Housing and Property Chamber
First-tier Tribunal for Scotland

Decision

of

the Housing and Property Chamber of the First-tier Tribunal for Scotland

(Hereinafter referred to as "the Tribunal")

Under Section 21(1) and 23 (1) of the Property Factors (Scotland) Act 2011

Case Reference Number: HOHP/PF/14/0076

Re : Property at 2/2 256 Crow Road, Glasgow G11 7LA ("the Property")

The Parties:-

Mr Colin Strain and Mrs Eleanor Strain, 2/2 256 Crow Road, Glasgow G11 7LA ("the Applicants")

Ross & Liddell Limited, 60 St. Enoch Square, Glasgow G1 4AW ("the Respondents")

The Tribunal comprised:-

David Bartos - Chairperson
Colin Campbell - Ordinary Member

NOTICE TO THE PARTIES

The Tribunal :

(1) varies the Property Factor Enforcement Order reference HOHP/PF/14/0076 in respect of the Property dated 3 July 2015 by

omitting part (7) and in part (8) by omitting the words "issue on their website and";

(2) certifies that the Respondents have complied with parts (6)(b) and (d) and (8) (as varied) of said Order;

(3) decides that the Respondents have failed to comply with parts (2), (3)(b), (5), (6)(a) and (c), of the said Order;

(4) revokes parts (2), (5), (6)(a) and (c), of the said Order; and

(5) decides that part (3)(b) of the Order remains to be complied with.

Reasons

1. By e-mails and posted correspondence issued on or about 21 March 2017 from the Clerk to the Tribunal the parties were invited to indicate whether the Property Factor Enforcement Order dated 3 July 2015 and issued on 7 July 2015 by recorded delivery post and e-mail (as varied by the interlocutor of the sheriff at Glasgow dated 18 January 2017) had been complied with or whether a variation or revocation of the Order was appropriate. By written response dated 2 April 2017 the Applicants submitted that parts (2), (3)(b), (5), (6), and (7) of the Order had not been complied with. By written response dated 23 March 2017 the Respondents submitted that the Order had been complied with in its entirety.

2. A hearing was fixed to take place on 18 May 2017 at 10.00 a.m in Wellington House, 134-136 Wellington Street, Glasgow G2 2XL. By Direction of the Tribunal dated 24 April 2017 the parties were directed to lodge certain documents relating to their respective submissions. Both parties lodged documents timeously.

3. The hearing took place at the date and time fixed. Both Applicants appeared with Mr Strain making representations. Mr Ritchie of Hardy Macphail appeared as the Respondents' representative. It was common ground of the parties that the Order had been issued on 7 July 2015. The time limits set out in the Order required to be applied in relation to that date.

Part (2)

4. With regard to part (2) of the Order, the Respondents' solicitors sent a letter dated 17 July 2017 to the Applicants enclosing a letter from Gerry Gilroy MRICS and director of building surveying of the Respondents to Alec Cassidy of the Respondents dated 15 October 2014. That letter had attached to it Mr Gilroy's note headed "Reinstatement Cost Estimate for the tenement of which the Property forms part. The note is dated October 2014. Both letter and note pre-date the Order.

5. The note bears expressly to be the result of a "desktop exercise" with no inspection having been carried out. The figures in the note bear to have been calculated based on the average building price index as published by the Building Cost Information Service which was a trading division of the RICS Business Services Ltd itself a trading division of the Royal Institution of Chartered Surveyors. These figures in turn are said to have been adjusted by the Respondents "in recognition of the form of construction applicable" for the tenement. Furthermore in the note Mr Gilroy does not accept responsibility for the accuracy of the sums quoted and states that no allowance is made for damage to adjoining property.

6. The Applicants submitted that this note does not comply with part (2) of the Order. They said that it pre-dated the Order. It was an internal communication. It did not involve an inspection. It was based on assumptions as to the state of the tenement. It failed to take account of the effect of reinstatement work on immediately adjoining tenements. The author excluded responsibility for its accuracy.

7. The Respondents submitted that the note and letter do amount to compliance. Mr Gilroy was a member of the RICS. Part (2) does not require an independent surveyor. Ultimately the Respondents were responsible for any under-insurance of the tenement. The Respondents' representative accepted that these documents pre-dated the Order. He was unable to provide the Tribunal with evidence as to what the Respondents actually did after the Order to obtain assistance and advice from a chartered surveyor.

