

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision and Statement of Reasons under Section 19 of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/20/0128

Re: 1/1 Rothesay Court, 2473 Dumbarton Road, Glasgow G14 ONT ("Property")

The Parties:-

Mark Welsh, 1/1 Rothesay Court, 2473 Dumbarton Road, Glasgow G14 ONT ("Homeowner")

Indigo Square Property Limited, 42 Holmlea Road, Glasgow G44 4AL ("Factor")

Tribunal Members:

Joan Devine – Legal Member

Mary Lyden – Ordinary Member

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("**Tribunal**") unanimously determined that the Factor has complied with the property factor duties and the Code of Conduct for Property Factors as required by section 14 of the Property Factors (Scotland) Act 2011. In all the circumstances the Tribunal does not propose to make a Property Factor Enforcement Order.

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**"

Following on from the Homeowner's application to the Tribunal which comprised documents received in the period 14 to 31 January 2020 ("**Application**"), the Convener, with delegated powers under section 96 of the Housing (Scotland) Act 2014, referred the Application to the Tribunal on 5 February 2020. The Tribunal had available to it, and gave consideration to, the Application, copy emails from the Homeowner, Written Submission, Productions, copy emails and copy letters provided by the Factor, the oral submissions made by both parties at the Hearing and the evidence of Paul Murray given at the Hearing.

Hearing

A Hearing took place by conference call on 23 September 2020. The Homeowner was in attendance. The Factor was represented by Brian Gilmour. Paul Murray gave evidence on behalf of the Factor.

In advance of the Hearing the Factor had indicated an intention to lead evidence from three witnesses. The Homeowner objected. The question of witnesses was dealt with as a preliminary issue. The Tribunal explained to the Parties that witnesses would take part in the Hearing only for the purpose of giving evidence and would not take part in the proceedings in advance of giving evidence. In those circumstances the Homeowner withdrew his objection to the witnesses giving evidence. Ultimately the Factor decided to lead evidence from one witness, Paul Gilmour.

Findings in Fact

1. The Property is a flat within a block of 6 at 2473 Dumbarton Road Glasgow G14 0NT.
2. The Homeowner has resided at the Property for approximately 18 years
3. The Factor performs the role of the property factor of the Development.
4. The Factor was appointed by a majority vote at a meeting of homeowners within the block on 18 March 2019 and has authority to act.
5. The Factor provided to the Homeowner a Written Statement of Services which sets out the basis of the Factor's authority to act.
6. The Factor provided to the Homeowner a Written Statement of Services which sets out the services the Factor offers to provide.

Summary of Submissions

Evidence of Mark Welsh - Authority to Act

1. Mr Welsh said that the Factor has no authority to act as they have not submitted a valid factor contract and do not say what services they will provide. Mr Welsh made reference to a document included with his Application which explained "who are Indigo Square" and was signed by Brian Gilmour. He also referred to a Written Statement of Services ("**WSS**") dated November 2019 also included with his Application. Mr Welsh said that the WSS narrated that the services would only be provided "on instruction". He said that no services at all have been provided by the Factor. No contractors had been instructed and no property maintenance at all had been carried out.

He referred to an invoice produced with his Application dated 12 September 2019 from the Factor which narrated various services. He said that none of the works listed in the invoice had been carried out.

