Housing and Property Chamber
First-tier Tribunal for Scotland

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

Decision: Section 43 Tribunals (Scotland) Act 2014 and Rule 39 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended

Chamber Reference: FTS/HPC/PF/21/1833

Property address: Flat 2/2, 71 Belville Street, Greenock, PA15 4SU ("the Property")

The Parties

Mrs Fiona Harris, PO Box 21167, Nicosia, Cyprus ("the Homeowner)

River Clyde Homes, Clyde View, 22 Pottery Street, Greenock, PA15 2UZ ("the Property Factor")

Tribunal Members

Ms H Forbes (Legal Member)

Mr A Taylor (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined to review the application and amend its statement of decision.

Background

1. Following a Hearing on 23rd November 2021, the Tribunal determined that the Factor had failed in carrying out its property factor duties in terms of Section 17 of the Act. The Tribunal issued a proposed Property Factor Enforcement Order ordering the Property Factor to pay the sum of £1700 to compensate the Homeowner for the distress, frustration and inconvenience caused as a result of the Factor's failures.

2. The decision was issued on 2nd December 2021.

3. By email dated 14th December 2021, the Property Factor submitted an application for review of the Tribunal's decision.

4. The application for review falls within the time limits for review under section 43 of the Tribunals (Scotland) Act 2014 and Rule 39 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended ("the Rules").

Application for Review

5. The application was in the following terms:

> The Property Factor asserts that a review of this Decision is necessary in relation to 3. above and the finding that the Property Factor failed in carrying out its property factor duties as referred to in paragraph 33 of the Decision. The Property Factor has complied with its property factor duties and has acted as any reasonable Property Factor would act in the circumstances. The review is necessary because the statements contained in paragraph 33 are inaccurate and have been misinterpreted by the Tribunal. As a result, a PFEO is being made because of the unsound determination made by the Tribunal. The PFEO should not be made. In the interests of proper justice, it is necessary for the Tribunal to review this decision. It is the Property Factor's position that the terms of paragraph 33 of the Decision are inaccurate, flawed and the Tribunal has made errors in finding facts.
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> Turning to paragraph 33. of the Decision "Failure to carry out property factor duties" the Tribunal……. "found that the Property Factor has failed in carrying out its property factor duties. In terms of the WSS, the Property Factor has certain duties in respect of the Property, including advising owners of all repairs expected to be in excess of £250 prior to instructing works as soon as possible for emergency or urgent work. The Property Factor commissioned a report and obtained a quote for the roof works in October 2018. A competitive quote was not procured and circulated to homeowners with a ballot until October 2020. Furthermore, the letter and ballot was not provided to the Homeowner at her correspondence address, deprived of the opportunity to respond to the ballot. It may be the case that, had the cheaper quote and ballot been provided to the homeowner at an earlier stage, they may have agreed to carry out the work. Instead, there was an inordinate delay, for which there appeared to be no compelling reason."
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> The Property Factor responds to the statements contained in paragraph 33 of the Decision as follows: - "In terms of the WSS, the Property Factor has certain duties in respect of the Property, including advising owners of all repairs expected in excess of £250 prior to instructing works as soon as possible for emergency or urgent work." Response: -The WSS does require the Property

Factor to advise owners of all repairs expected more than £250 prior to instructing works as soon as possible. The Property Factor agrees with this statement.

“The Property Factor commissioned a report and obtained a quote for the roof works in October 2018.”

Response: -River Clyde Homes commissioned a report from a roofing consultant following an inspection of the roof at 71 Belville Street, Greenock and obtained a quote for roof works. The Report recommended that the roof should be replaced to alleviate the water ingress. River Clyde Homes commissioned the Report in its capacity as landlord of the property at 2/1, 71 Belville Street, Greenock in response to information received from the tenant of River Clyde Homes of water ingress in 2/1, 71 Belville Street. The report was not commissioned by River Clyde Homes in its capacity as Property Factor. The report was commissioned by River Clyde Homes acting as a landlord and property owner. The Property Factor does not agree with this statement.

