Decision 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

Sandra Dickson, 1 Myre Dale, Bonnyrigg EH19 3NW ("the Applicant")

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

Reference No: FTS/HPC/PF/20/2395

Re: Property at GF2, Chilton, Gracefield Court, Musselburgh EH21 6LL ("the Property")

Tribunal Members:

John McHugh (Chairman) and Mike Links (Ordinary (Surveyor) Member).

DECISION

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

The Respondent has not 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 of GF2, Chilton, Gracefield Court, Musselburgh EH21 6LL (hereinafter “the Property”).
2 The Property is located within a mixed development consisting of 11 flatted blocks and associated common areas known as Gracefield Court (hereinafter "the Development")
3 There are a total of 72 flats in the Development.
4 A Deed of Conditions governs the arrangements for the sharing of costs relating to common property within the Development among the proprietors of the properties within the Development.
5 The Respondent is the property factor responsible for the management of common areas within the Development.
6 The property factor’s duties which apply to the Respondent arise from the Statement of Services and the Deed of Conditions. The duties arose with effect from 1 October 2012.
7 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from 7 December 2012.
8 On 25 March 2020 the Respondent advised property owners in the Development that normal services would be interrupted because of the COVID-19 pandemic restrictions
9 On 21 April 2020 the Respondent advised owners that normal service had been resumed.
10 The cleaning contractors had missed some of their normal visits to site and a refund has been given to the Applicant in respect of these.
11 The gardening and window cleaning contractors attended in accordance with their usual obligations.
12 All owners of properties within the Development are obliged to participate in a common policy of insurance covering the whole Development in terms of the Deed of Conditions.
13 The Respondent obtains buildings insurance for the Development in terms of the Deed of Conditions.
14 The Respondent shares any excesses imposed on claims by the insurers equally among all proprietors.
15 That practice has been in place since at least 2008/2009.
16 The Respondent’s Written Statement of Services allows the owners to vote for a different treatment of the insurance excesses. No such vote has been held by the owners.
17 The Respondent holds a garden contingency fund on behalf of the owners.
18 In 2018 the Respondent made two payments of £224.68 and £146.80 out of the contingency fund without the authority of the owners.
19 The payments were used for planting in the Development common areas.
20 The Applicant has, by her correspondence, including by her letter of 16 November 2020, notified the Respondent of the reasons why she 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.

21 The Respondent has unreasonably delayed in attempting to resolve the concern raised by the Applicant.

Hearing

A hearing took place at by telephone conference on 24 January 2022. The hearing had originally been set down for a Case Management Discussion but all parties confirmed that they were prepared to proceed with a full hearing and so the Tribunal elected to proceed in this way.

The Applicant was present at the hearing and assisted by her friend, Jane Calder.

The Respondent was represented at the hearing by Sarah Wilson, one of its directors. No other witnesses were called by either party.

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 2017 as "the 2017 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 the Respondent's Written Statement of Services dated January 2014 marked as Updated 2020 and with two Appendices marked as updates for 2019 and 2020 which we refer to as "the Written Statement of Services".

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 Written Statement of Services is relied upon in the Application as a source of the property factor's duties.

The Code

The Applicant complains of failure to comply with the Code.

The Applicant complains of breaches of Sections: 5.1, 6.1 and 6.4 of the Code.

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

"…SECTION 5: INSURANCE

5.1 You must have, and maintain, adequate professional indemnity insurance, unless you are a social sector property factor who can demonstrate equivalent protections through another route…

…***SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE***

This section of the Code covers the use of both in-house staff and external contractors.

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...

…6.4 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."

The Matters in Dispute

The Applicant complains in relation to the following issues:

(1) The Respondent has charged for services carried out by contractors in respect of times when those services had been suspended.

(2) The Respondent has apportioned the uninsured excess applying to individual claims upon the Development insurance policy among all owners.

(3) The Respondent has carried out gardening works using the contingency fund without authority.

We deal with these issues below.

1 Charges for Suspended Services

The Applicant complains that the Respondent has charged for services for contractors which were not in fact carried out as they had been suspended.

Three contractors are involved: the gardener, Basic Botanics; the cleaner, KRD; and the window cleaner, Sonnys.

The Respondent issued a communication to owners dated 25 March 2020 which advised that these services would be suspended because of the COVID-19 pandemic related restrictions.

On 21 April 2020, the Respondent issued a further communication to owners via its online portal confirming that the contractors had resumed service.

The Applicant was concerned that she appeared to be being charged for services during the apparent period of suspension.

She raised her concerns with the Respondent. The Respondent confirmed that there had been a suspension in the provision in the cleaning services and that a refund would be provided. It advised that there had in fact been no interruption in service in respect of the window cleaning or gardening as those contractors confirmed to the Respondent that they had carried out site visits in accordance with their normal obligations.

The Applicant has asked for the dates of the contractors' visits. The dates relating to the window cleaning contractors were provided but the Respondent advises that it has asked the gardening contractor for its dates but received no information in response.

The Applicant has no actual knowledge of whether there was an interruption in service as regards the gardening and window cleaning but draws a negative inference from the lack of response by the gardener to the request for visit dates.