2. The Tribunal asked Mr Welsh to identify where it was in the WSS that it was stated that services would only be provided on instruction. The Tribunal read out the words which appeared in the WSS under the heading "Services Provided" and noted that the wording did not contain a reference to services being provided only "on instruction". The Tribunal invited Mr Welsh to identify the specific wording. Mr Welsh said that he had a copy of the WSS on his phone and would have difficulty in reviewing it.
3. Mr Welsh made reference to the photographs provided with his Application and said that these made clear that no work had been carried out to the garden, the lights in the common areas did not work and the building was generally in an appalling state. He made reference to the photograph of the electrical cupboard which he said was a fire hazard.
4. The Tribunal asked Mr Welsh who had been the factor prior to the appointment of the Factor. He said that there had never been a factor for the Property. He said that he had bought the Property approximately 18 years ago. He said that the development consists of around 15 blocks with 6 flats over 3 floors in the block which he occupies.
5. Mr Welsh said that the owners of flat 0/2, 2/2 and 2/1 had all let their property to third parties which was in breach of the title. He referred to the Deed of Conditions which governed the title to the Property and the other flats in the block and to the provision which states:
6. *"(THIRD) The said dwellinghouses shall be used solely as private dwellinghouses and for no other purpose whatsoever and none of the said dwellinghouses shall be sub-divided or occupied by more than one family. (FOURTH) The Feuars are prohibited from carrying on within the said dwellinghouses or any other part of the development any trade, business or profession."*
7. Mr Welsh said that letting a property to a third party was using the property as a business. Mr Welsh said that this breach of the Deed of Conditions meant that any vote cast by a homeowner was invalid. The Tribunal asked Mr Welsh about the appointment of the Factor. He said that he had instructed legal action against various owners namely Mr Murray and Ms Cox. They had called in the Factor to assist at the development and knew that Mr Welsh objected to the appointment of the Factor. Mr Welsh said that he did receive a letter from Ms Cox saying that a meeting of homeowners was being convened. He told the Tribunal that he did not want to attend and did not attend.
8. Mr Welsh said that he had raised an action in Glasgow Sheriff Court which related to the validity of the factor agreement. The Tribunal asked Mr Welsh if there was any order granted by the Court which prohibited the holding of the meeting to appoint the Factor or prohibited the Factor from acting. Mr Welsh said that there was no such order of the Court.

9. Mr Welsh said that a hearing took place at Glasgow Sheriff Court on 10 March 2019. At that hearing he agreed with Mr Murray that a factor should be appointed.
10. The Tribunal asked Mr Welsh about the ownership of the properties within the block. He told the Tribunal that the following properties are owned by the following parties:
 - Flat 0/1 is owned by Paul Murray.
 - Flat 0/2 is owned by Lok Kit Cheung.
 - Flat 1/1 is owned by Mark Welsh.
 - Flat 1/2 is owned by Colette Cox.
 - Flat 2/1 is owned by Wendy Brown.
 - Flat 2/2 is owned by Jennifer MacAskill.
11. The Tribunal asked Mr Welsh about the meeting held to appoint the Factor on 18 March 2019. The Tribunal asked Mr Welsh why he regarded the votes by the homeowners at that meeting to be invalid. Mr Welsh said that the vote cast by Steven Rollo was invalid as he had no entitlement to vote. He is the letting agent for Wendy Brown. As he is not an owner he is not entitled to vote. He said that the vote of Lok Kit Cheung was invalid. He said that this homeowner's rights should be limited as he is using the flat for people trafficking. Mr Welsh submitted that as Mr Cheung is not complying with the Deed of Conditions he is not entitled to vote. Mr Welsh submitted that the votes of all other homeowners were invalid as they had never paid for property maintenance. He said that their votes were not for the benefit of the property.
12. The Tribunal asked Mr Welsh if he received the letter dated 4 March 2019 calling a meeting of the homeowners to take place on 18 March 2019. He said that he did receive the letter.
13. Mr Welsh said that the Factor could only have authority to act if it arose from a legal factor's agreement. He said that there could not be a valid factor's agreement when the Factor undertakes no repairs.
14. Mr Welsh summarised his position as regards Section 1 of the Code by saying that the WSS says that services will only be provided on instruction. Mr Welsh said that homeowners in the block have specifically instructed the Factor that no services are to be provided. He said that this is evidenced by the photographs produced with his Application which show that no maintenance has been carried out. He said that the common parts of the block had not been cleaned once in 18 months. He said that there had been an abuse of voting rights by the homeowners in the block.