“A competitive quote was not procured and circulated to homeowners with a ballot until October 2020.”

Response: -The Property Factor did procure a competitive quote and circulate with a ballot to homeowners in the block 71 Belville Street in October 2020. In November 2018 the Homeowner reported water ingress to The Property Factor, and shortly thereafter the Homeowner made separate arrangements to have temporary repairs carried out to the property without any warning to the Property Factor. As stated in the Decision, the Property Factor did not pay the sum requested by the Homeowner to the Property Factor in July 2019 for the temporary works as the Homeowner was unable to provide vouched invoices for the temporary works. The Property Factor is a charity under an obligation to obtain best value for any spend. As the repairs had been undertaken to the roof on the instruction of the Homeowner it was the Property Factors position that it should not procure any further reports or to instruct additional works to the roof at that time unless it was clear and established that the roofing works undertaken at the bequest of the Homeowner had not alleviated the water ingress. If this was the case, and the roofing works had rectified the problem, there would be no need for any further survey or additional roof works. Around May or June 2020, it became apparent that the roofing works undertaken by the Homeowner had not alleviated the water ingress issues. The Homeowner then instructed further works. Again, because of the Homeowner instructing the second roofing works, there were no grounds for the Property Factor to instruct a further survey/works to the roof at that time. Time would tell if the repairs had remedied the issues. Subsequently, after completion of the second roofing works, it became apparent that the those roofing

works also had not alleviated the roof problem. It became apparent at that point that a full survey of the roof to ascertain why the repair works had not alleviated the water ingress issues was necessary. At this time the Property Factor commissioned and procured a competitive quote. This was supplied by the Property Factor to the homeowners of 71 Belville Street along with a ballot. While on the face of this statement the timeline is correct, the Property Factor choose not to commission and procure a competitive quote until October 2020- this was not unreasonable in the circumstances. Any reasonable Property Factor would wait to ascertain if the 2 previous roof repairs by the Homeowner had alleviated the roofing problem before taking any further action.

The Property Factor accepts this statement.

“Furthermore, the letter and ballot was not provided to the Homeowner at her correspondence address, deprived of the opportunity to respond to the ballot. It may be the case that, had the cheaper quote and ballot been provided to the homeowner at an earlier stage, they may have agreed to carry out the work. “

Response: - The Homeowner did not include any submission within the complaint that she had not received the letter or ballot dated October 2020. It was not implied within any of the productions that the Homeowner had not received the letter or ballot. The Homeowner has been unable to provide any evidence that the Homeowner had provided formal notice of her correspondence address to the Property Factor as an alternative address to the Property for correspondence by the Property Factor. The onus is on the Homeowner to provide alternative correspondence addresses to the Property Factor. This was not considered by the Tribunal. The Tribunal made the finding that “the letter and ballot was not provided to the Homeowner at her correspondence address, deprived of the opportunity to respond to the ballot”, without considering if the Homeowner had notified the Property Factor of her correspondence address. In any event, it would have been irrelevant if the Homeowner had agreed to the roofing works as detailed in the letter and ballot. The Property Factor had already been advised by the 2 other homeowners on the ground floor in the block 71 Belville Street that they could not agree to the roofing works. The other homeowners had informed the Property Factor that they did not have the funds to pay for their share of the costs of the roofing works. The other homeowners had informed the Property Factor that they did not have the funds to pay for their share of the costs of the roofing works. For the roofing works to proceed there would need to be a majority in favour of the works, in terms of the title deeds. If the Homeowner had agreed to proceed with the roofing works, the Property Factor would still have been unable to instruct the roofing works due to the refusal of the ground floor owners in the block 71 Belville Street to the roofing works. This

would be impossible without a majority of the owners in the block agreeing to the works as stated in the title deeds-and it was irrelevant whether the Homeowner agreed to this. The Tribunal made the finding that the Homeowner "may have agreed to the works" without considering the objections and the need for a majority before the roofing works could proceed. As stated in the paragraph above there were reasons why the letter and ballot had not been provided by the Property Factor "at an earlier stage".

