which was issued on 5 August 2015 ("the previous decision"). A Property Factor Enforcement Notice following that decision required the Factor to apologise to the Homeowner for its failures to comply with its duties under the Act and to pay compensation. During the course of the hearing leading to that decision, the Factor made certain undertakings which will be referred to below.

5. The Homeowner intimated his concerns regarding the alleged failures in duty on the part of the Factor by letter dated 26 September 2016, in compliance with the requirements of section 17(3) of the Act.

Committee findings

The Committee made the following findings in fact pursuant to Regulation 31(2)(b)(i) of Schedule 1 to the 2016 Regulations:

6. Although the application claims fell under three heads as noted above, the Homeowner's complaint centred around the administration of the contract for maintenance of the lift which served the Property and the associated block. The previous decision also concerned a complaint regarding the lift within the block and sets out much of the material background which need not be repeated here except in abbreviated form. The most pertinent paragraphs of the previous decision are to be found at paragraphs 12 to 14 inclusive.

7. The Homeowner purchased the Property in April 2011. The Factor was appointed by the house builder who constructed the block, Mactaggart and Mickel. The Factor took over property management duties in April 2013. In January 2012, the lift was installed by a company called Express Lifts. They had provided a warranty over the lift of three years which expired in January 2015. As of January 2016 it was maintained by a company called Otis.

8. Following the hearing in April 2015, the Homeowner understood that Express Lifts still operated a warranty for repair and maintenance of the lift. This was understandable given what had been said in evidence by the Factor at the previous hearing. Mr McIntosh had provided evidence on behalf of the Factor that the three year warranty had been allowed to "roll on" past the January 2015 expiration date. He also informed the hearing that the company (i.e. Express Lifts) "will continue to maintain the lifts without any charge to the owners."

9. As it turned out, that evidence was not entirely correct. The warranty had indeed run out in January 2015, but what the Factors had in fact undertaken was to continue to bear the maintenance costs for the lift until such time as a new maintenance contract was concluded following a competitive tender. That was achieved with effect from January 2016. At all events, the upshot as far as the Homeowner was concerned was that, at the very least, he should receive no bills for maintenance of the lifts for the entirety of 2015.

10. Notification of the appointment of Otis as contractor following a competitive process involving three contractors was sent to the Homeowner on 21 July 2015. However, on 25 August 2016, the same Mr McIntosh who had attended the hearing in April 2015 and who also appeared in relation to the complaint with which this decision is concerned, sent a letter to all homeowners within the common block detailing past charges for Express Lifts, as well as future charges for 2016 in respect of Otis, the preferred contractor. The 2015 charges were for four periods covering 19 January 2015 to 18 January 2016 of £401.34 for each period. For the Otis contract, two periods from 19 January to 18 July 2016 and 19 July to 18 October 2016 were detailed as being £579 and £289.50 respectively. The total cost per proprietor was stated to be £274.87.

11. The Homeowner swiftly objected to the notification of charges by email dated 25 August 2016 making reference to the earlier HOHP decision, but received no response. He again wrote by email dated 31 August 2016 to Karen Jenkins, again with no satisfactory outcome. He wrote again to Miss Jenkins on 7 September 2016 and provided the formal notification dated 26 September 2016 to the Factor referred to above. Therefore, he provided the Factor with no fewer than four opportunities to put matters right before the case came before the Tribunal.

12. It was not until 4 November 2016 in an email to the Homeowner that Miss Jenkins for the Factor admitted that there had been an error in relation to the backdated charges for the Express Lifts. At that point she confirmed that no charges had been levied as set out in the letter of 25 August 2016 and that any charges from Express Lifts would be of no concern to the owners within the block. As it turned out in terms of the evidence at the hearing, this was because the Factors were in fact absorbing any costs levied by Express Lifts during 2015 themselves, the warranty having run out in January of that year.

13. In written submissions to the Tribunal and in evidence, Miss Jenkins explained that the charges proposed in the letter of 25 August 2016 had been issued as a result of an oversight on her part for which she apologised. She had not been aware of the previous decision, having only joined the Factor in August 2016 and had been attempting to carry out an extensive audit of all matters since then. The Tribunal asked Mr McIntosh why it was that he could have allowed the letter of 25 August 2016 to go out in his name, given that he was present at the earlier hearing and had given the undertakings referred to in the course of that decision. He was expressly unable to answer to that question.

14. This gave rise to some serious concern for the Tribunal. Not only was inaccurate information provided by the Factor to the previous hearing, the

undertakings given there were not honoured. Further, it appeared to the Tribunal that the Factor did not take either their duties or the role of the Tribunal (in its earlier form as a panel) seriously. This could be the only explanation for the earlier decision of the HOHP not being uppermost in their consideration and for it being overlooked and only brought to mind by the persistence of the Homeowner. The Factors ought to have had a system in place for passing on the outcome of Tribunal decisions, given that the Tribunal is there to ensure that property factors comply with their duties and therefore the integrity of the property management industry. It is no excuse that an internal audit was being undergone and that Miss Jenkins the Team Leader had only just joined the Factor. If adequate systems were in place to ensure that such vital information is passed on, then such internal difficulties would have no bearing on the proper observance of Tribunal decisions and undertakings made in the course of them.