Evidence of Mark Welsh – Section 20.1 of the Code

15. As regards Section 2.1 of the Code the Tribunal asked Mr Welsh to explain his concerns. He said that Mr Gilmour of the Factor had sent a letter to him saying that he could take his complaint to the Property Ombudsman. However, the Factor was not registered with the Property Ombudsman. The Factor services are not audited and there is no complaints procedure. Reference was made to an email from Brian Gilmour to Mark Welsh dated 28 November 2019 which states:
16. *"We have a complaints procedure as recommended by the Property Ombudsman Scheme and if you are not satisfied with this process you are at liberty to proceed with your case through the First Tier Tribunal of the Housing and Property Chamber."*
17. Mr Welsh made reference to his email to the Tribunal dated 21 September 2020 which referred to the instruction of works to the rear and front door of the Property and the door entry system. Mr Welsh said that this work should have been done some time ago. He said it was his position that the Factor should carry out the work even if only one homeowner asked for the work to be carried out. He said that other homeowners had refused to instruct these works.
18. The Tribunal asked Mr Welsh about the door entry system. He said that it had not been functioning since 2016. It had not been repaired as other homeowners refused to pay for the repairs. Whilst he agreed that the works had now been instructed he questioned whether they would actually take place.

Evidence of Brian Gilmour - Authority to Act

19. Mr Gilmour told the Tribunal the background to the development. He understood that it had been built in the early 1980's. He said there are about 80 units on the development. It is an L shaped development built for private owner occupation. There are 10/12 blocks of flats. Mr Gilmour told the Tribunal that each stairwell could have had a single factor appointed.
20. Mr Gilmour told the Tribunal that the Factor carries out letting as well as property factor services. The Factor was approached in December 2018 about factoring a block adjoining the property at 2473 Dumbarton Road. Mr Gilmour told the Tribunal that the title said that two owners could convene a meeting for all owners at the development. The Factor mailshotted all of the flats on the development and convened a development wide meeting. Through that process the Factor discovered that one close was self-factored. One had a third party factor in place. Owners in some of the other blocks said that they wanted a factor. The first one that the Factor took on was 2471 Dumbarton Road. Mr Gilmour told the Tribunal that the Factor was approached by Colette Cox about factoring 2473 Dumbarton Road. He referred to document 3A in the Factor's inventory of productions which was a letter calling a meeting of the owners in the block where the Property is situated. He then referred to document 3B which was a reply to Mr Welsh from the Factor confirming that a meeting of the owners in the block had been convened. He referred to document 3C which was the Minute of the Meeting

held on 18 March 2019. He referred to document 3D which was a list of the attendees.

21. The Tribunal asked Mr Gilmour if Stephen Rollo had a mandate from the owner of the property let by him to attend the meeting on their behalf. Mr Gilmour said that he did have an email from Wendy Brown, the owner of the property, authorising Stephen Rollo to vote on her behalf. The Tribunal noted that in any event as the Deed of Conditions provided for a vote being carried by three homeowners even if the vote of Mr Rollo was discounted three homeowners had voted in favour of the appointment of the Factor. Mr Gilmour confirmed that that was correct.
22. Mr Gilmour then referred to document 3G which set out the selection of services that the Factor offered to owners. He then referred to the WSS which was produced as items 1A and 1B in the Factor's inventory. He said that once appointed the Factor would issue the WSS. Document 1A was the first WSS which was issued. Document 1B was a slightly revised version which was issued in November 2019.
23. As regards authority to act, Mr Gilmour told the Tribunal that the Deed of Conditions governing the Property allows a quorum of three homeowners at a meeting.
24. Mr Gilmour said that he regularly corresponds with Mr Welsh and Mr Welsh insists that he is the only person who has a right to vote. Mr Gilmour said that he has suggested that Mr Welsh obtains legal advice or advice from an organisation such as Citizens' Advice. He had provided Mr Welsh with website addresses where support and information could be provided.
25. Mr Gilmour told the Tribunal that he was comfortable that the Factor has authority to act.
26. Mr Gilmour referred to the submission by Mr Welsh that the WSS provides that no services will be provided without an instruction from the homeowners. Mr Gilmour said that that is simply not the wording of the WSS and he did not propose to say any more about it.
27. Mr Gilmour noted that as a Property Factor he does not have authority to undertake work without the participation of the homeowners.
28. Mr Gilmour told the Tribunal that following their appointment the Factor issued the letters shown at productions 3F and 3G.
29. Mr Gilmour then turned to the submission made by Mr Welsh that no maintenance had been carried out on the specific instruction of homeowners that no work was to be carried out. He referred to item 4 in the productions for the Factor which was a quote for carrying out gardening services dated 14 May 2019. He said that this detailed the gardening services that were to be provided. Mr Gilmour referred to a photograph produced by Mr Welsh dated 9 October which showed that the grass had been cut.
30. Mr Gilmour referred to production 7 which was a letter dated 10 May 2019 which referred to proposed works. He then referred to a further production under item 7 which was a letter dated 26 June 2019 which referred to a problem determining the extent of the gardens which formed the common parts of each close. He told the Tribunal that if there was one Factor for the