8. The Tribunal noted that part (2) of the Order provided that within a two week period the Respondents "shall" in assessing the reasonable cost of reinstatement of the tenement obtain assistance and advice from a suitably qualified chartered surveyor and shall provide a copy of surveyor's report on the reinstatement value to the Applicants. This made it clear that what was sought was assistance and advice from the surveyor to be obtained for the purposes of a fresh assessment.

9. Not only was there no evidence that reinstatement value as at July 2015 had been assessed but the sending of a letter to the Respondents enclosing historical advice from October 2014 in purported compliance with the Order indicates that no assistance and advice had been obtained following notification of the order. On that basis the Tribunal found no compliance with part (2).

Part (3)(b)

10. With regard to part (3)(b) of the Order the same letter of 17 July 2015 enclosed a copy of a letter from the Respondents' insurance brokers JLT Speciality Limited dated 14 July 2015 with a schedule and, as accepted by the

Respondents' representative, a copy of a certificate of Common "Block" Buildings Insurance bearing to have been issued by the Respondents.

11. The Respondents submitted that this copy certificate amounted to compliance with part (3)(b). The Appellants submitted that there was no compliance. They said that it did not identify the insurer. The presence of the logo of Zurich on the top left corner of the document was insufficient. There was no signature of any person on behalf of a specified insurer. In addition the certificate was clearly a copy. Under the Order the Appellants were entitled to an original certificate.

12. The Respondents submitted that the logo of Zurich was sufficient to indicate that the policy was underwritten by Zurich. In addition the letter from JLT made it clear that the insurers were Zurich Insurance plc who had provided authority to the Respondents to issue all policy documentation including "renewal and/or duplicate certificates of insurance" to new and existing owners. Their representative, accepted, however that the letter was not part of the certificate. He submitted further that the lack of a signature on the certificate was immaterial. It was in any event difficult to distinguish copies and originals. He accepted it was a copy but was unable to provide evidence as to the location and source of any original certificate while noting that the JLT letter enabled the Respondents to issue duplicate certificates.

13. The Tribunal noted that part (3)(b) of the Order required the Respondents to issue an insurance certificate which among other things reflected the terms of the insurance of the tenement. It did not require to be signed. As noted by the Committee in paragraph 38(3) in its Statement of Reasons for the Order the policy provided for indemnity by a "Company" named in a schedule. It is clear that the schedule forms part of the insurance of the tenement and identifies the insurer. Yet the identification of the insurer within the schedule is not reflected in the certificate. Knowledge of the insurer is important to allow the insured homeowner – indpendently of the factors who have ceased to provide insurance services - to know exactly who it is that has undertaken to indemnify the homeowner upon the occurrence of the insured risk. Without that information the insured would not be in a position to make a claim. In these circumstances the Tribunal found that in not reflecting the identity of the insurer the certificate did not comply with Part (3)(b).

14. In addition, part (3)(b) required the production of a certificate and not a copy certificate. It was not suggested by the Respondents that the copy which they accepted had been provided was the best evidence that could be obtained and therefore could be relied in a claim in court. The Order does not contemplate that the Applicants should be provided with copy documents when there may be original documents that could be provided. That is the position here and the Tribunal found that the copy document provided did not comply with part (3)(b) in this respect also.

Part (5)

15. With regard to part (5), the Respondents submitted that their solicitors' letter to the Applicants enclosing Mr Gilroy's letter of 15 October 2014 had amounted to compliance. In his letter Mr Gilroy had written "It is recommended that going forward that a Reinstatement Cost Estimate for insurance purposes be carried out on a three/five yearly basis subject to market conditions". Separately the Respondents submitted that their solicitors' letter to the Applicants dated 7 August 2015 had amounted to compliance in its enclosure of a revised Service Level Agreement dated August 2015 ("SLA") applicable only to the tenement. This SLA provided on page 6 that "We recommend that a reinstatement valuation is carried out at three yearly intervals. No revaluation will be instructed without the consent of the majority of the homeowners in the tenement.".