15. In these circumstances, the Tribunal had no hesitation in finding that there had been a breach of section 2.1 of the Code by the Factors. Section 2.1 provides that Factors must not provide information which is misleading or false. The letter of 25 August 2016 was clearly misleading as the Homeowner was not liable for the charges there listed standing the undertakings given at the previous hearing. In addition, the time taken to properly respond to the concerns of the Homeowner were on any view excessive and inexcusable for such a clear-cut issue which was an aggravating factor in respect of this breach. The service provided during that time was inadequate as a result of this breach of the Code which will be reflected in the Property Factor Enforcement Notice to follow hereon.

16. Matters, however, do not end there. The Homeowner made reference to another recent decision of the HOHP between the same parties, again with the lift being at issue under reference HOHP/FP/16/0098. It was agreed by the parties that any findings in fact made by the Chairperson of that hearing could be applied to the present decision. Part of the evidence in that decision concerned an incident where a resident was trapped in the lift on 20 May 2016. The Tribunal notes that at paragraph 14 of that decision, the Chairperson stated the following:
"The keys for the lift room within the applicant's development had in fact been missing from the respondent's office for time and at least since January 2016 when Otis took over the contract. The keys are understood to have been held by the former lift maintenance company and not returned."

17. Standing the above accepted evidence, the Tribunal was not satisfied on the balance of probabilities that there was in fact an active maintenance contract in place with Otis between 19 January 2016 and 20 May 2016. Therefore, it does not consider it appropriate that charges should be levied on the homeowner for the Otis contract between those two dates. In the Property Factor Enforcement Notice to follow hereon, the Tribunal will require the Factor to waive the lift maintenance charges between those dates. In other words, the charge of £579 for the period 19 January to 18 July 2016 will be reduced by approximately two thirds. The chargeable period in respect of maintenance by Otis will only commence on 21 May 2016.

18. In the course of the evidence, the Homeowner accepted that there had in fact been a competitive tendering process in respect of the lift maintenance. This stands to reason, given that a different contractor now maintains the lift. The Factor's letter of 21 July 2015 made reference to a completive tendering process involving three contractors, which was accepted. Accordingly, he withdrew his application in relation to section 6.3 of the Code. He also accepted that the charges to be levied by Otis are in fact preferable to those that would have been payable to Express Lifts had they continued to maintain the lift after the expiry of the warranty period. Accordingly, he also withdrew his claim in respect of alleged breach factor duties generally in relation to the tendering process.

Decision

19. The Tribunal finds that the Factor has breached its duty to comply with the Code in respect that it failed to adhere to the terms of section 2.1 thereof. The Homeowner, having withdrawn his complaint in respect of section 6.3 of the Code and the factor duty generally, the Tribunal makes no finding with respect to those parts of the application. In terms of section 19(2) of the Act, the Tribunal is required to propose a Property Factor Enforcement Order. This will follow this decision under separate cover.

Appeals

20. A Homeowner or Factor aggrieved by the decision of the Tribunal may seek permission to appeal from the First-tier Tribunal to the Upper Tribunal on a point of law only within 30 days of the date the decision was sent to them.

M O'Carroll

Signed: M O'Carroll Date 6 January 2016
Chairman

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Notice of Property Factor Enforcement Order ("PFEO")

This Notice should be read in conjunction with the decision of the Tribunal of even date under reference HOHP/PF/16/0131

1. By decision of even date with this Notice, the Tribunal determined that the Factor had breached its duties in terms of s 17(1)(b) of the 2011 Act in that it had failed to comply with section 2.1 of the Code of Conduct for Property Factors as required by s 14(5) of that Act.

2. In accordance with s 19(3) of the 2011 Act, having been satisfied that the Factor has failed to carry out the property factor duties, the Tribunal must make a Property Factor Enforcement Order. Before making an Order, to comply with s 19(2) of the Act, the Tribunal before proposing an Order must give notice of the proposal to the factor and must allow the parties an opportunity to give representations to the Committee in relation to this Notice.

3. The intimation of this Notice of Property Factor Enforcement Order to the parties should be taken as notice for the purposes of section 19(2)(a) and the

parties are hereby given notice that they should ensure that any written representations which they wish to make under s 19(2)(b) must reach the First-tier Tribunal for Scotland (Housing and Property Chamber) by no later than 14 days after the date the decision is intimated to them.

4. If no representations are received within that timescale, then the Tribunal will proceed to make a PFEO in the following terms without seeking further representations from the parties.

5. Therefore, the Committee propose to make the following PFEO:

   Within 28 days of the communication of the PFEO to the Factor, the Factor must:

   (i) Pay compensation to the Homeowner in the sum of £250 (Two hundred and fifty pounds) in respect of the inconvenience and time occasioned by the Factor's failure to comply with its duties under the Code.

   (ii) Reimburse the management fees paid by the Homeowner to the Factor during the period from 25 August 2016 to 27 December 2016 in recognition of its failure to comply with its duties under the Code during that period.

   (iii) Waive the lift maintenance charge levied by Otis as referred to in the said decision between the period 19 January and 20 May 2016.

   (iv) Provide documentary evidence of compliance to the Homeowner Housing Panel with the above Orders within 7 days of having done so by recorded delivery post.

Appeals

6. A Homeowner or Factor aggrieved by the decision of the Tribunal may seek permission to appeal from the First-tier Tribunal to the Upper Tribunal on a point of law only within 30 days of the date the decision was sent to them

M O'Carroll

Signed: M O'Carroll Date 6 January 2016
Chairman