whole development there would be no difficulty but when there were different factors for different closes there was a difficulty in identifying where the garden for each close started and stopped.

31. Mr Gilmour then referred the Tribunal to production 5 which was a quote for roof repairs and photographs of the roof. Mr Gilmour referred to an email from Mr Welsh dated 24 July 2019 which referred to trespass and property damage and a contractor being on the roof being unsafe. The email was dated 24 July 2019. Mr Gilmour referred to the response sent on the same date.
32. Mr Gilmour referred to production 6 and told the Tribunal that the Factor had written to homeowners about repairs to the door. Quotations were obtained which were at production 6. He referred to correspondence in connection with the repairs to the door at production 7. Mr Gilmour told the Tribunal that the homeowners did not want to proceed with the work. He said that the door had been broken for some time and did not necessarily have to be immediately replaced.
33. As regards the lighting in the common areas Mr Gilmour told the Tribunal that the Factor undertook inspections regularly. He referred to production 10C. He said that when the Factor carries out an inspection they put a card through each door of the homeowners so that the homeowner knows that the Factor has been in attendance. Production 10C was an envelope containing a ripped up card which Mr Gilmour thought had been sent to the Factor by Mr Welsh as it referred to being for the attention of "Big Brian". He was aware that Mr Welsh referred to him in that manner.
34. Mr Gilmour said that the building has patently been neglected for many years and there is also a neighbour dispute ongoing. He said that Mr Welsh thought that the Factor had no authority to act so he would not correspond with the Factor other than in the manner evidenced by production 10C. Mr Gilmour explained that that is why the Factor has produced so much correspondence to show their attempts to engage with Mr Welsh.
35. Mr Gilmour told the Tribunal that the Factor inspects the property during daylight hours which means the lighting in the common areas is often not on. The Factor relies on neighbours to notify if there is a problem with the lights.
36. Mr Gilmour told the Tribunal that in October 2019 the Factor was notified that there was a problem with the lights. The Factor sent a contractor to the property. He was verbally abused by Mark Welsh. This was reported to the Factor by Steven Rollo. Reference was made to document 10A. Mr Gilmour said that he spoke with the electrician who said that he would not go back to the property. The Factor therefore arranged for a further contractor to attend the property who was accompanied by Mr Gilmour. On that visit it was noted that the electrical cupboard had been used as a storage area. The Factor wrote to the owners asking them to clear it out. Mr Gilmour said that the lights were fixed by Merryvale. As far as Mr Gilmour was aware the lights were continuing to work.
37. As regards cleaning of the property Mr Gilmour said that cleaning contractors attended regularly. There is a sign-in sheet for cleaners which had been removed and now replaced.

38. Mr Gilmour told the Tribunal that the Factor revisited the question of replacing the door in early 2020. He referred to the further bundle of correspondence which had recently been lodged with the Tribunal. He said that the Factor had reached out to Mr Welsh. He referred to a letter dated 5 June and an email to all owners dated 17 June with quotes for repairing the doors and security entry. Mr Gilmour referred to further contact with homeowners dated 8 and 24 July and 25 August 2020. He referred to a quote being circulated to carry out the necessary repairs for £2,700. Mr Gilmour told the Tribunal that the Factor also arranged to have the gutters cleared.
39. In summary, Mr Gilmour said that the property was cleaned regularly, the question of repairing the doors had been revisited twice, the gutters had been cleared and an electrician had attended regarding the lighting.
40. As regards the doors, he said that all homeowners including Mr Welsh had now paid for their share of carrying out the necessary repairs. One homeowner has not yet paid their share. However, their representative, Mr Rollo, has confirmed that payment will be forthcoming. In those circumstances the Factor will proceed to instruct the works. As regards when the works would commence, Mr Gilmour was waiting to hear further from the locksmith.