16. The Applicants submitted that the internal recommendation in Mr Gilroy's letter was insufficient. It did not say revaluations would be undertaken by the Respondents but merely recommended that they be undertaken. The same criticism applied to the content of page 6 of the SLA. It did not say that the Respondents would carry out the valuations at a certain frequency. Part (5) reflected section 5.8 of the Property Factors' Code of Conduct which imposed an absolute duty on the Respondents (as the arrangers of insurance) to instruct such revaluations and do not allow for pre-conditions such as the one in the SLA. The position was akin to that in HOHP/PF/15/0058 which also involved the Respondents' service level agreement for another tenement.

17. Ultimately the Respondents accepted that the SLA did not satisfy section 5.8 of the Code.

18. The Tribunal accepted the Applicants' submission. Part (5) requires the Respondents to inform the homeowners in the tenement of the "frequency with which property valuations will be undertaken". A mere internal recommendation does not satisfty that requirement. Equally a recommendation to owners combined with a pre-condition that a majority of owners must instruct the Respondents is not compliance. The Tribunal found that there had been a failure to comply with part (5) of the Order.

Part (6)

19. Part (6) required the Respondents to issue an amended service level agreement to the Applicants with a written statement of services containing various pieces of information. These were listed (a) to (d) in part (6).

20. Part (6)(a) required the written statement to clearly identify the services provided as "core services" and those not provided as "core services". This requirement reflected the provisions of section 1.1a B of the Code of Conduct which the then Committee had found had been breached.

21. The SLA on page 2 contained a heading "CORE SERVICES". Under that heading were the sentences:

> "We will order to be executed any common or mutual operations and repair and any painting or decoration to the common parts of the tenement"
>
> "The provision of additional services may incur further expenditure the details of which will be agreed [*sic*] with a majority of the owners in advance of incurring additional expense".

22. The Respondents submitted that the first quoted sentence identified the core services (other than the arrangement of a block common insurance policy) and the second quoted sentence identified the non-core services. Their representative was however unable to identify any services in the SLA which did not involve some common or mutual operations. He accepted ultimately that the installation of an electric door entry system would involve operations to the commonly owned walls and door of the tenement.

23. He suggested that "major repairs" mentioned on page 4 where "additional fees would be incurred for the appointment of surveyors, architects etc" would not be core services whereas "routine repairs" would be. However he accepted that it may be difficult to distinguish which services were or were not "core" for the purposes of section 1.1aB of the Code and that there may be some benefit in further explanation.

24. The Applicants had no submission on this matter other than to note that under their invoices from the Respondents there was no indication as to which services being charged for were or were not "core".

25. The Tribunal recalled paragraphs 95 to 97 of its decision dated 17 April 2015. These do not require to be repeated. The fact that even now the Respondents' representative was unable to make an unequivocal statement as to which particular services were core and which were not, underlines the lack of transparency which remained in the SLA under the heading "CORE SERVICES". The written statement contained in the SLA did not comply with part (6)(a) of the Order.

26. With regard to part (6)(b) it was not disputed that there had been compliance.

27. With part (6)(c) the parties adopted their submissions in relation to part (5). The Tribunal concluded that the mere recommendation to owners that a revaluation be carried out at three-yearly intervals combined with a pre-condition that a majority of owners must instruct the Respondents for the revaluation is not compliance with part (6)(c).

28. With regard to part (6)(d) it was not disputed that there had been compliance.

Part (7)

29. Part (7) required the payment by the Respondents to the Applicants the sum of £ 125 within 2 weeks of the notification of the Order. It was common ground between the parties that the Order had been notified on 7 July 2015. It followed that "payment" had to be made by 21 July 2015. It was also agreed that the Repondents had sent their cheque for £ 125 to the Applicants in their letter dated 16 July 2015 which had been sent by first class post. It was also not disputed that the Applicants had presented the cheque for payment and that it had cleared.

30. The Respondents submitted the delivery of the cheque was sufficient for payment. There was no need for clearance of the funds. On that basis part (7) of the Order had been complied with.

31. The Applicants submitted that for payment clearance of the funds was required. Mr Strain testified that he had paid the cheque into an account on Friday 17 July 2015. This was evidenced by a copy receipt from the bank which he produced. The Tribunal accepted that evidence.