The Property Factor does not agree with the statements.

"Instead, there was an inordinate delay, for which there appeared to be no compelling reason."

Response:- Although here was a delay from the initial intimation of the water ingress by the Homeowner to the Property Factor in November 2018 to the issue of the letter and the ballot by the Property Factor in October 2020, there were compelling reasons for this delay i.e., the Property Factor waiting for confirmation that the 2 roofing repairs arranged and instructed by the Homeowner without prior notice the Property Factor, had alleviated the water ingress problem.
The Property Factor does not agree with the statement by the Tribunal that there were "no compelling reasons" for the gap between 2018 and 2020. The Property Factor believes that it has justified the reason for the delay between November 2018 and the issue of the letter and ballot in October 2020. This information was relayed to the Tribunal at the Hearing but is not included in the Decision. The Property Factor has acted as any other reasonable Factor would act in the circumstances by waiting to find out if the repairs had been effective without further costs/works. The Property Factor disagrees with the Tribunal's finding that it has failed in its property factor duties.

The Property Factor does not agree with this statement.

The Property Factor has not failed in carrying out its property factor duties. It is the Property Factor's position that the above establishes conclusively that it is necessary for a review of the Decision and a detailed consideration of paragraph 33. The Property Factor requests a review of this Decision.

6. By email dated 3rd January 2022, the Homeowner made written representations as follows:

> I do not see any grounds for reconsidering the decision. It was my position that RCH represented themselves as principles in their Statement of Services which adopted the language in the Deeds of our property. I am aware of the change in legislation which allowed them to be only an agent of the owners but they did not change their statement

of services until after the roofing issue arose. Even if they are merely agents, they failed to advise us of this change of legal status and they continued to act, when it suited their purposes to act as a principle, as they did when they appointed an engineering firm to survey the building and invoiced us for the report to be done.

RCH should have made this clear from the outset because it appeared from the statement of services that they were responsible for organising the repairs, paying for it and recovering the money from the owners. Even as an agent, the terms of their agency required them to deal, in the first instance, with the repairs. They could have balloted the owners at the time so that we as owners could have had a discussion about the repairs. They could have suggested that we have an owners' meeting for instance.

When they did ballot the owners they did not advise us. All communications between owners and RCH is by way of email. I provided a large number of the many emails with RCH in my productions for the hearing and there were in total about 100 emails back and forth between us and RCH about the roof. Their comment about not being required to write to us at a specific address is, in my submission, spurious because they knew how to contact us and chose not to. In addition, the quote for works which they obtained from their subsidiary, Homefix, does not mention that work had obviously been done to the roof. It is apparent to anyone who sees the roof that the entire roof had work done to it. The roof above RCH's maisonette had been refelted.

RCH were asked at the beginning of the hearing if they had any additional documentation to submit but only produced the quote during the hearing. They also failed to produce the letter to us about the change in legal status. I produced that only when I realized its significance as the hearing progressed. I only became aware of RCH's position that our roof repairs were not successful when they filed their response to my application to the Housing Tribunal. I then wrote to them by email asking them to set out what evidence they had of this and they did not respond. This past Friday, my wife's daughter and family went to our maisonette and saw inside. They advised that there was no sign of current leaking. They also advised that RCH's maisonette was tenanted and that they could hear conversation inside which seemed to be a domestic dispute. They also said that there was a strong odour of cannabis coming from RCH's maisonette. It appears, therefore, that RCH has decided that the roof repairs have been successful and the maisonette is habitable. Mr Orr did not mention this at all in the hearing. If necessary my stepdaughter can give evidence if it is decided to have a hearing to reconsider the evidence. She is a solicitor.