Evidence of Brian Gilmour – Section 2.1 of the Code

41. As regards the complaint under Section 2.1 of the Code Mr Gilmour explained that the Factor is a member of the Property Ombudsman as regards their letting business. He said that the complaints procedure referred to in the WSS is as recommended by the Property Ombudsman. However, the Factor had not suggested that Mr Welsh should go to the Ombudsman but to the First Tier Tribunal if he was not happy with the outcome of a complaint. Mr Gilmour said that in this case the complaints procedure had not yet been exhausted.

Questions Arising from Evidence

42. Mr Welsh then raised questions arising from the evidence of Mr Gilmour. Firstly, he referred to the cleaning and noted that the invoices provided by the Factor do not contain a charge for cleaning.
43. Secondly, he referred to the lighting and said there had been a problem with the lighting from May to November 2019. He said that at that point he had the lights repaired. As regards the contractor Mr Welsh denied verbally abusing him. He said that he had asked the contractor to provide evidence of his qualification and the contractor had refused to do so. The Tribunal asked how many lights were out. Mr Welsh said every single one was not working. The Tribunal asked who had reported the problem with the lights to the Factor. Mr Gilmour said that Paul Murray, one of the homeowners, had reported this in October by telephone.
44. The third point made by Mr Welsh related to the gardening. He said that he noted Mr Gilmour had said that no gardening was carried out until July. Mr Welsh said he was not aware of any gardening being carried out in June or July. It was not carried out until much later in the year.

45. As regards the door repairs, Mr Welsh noted that the repairs have still not been carried out. He accepted that the works are now to be carried out but in his view it would have been appropriate for the Factor to act on the instruction of one homeowner even if the others objected.
46. As regards the guttering, Mr Welsh asked how the contractor accessed the roof. As regards the roof repair, Mr Welsh said it was his position that no repairs were carried out to the roof.
47. Mr Gilmour then commented on the points made by Mr Welsh. He said that the gutters were cleared by Advance Site Services. He did not know how they accessed the roof. As regards the cleaning of the close, he said that this was included in the management fee. The contractors had been Spotless Cleaning. They are no longer in business. The cleaning is now carried out by Ultimate. As regards roof repairs, he referred to the quotes for roof repairs in Section 5. He said that the work had been carried out.
48. He said that Mr Welsh has never engaged constructively with the Factor. Mr Gilmour said that the challenge here is that Mr Welsh has had a long dispute with his neighbours. He said that he also has a misunderstanding of Scots' property law and what property factors are allowed to do. He said that property factors cannot carry out work if the majority of homeowners do not agree.

Evidence of Paul Murray

49. Paul Murray joined the Hearing by telephone. He explained that he owns a ground floor flat at 2473 Dumbarton Road. Mr Gilmour asked him about the cleaners. He said that he had seen cleaners in the property about once each week since around April 2019. He had seen the cleaner hoovering and dusting. He said that he had also seen the cleaner carrying out duties over the weekend. Mr Gilmour asked him about gardening. Mr Murray said that the garden areas had never looked as good.
50. The Tribunal asked Mr Murray about the suggestion by Mr Welsh that the grass was excessively long and there was rubbish in the garden area. Mr Murray said that the property was on Dumbarton Road and therefore there was an amount of rubbish. However, he said that the garden work had been carried out since the Factor was appointed.
51. As regards the overflow from his flat Mr Murray said that he had received a letter from the Factor and he had the work attended to thereafter. He was asked about gutter cleaning. He said that he was not aware of contractors carrying out the works but he thought that there had been some sort of drama. He was asked by Mr Gilmour about the roof repair. He said that he thought there had been a leak. He assumed that the work had been done but could not confirm. As regards the lights in the common area, Mr Murray said that prior to the appointment of the Factor there was a problem with the lights but he was not aware of any problem since the Factor had taken over.
52. Mr Welsh then raised a number of issues following the evidence of Mr Murray. Firstly he said that he believed that both Mr Gilmour and Mr Murray had perjured themselves. This was for four reasons. Firstly Mr Murray had said that cleaning was carried out weekly whereas Mr Gilmour had said it was quarterly. Secondly he said that Mr Murray said that the gardening was

carried out right away following the appointment of the Factor whereas Mr Gilmour said that it was later. Thirdly Mr Welsh referred to flooding and noted this had happened on two occasions. Finally Mr Welsh said that Mr Gilmour had given evidence that Mr Murray had called him about the lights. This had not been confirmed by Mr Murray.