32. The Applicants were unable to give evidence as to the date upon which the cheque had cleared. Mr Strain relied on the Co-operative Bank's information sheet about an Office of Fair Trading "customer promise" which provided for "maximum cheque processing timescales". Under these timescales a cheque would clear only at "T + 4" being the transaction day plus 4 clearing days which required to be business working days not including weekends. He submitted therefore, that the Respondents' cheque did not clear until Wednesday 23 July or Thursday 24 July at the earliest. This was not timeous payment, he submitted.

33. The Tribunal took the view that there was force in the Respondents' submission given that the cheque had cleared. Neither party had provided any legal authority for their respective positions. In these circumstances the Tribunal took the view that there was no need to decide whether payment had been timeous. Rather, given that payment had been made either before, or at latest 2 or 3 days after the time limit, it was entirely reasonable for the Tribunal to vary the Order by omitting part (7). There could be no prejudice to either party in such variation.

Part (8)

34. Part (8) required the issue to the Applicants and on the Respondents' website of an amended Complaints Procedure.

35. The Respondents relied on their sending of an amended complaints procedure to the Applicants by their letter of 10 August 2015. The Applicants were content to accept this amended Complaints Procedure as compliance with part (8). Neither the Respondents nor the Applicants were able to advise the Tribunal on whether the amended Complaints Procedure had been issued on the Respondents' website.

36. Given that the Applicants were content with the intimation to them of amended Complaints Procedure, the Tribunal decided that it was reasonable to vary the Order by omitting the requirement to issue the Procedure on the website.

Revocation of Order

37. The Respondents' representative submitted that in so far as the Tribunal might find that the Respondents had failed to comply with any part of the Order, any such part of the Order should be revoked under section 21(1)(b) of the Act as the action still required was no longer necessary.

38. It was agreed that the Respondents had ceased to be factors for the tenement, including the Property, on 4 April 2016. Their representative submitted that in paragraph 41 of her judgment on appeal, the sheriff had refused to remit to the Tribunal to allow them to order new remedies in place of parts (1), (3)(a), and (4) of the Order which she had quashed. This was because she viewed any new remedy as an academic exercise given the termination of the factoring. It was submitted that parts (2), (3)(b) and (5) all followed on from the revoked part (1). If it was academic for the sheriff not to remit in respect of part (1), it followed that any work still to be done under parts (2), (3)(b) and (5) was no longer necessary. As there was no ongoing relationship between Applicants and Respondents any issuing of further documentation would be academic.

39. The Applicants submitted that the Tribunal had a discretion not to revoke under section 21(1)(b). It should exercise that discretion not to revoke. To allow revocation or variation of the PFEO would be to deny justice and to strike at the overriding objective of the 2011 Act. The Respondents had been their property factors at the time of the breaches and had continued to be so until after the PFEO and the marking of their appeal against it. Mr Strain submitted that the sheriff had not been made aware that the Respondents' resignation was after the making of the PFEO. The Respondents should not be allowed to avoid their obligation to comply with the PFEO through mere resignation. There was a public interest in securing compliance of a PFEO.

40. The Applicants drew an analogy from the circumstances in HOHP/PF/14/0035/0036/0037. In that case the Committee had issued a notice of proposed PFEO requiring the factor to pay £ 600. Before the Committee came to

consider whether to make the proposed PFEO the factor had paid the £ 600. Nevertheless the Committee had made a PFEO requiring the payment of the £ 600. It had done so on the basis of being required to do so under section 19(3) but it had stated that had it had a discretion it would have exercised the discretion to issue a PFEO despite the payment. Its reason was that the issue of a PFEO was a matter of public interest and that it would be unfortunate if the non-issue of a PFEO in those circumstances led to a practice of PFEOs being avoided in order to avoid publicity.

41. With regard to the Respondents' submission on parts (2), (3)(b) and (5) being academic, the Applicants founded on paragraph 40 of the sheriff's submission in which she stated that the unquashed parts of the PFEO stood separately. If sheriff's reasoning relating to part (1) being academic related to them, they could have been quashed also, but they had been preserved expressly.

42. The Tribunal considered the failures it had found in respect of parts (2), (3)(b), (5), (6) – with the exception of heads (b) and (d) – and part (8). The initial question in respect of each was whether the action required was no longer necessary. The second question was, that if it was no longer necessary whether the Tribunal should nevertheless exercise its discretion not to revoke the Order.