The Respondent reports that it conducted its usual six weekly inspections of the Development and identified no deficiencies in the gardening service.

It is understandable that the Applicant would have had genuine concerns when it had been reported that a suspension in service had occurred and then was advised that there had, in the event, been none. Her enquiries identified that there had been an interruption in the cleaning service. However, the same enquiries revealed that the window cleaner and the gardening contractor advised that they attended as scheduled and there is no evidence to the contrary.

We therefore accept the evidence of the Respondent that there was in fact no interruption of the normal gardening and window cleaning services and therefore there is no basis for a refund.

We find no breach of the Code or of property factor's duties.

2 The Treatment of the Development Insurance Excess

The Respondent arranges for an insurance policy to be maintained in respect of the Development. It includes Buildings and Public Liability Insurance cover for the buildings and common areas in the Development.

The Written Statement of Services provides as follows:

"6.7 Insurance Premium Excess

6.8 Unless so instructed by a majority of owners, any excess applicable to the co-owners' insurance policy will be apportioned between all owners covered by that policy. Any excess will be liable to be charged at the date of a claim and an appropriate retention of monies will be withheld from any owner selling his/her property after the date of the claim, if the claim is outstanding at date of sale."

There appears to have been some changes in the wording as the Written Statement of Services has been revised over the years but the provision regarding apportionment has remained consistent.

The Applicant complains that the Respondent should not treat the excess in this way but should apply the excess to the person who is the instigator of the claim. She cites a theoretical situation where a neighbour in a different block is careless and a flooding claim results with the effect that the excess is shared among all owners rather than paid by the careless owner.

Her second complaint is that in becoming involved in claims which relate to private property, the Respondent is overreaching its proper remit which should be confined to the Development's common parts (and not the privately owned parts). The Applicant refers to the Written Statement of Services at section 1.5 in which the Respondent explains that its authority extends only to common parts. Section 1.5 of

the Written Statement is broadly accurate. However, the situation regarding insurance is slightly more complex.

We have not been provided with a copy of the Deed of Conditions although Ms Wilson read out its terms during the hearing. It appears to be in reasonably typical terms in that it requires the owners of properties within the Development to hold buildings and public liability insurance in a common policy obtained via the Respondent as factor.

Such insurance covers the whole buildings ie the common parts and the individually owned flats. Such insurance is typical for properties of this kind and brings the benefit that where one incident occurs, such as water ingress, there needs to be only one claim on one policy for the cost of repairing the roof, the common stairs and several different flats. That contrasts with there potentially being several insurers debating their respective liabilities.

We are therefore of the view that the complaint that the Respondent has crossed the line between its proper responsibilities for common property to interfere in the private property of owners is not correct; the Respondent is empowered to do so in relation to insurance by the Deed of Conditions.

As regards the decision to apply excesses across all owners rather than to the original claiming owner, there is some confusion around when and whether this new policy came to be applied. It seems however from the Applicant's evidence at the hearing to have occurred around 2008/9. The Applicant advises that she had to fully pay an excess herself in 2008. The Applicant believes a change of broker was the reason, having been advised of that by the Respondent. Ms White advised that she thinks that was not the correct reason.

In any event, the Deed of Conditions says nothing about the treatment of any excesses. They have to be dealt with in some way. Sharing the cost of each excess among all of the 72 owners seems to the Tribunal to be a reasonable approach. It avoids the burden falling solely on one proprietor and also avoids the need on every occasion to identify the single owner or owners who are "responsible" for any claim and who should be liable for the payment of the excess. That task may often be impossible.

The Respondent's position is clear in its Written Statement of Services that the owners may choose to vote for a different apportionment of the excesses. The parties agree that no such vote has been completed.

In the event that the change to the treatment of the excess was itself a breach of property factor's duties or of the Code, that is said to have happened prior to the inception of the 2011 Act so a question would arise as to whether the Tribunal has the jurisdiction to consider that matter. However, the Tribunal can identify no breach of the Code or of property factor's duties relating to this this whole issue.

3 Use of the Contingency Fund

The Applicant has a general background dissatisfaction with the common garden maintenance standards. She is particularly concerned that in around 2017 work was instructed by the then residents committee who were empowered to instruct improvement works but that those works were concentrated on a part of the Development remote from the Property. There is now no resident's committee with the power to instruct works and it is difficult to establish a quorum of owners to enable instruction of further garden works.

The Applicant's specific complaint is that the Respondent used the Development's contingency fund to pay for planting of shrubs at the Development. The Respondent did not have the authority to do this. The sums involved were two payments – one of £224.68 and a second of £146.80.

The Respondent has accepted that it did not have authority to use the contingency fund and has apologised. The Respondent has explained that this situation came about as a result of an error by a member of staff who is no longer with the Respondent.

The Applicant agrees that she has received the Respondent's apology. The Tribunal invited the Applicant to explain what remedy she seeks for this situation. She advised that she does not wish compensation. She has raised this complaint to highlight what she perceives as the Respondent's failure to follow the terms of the Deed of Conditions.

We find there to have been a breach of property factor's duties in respect of the use of the contingency fund without authority.

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.

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 January 2022