53. Mr Gilmour responded by saying that he had not said that cleaning was carried out quarterly, he had said that inspections were carried out quarterly. As regards the other issues Mr Gilmour said that he did not expect Mr Murray to maintain a diary of maintenance events carried out at the property.

Remedy Sought

In the Application the Homeowner said that he did not see a way forward with the Factor and he sought the assistance of the Tribunal to bring about a resolution.

The Code

Section 1.1 A(a) of the Code states that the written statement of services should set out:

"a statement of the basis of any authority you have to act on behalf of all the homeowners in the group"

Section 1.1 B(c) of the Code states that the written statement of services should set out:

"the core services that you will provide. This will include the target times for taking action in response to requests for both routine and emergency repairs and the frequency of property inspections (if part of the core services) "

Section 2.1 of the Code states:

"You must not provide information which is misleading or false."

Tribunal Findings and Reasons for Decision

1. The Homeowner's basis for complaint under Section 1.1a A(a) of the Code was that the votes of the homeowner's who had voted in favour of the appointment of the Factor were invalid. He submitted that the vote by Steven Rollo was invalid as he is the letting agent for flat 2/1 and is not the owner. He submitted that the votes of the other homeowners within the block were invalid as they were acting in breach of the Deed of Conditions in that they have let their properties to a third party or have failed to pay for property maintenance. The Tribunal heard evidence from Mr Gilmour that the owner of flat 2/1 had authorised Mr Rollo to vote on her behalf at the meeting on 18 March 2019. A copy of the email providing authorisation was not provided to

the Tribunal. The Tribunal was however provided with a copy of the letter issued to homeowners convening the meeting on 18 March 2019, the minutes of the meeting and the mandates signed by three homeowners (in addition to Mr Rollo) voting in favour of the appointment of the Factor. The Minutes narrated the attendance of four home owners in person and one by proxy all of whom voted in favour of the appointment of the Factor. The Deed of Conditions provides that the decision of a majority voting shall be final and binding on all members. In those circumstances, even if the vote of Mr Rollo was disregarded, the majority of homeowners had voted in favour of the appointment of the Factor. The Tribunal heard evidence from Mr Welsh that three of the homeowners had let their property to a third party and that all of the homeowners had acted contrary to the deed of conditions in a number of ways including failing to pay for property maintenance. The Tribunal did not consider that such actings, even if proven, would invalidate the vote cast by a homeowner regarding the appointment of a property factor for the block.

2. The Homeowner's basis for complaint under Section 1.1a B(c) of the Code was that the WSS, whilst it narrated a range of services which the Factor offered to provide, stated that the services would be provided only on instruction. He also submitted that, as a matter of fact, the Factor had provided no services. Having reviewed the WSS the Tribunal noted that it did not state that services would be provided on instruction although the Tribunal recognised that the consent of homeowners would be required before any property factor could carry out works involving significant cost. Having considered all of the evidence, the Tribunal were of the view that on the balance of probabilities, the Factor had provided services for the benefit of the homeowners within the block.
3. The Homeowner's basis for complaint under Section 2.1 of the Code was that the Factor had written to him inviting him to take his complaint to the Property Ombudsman when the Factor was not registered with the Property Ombudsman. The Tribunal did not consider that this was misleading or false.
4. In all the circumstances the Tribunal considered that the Factor had complied with the property factor duties and the Code and it would not be appropriate to make a Property Factor Enforcement Order.

Appeals

In terms of section 46 of the Tribunals (Scotland) Act 2014 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.

Date : 29 September 2020

Joan Devine, Legal Member