I do not feel that another hearing is warranted. I agree that the balloting of owners at an early stage was the appropriate action to be taken by

RCH over such an important issue and there is no excuse for them acting the way they did. I feel vindicated in my belief that RCH were trying to get owners to enter into a contract with a third party with some connection to RCH. That is how it looks to me and it is, I submit, the only plausible explanation of their refusal to deal with the roof and to engage all owners at the onset of the problems with the roof. I do not accept their suggestion that the fee they charge is geared to being only an agent, due to the nature of the neighbourhood. All but one owner were landlords. Mr Hoey was in his nineties and had lived in the flats for many years. I am sure that had three owners decided to press on with repairs, they would have been done as we eventually did at a much lower cost, with some arrangement reached with Mr Hoey.

I do not feel it adds anything to RCH's position to state that they waited to see if the works we did were effective before balloting the owners. I feel this makes their position weaker. They are supposed to ballot owners, not refuse to and then force one owner to do the work, then say the work was unsuccessful without any evidence to support that assertion.

I also do not see any basis for them to be given leave to appeal. The decision was entirely reasonable and is well reasoned and carefully written. Indeed, I feel that the Tribunal could have been more critical of the conduct of RCH.

7. Both parties indicated a view that the review could be considered without the need for a hearing. The Tribunal decided to consider the review without the need for a hearing.

8. Both parties provided further written representations in response to each other, but these were not taken into account by the Tribunal as they were not called for by the Tribunal in terms of the Rules and they did not appear to be relevant to the matters before the Tribunal.

Decision

9. The Tribunal considered the Homeowner's application for review.

(i) Commissioning of report

The Tribunal considered the capacity in which River Clyde Homes commissioned the report as immaterial. There were various statements made by the Property Factor in their written submissions that show that, upon receiving the report, they circulated it to homeowners. For the sake of accuracy, the Tribunal agreed to amend paragraph 33 of the statement of decision to indicate that River Clyde Homes commissioned the report.

(ii) Correspondence Address

The Tribunal considered the comment by the Property Factor that the Homeowner did not include any submission within the complaint that she had not received the letter and ballot of October 2020 to be disingenuous. The Homeowner was not aware of the existence of the letter and ballot until the day of the hearing, therefore it would be impossible for her to have made any such submission. The Tribunal was entitled to make the decision it made based on the evidence before it, which was that the Homeowner was not living in the Property, and had, indeed, never lived in the Property, a fact that the Property Factor could not fail to be aware of. There were effective channels of communication between the parties, evidenced by the existence of several letters with various addresses, and emails, which reached the Homeowner despite her not residing in the Property. This would suggest that, for an unknown reason, the Property Factor departed from their usual method of communication on this occasion, to the detriment of the Homeowner.

(iii) Delay in sending out ballot

The Tribunal members did not note any statement by the Property Factor's representative that the reason for the delay was that the Property Factor was waiting to see if the Homeowner's repairs had been successful, nor was this reflected in the written representations put forward by the Property Factor. The Tribunal took into account the following evidence in reaching its decision that there was an inordinate delay:

(a) Oral Evidence

20. Mr Orr said the Property Factor did not believe, on the basis of independent advice, that the second repair carried out by the Homeowner would stop the water ingress. It would not be reasonable to contribute to the cost when they had been advised in advance that the repair would not work.

(b) Written Evidence

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The advice provided by Trudy Morgan was that she, in her capacity as administrative assistant, was not disputing the veracity of the works being argued; simply that she could not take the matter forward without an invoice for consideration. This is neither an acceptance of liability or a statement that we, as factor, should reimburse Mr Harris for works which **we had already provided advice were not satisfactory.**

> At no juncture did we suggest we would provide this service to Mr Harris, indeed we advised further that as his neighbour, **we dispute our share of the works contrary to the advice provided and as they have not proven to remedy the water ingress on the roof.**
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> The overwhelming evidence before the Tribunal was, therefore, that the Property Factor did not believe the works carried out would solve the problem. The Tribunal saw no reason to change its decision that the Property Factor ought to have balloted for the works required at an earlier stage.

10. The Tribunal will amend its decision in accordance with paragraph 9(i).

11. This Decision is not subject to appeal.

[redacted]

Legal Member

Date: 21st January 2022