43. Part (2) required the Respondents to obtain assistance and advice for the reinstatement cost for the tenement following the July 2015 Order. Part (5) required the Respondents to advise of the frequency of property revaluations. These would involve a revaluation of the reinstatement cost for insurance purposes. The purpose of part (5) was also reflected in part (6) head (c).

44. That the sheriff may not have seen parts (2), (5), and (6) head (c) as academic is immaterial. She left them in place subject to any future decision of the Tribunal under section 21(1).

45. The Respondents arranged insurance for the period from 15 May 2015 to 15 May 2016. They did so for the sum insured as stated in the copy insurance certificate. Upon ceasing to be factors the Respondents have no further responsibility to arrange insurance in the future nor do they have power to change any insured sum for the future or to carry out revaluations. Thus the Tribunal concluded that compliance with parts (2), (5), and part (6) head (c) was no longer necessary.

46. Part (3)(b) required the Respondents to issue an insurance certificate relating to insurance to be in force for the tenement after the PFEO. A copy certificate was issued but it lacked identification of the insurer. Despite the Respondents having ceased to be factors, this insurance remains in force in respect of the period which it covers. For all that the Tribunal knows claims may yet be made under it. This matter is not academic. Applicants are entitled to be

put in a position where they know who would indemnify them under the policy. For these reasons the Tribunal decided that compliance with part (3)(b) had not ceased to be necessary.

47. Part (6)(a) required the clear identification of core and non-core services. The purpose was to allow the Applicants to know for the future what was a core service, which might attract a management fee, and what was not, which might attract separate additional charges. Given that the Respondents are no longer factors, that future no longer exists. The issuing of a written statement of services by the Respondents as factors for the Property has no further apparent purpose. None was suggested by the Applicants. In these circumstances the Tribunal decided that part (6)(a) of the Order was no longer necessary.

48. Turning to the Tribunal's discretion not to revoke the Order even if it found the actions sought in it no longer to be necessary, the Tribunal considered the Applicants' submissions as to the denial of justice, the overriding objective of the 2011 Act and public interest.

49. A discretion such as the one the Tribunal has under section 21(1) must be exercised in the interests of justice. That means justice to both parties. It can include the public interest. If the Tribunal finds that actions in an order are no longer necessary it will be unusual for the Tribunal not to revoke the order. This is because a PFEO is not an order made in a vacuum. It is there to achieve an end, that being to remedy the breach or breaches that have been found. If the actions to achieve that end are no longer necessary it will be difficult to see any reason why the order should continue.

50. The Applicants submitted that the reason for the continuance of the Order was for justice. Without it they would be left without remedies for the breaches. That was unfair. Resignation from factoring did not amount to compliance. The position was analogous to the payment in HOHP/PF/14/0035 etc to avoid a PFEO.

51. In the present case the Tribunal found that leaving in place an order which required the taking of action by the factor that was no longer necessary did not have the effect of denying the Applicants an effective remedy. Unlike the case HOHP/PF/14/0035 etc a PFEO had been issued. The Respondents had resigned as factors. The Applicants could gain no benefit from compliance by the Respondents with parts (2), (5), (6)(a) and (c) of the Order. The purpose of the 2011 Act did not extend to the making of Orders which could not bring benefit to homeowners. There was no public interest in having the Respondents issue documents which could not benefit homeowners. The public would be aware from this decision, once it was published on the Tribunal website the nature of any non-compliance. In these circumstances the Tribunal was not persuaded to exercise its discretion not to revoke the parts of the Order which were no longer necessary.

52. The decision of the Tribunal was unanimous. Notice of the decision will be served on the Scottish Ministers. The Respondents are reminded that a person who without reasonable excuse fails to comply with a property factor enforcement order commits a criminal offence.

Right of Appeal

The the parties may seek permission to appeal on a point of law against this decision to the Upper Tribunal by means of an application to the First-tier Tribunal made within 30 days beginning with the date when this decision was sent to the party seeking permission. All rights of appeal are under section 46 of the Tribunals (Scotland) Act 2014 and the Scottish Tribunals (Time Limits) Regulations 2016.

D. BARTOS

Signed ..... 25 May 2017

David Bartos, Chairperson