Decision of the 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

Mel Goldie, 22 Buchanan Drive, Burnside, Rutherglen G73 3PE ("the Applicant")

Hacking and Paterson Management Services, 1 Newton Terrace, Glasgow ("the Respondent")

Chamber Ref: HOHP/PF/16/0174

Re: 0/1,127 Cartvale Road, Glasgow G42 9RN ("the Property")

Tribunal Members:

John McHugh (Chairman) and Andrew Taylor (Ordinary Member).

DECISION

The Respondent has not 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 a flat at 0/1,127 Cartvale Road, Glasgow G42 9RN

2 The flat is located within a traditional tenement building (hereinafter "the Block").

3 There are eight flats within the Block.

4 The Respondent has acted as the factor of the Block for many years and continues as factor at present.

5 The Respondent employs insurance brokers to obtain suitable buildings insurance for the Block.

6 The property factor's duties which apply to the Respondent arise from the Respondent's Written Statement of Services. 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 the date of its registration as a Property Factor (1 November 2012).

8 The Applicant has, by his correspondence, including the completed complaints form of 26 February 206 and his letter of 18 April, notified the Respondent of the reasons as to why he considers the Respondent has failed to carry out its obligations to comply with its duties under section 14 of the 2011 Act.

9 The Applicant has failed to notify the Respondent of the reasons as to why he considers the Respondent has failed to carry out its obligations to comply with its property factor's duties.

10 The Respondent has not failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at Wellington House, Glasgow on 10 February 2017.

The Applicant was present at the hearing and was assisted by his wife.

The Respondent was represented by one of its directors, David Doran.

There were no other witnesses 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 2016 as "the 2016 Regulations".

The Respondent became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

During the course of the Application, the Tribunal issued a single procedural Direction.

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 "Terms of Service and Delivery Standards" 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 the source of the property factor's duties.

The Code

The Applicant complains of failure to comply with Sections 1.1a C h and E n; 3 (introduction), 3.3; 5.2, 5.3, 5.6, 5.7; and 6 of the Code.

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

*"...**SECTION 1: WRITTEN STATEMENT OF SERVICES***

...1.1a For situations where the land is owned by the group of homeowners
The written statement should set out:

A. Authority to Act
a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group;
b. where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation;

B. Services Provided
c. 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 service);
d. the types of services and works which may be required in the overall

maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a "menu" of services) and how these fees and charges are calculated and notified;

C. Financial and Charging Arrangements

e. the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee;
f. what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services each owner within the group is responsible for. If management fees are charged at a flat rate rather than a proportion, this should be stated;
g. confirmation that you have a debt recovery procedure which is available on request, and may also be available online (see Section 4: Debt recovery);
h. any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service);
i. any arrangements for collecting payment from homeowners for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service);
j. how often you will bill homeowners and by what method they will receive their bills;
k. how you will collect payments, including timescales and methods (stating any choices available). Any charges relating to late payment, stating the period of time after which these would be applicable (see Section 4: Debt recovery);

D. Communication Arrangements

l. your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied following completion of your in house complaints handling procedure (see Section 7: Complaints resolution);
m. the timescales within which you will respond to enquiries and complaints received by letter or e-mail;
n. your procedures and timescales for response when dealing with telephone enquiries;

E. Declaration of Interest

o. a declaration of any financial or other interests (for example, as a homeowner or lettings agent) in the land to be managed or maintained;

F. How to End the Arrangement

p. clear information on how to change or terminate the service arrangement including signposting to the applicable legislation. This information should state clearly any "cooling off" period, period of notice or penalty charges for early termination....

*...**SECTION 3: FINANCIAL OBLIGATIONS***

While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.

The overriding objectives of this section are:

Protection of homeowners' funds
Clarity and transparency in all accounting procedures
Ability to make a clear distinction between homeowners' funds and a property factor's funds...

... 3.3 You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance...

...SECTION 5: INSURANCE...

... If your agreement with homeowners includes arranging any type of insurance, the following standards will apply:

5.2 You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this.

...5.3 You must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider. You must also disclose any other charge you make for providing the insurance...

... 5.6 On request, you must be able to show how and why you appointed the insurance provider, including any cases where you decided not to obtain multiple quotes.

...5.7 If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) should be available for inspection, free of charge, by homeowners on request. If a paper or electronic copy is requested, you may make a reasonable charge for providing this, subject to notifying the homeowner of this charge in advance...

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.

6.2 If emergency arrangements are part of the service provided to homeowners, you must have in place procedures for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for giving contractors access to properties in order to carry out emergency repairs[5], wherever possible.

6.3 On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff.

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.

6.5 You must ensure that all contractors appointed by you have public liability

insurance.

6.6 If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance.

6.7 You must disclose to homeowners, in writing, any commission, fee or other payment or benefit that you receive from a contractor appointed by you.

6.8 You must disclose to homeowners, in writing, any financial or other interests that you have with any contractors appointed.

6.9 You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor."

Jurisdiction

The Respondent raised a concern that the Applicant had failed to notify it of certain matters. These were any breach of property factor's duties in the form of breaches of the Written Statement of Services and any breaches of the Code other than those identified in the Applicant's completed complaints form dated 26 February 2016 and its supplementary pages and in the Applicant's letter of 18 April 2016.

The Applicant's response to this was that he considered that the general thrust of his complaint should be evident to the Respondent and so as an inexperienced layperson he should be excused any technical failure to tick a particular box or identify as specific element of the Code. We have considerable sympathy for the Applicant's position. We also have had regard to the overriding objective set out in Rule 3 of the 2016 Regulations which requires us to deal with proceedings justly including avoiding over formality. Nonetheless, our jurisdiction is prescribed by the 2011 Act and, in particular, section 17(3) which requires prior notification to have been given to a property factor of the alleged failure to comply with the relevant property factor's duties or the Code before an application may be made. We therefore consider that we do not have jurisdiction to deal with any complaint which has not been notified to the Respondent in advance of the making of the Application and this includes the breach of property factor's duties arising under the Written Statement of Services, with the effect that there is then no complaint of breach of property factor's duties to be considered.

Mr Doran accepted that the various breaches of the Code referred to in the completed complaints form dated 26 February 2016 and its supplementary pages and in the Applicant's letter of 18 April 2016 have been adequately notified.

We find that no other sections of the Code have been the subject of notification and so any sections referred to by the Applicant and not included in the correspondence of 26 February and 18 April fall to be excluded from consideration.

On a practical note, on discussion at the hearing of the various paragraphs of the Written Statement of Services and of the Code in respect of which we have identified that we have no jurisdiction, we noted that none appeared relevant to the matters of complaint and so even if they had been included they would have made no difference to the ultimate outcome.

The Matters in Dispute

The factual matters complained of all relate to the buildings insurance procured by the Respondent and were:

(1) The Respondent's failure to obtain insurance cover in a competitive manner.

(2) Concerns around the commission received by the Respondent.

(3) The Respondent's failure to be open and transparent concerning insurance matters.

We deal with these issues together since they are closely related.

Insurance Arrangements

It would appear appropriate to commence with an explanation of the arrangements which apply regarding insurance. Mr Doran explained that the Respondent uses the services of two insurance brokers, one being OKD, who have recently changed their name to Bluefin (for convenience in this Decision references to Bluefin should be taken to include OKD). The second is AON. Mr Doran could not say why two brokers are used although he was able to say that the Respondent's portfolio was split into two, with one group of properties factored by the Respondent referred to Bluefin and a second separate group referred to AON. He confirmed that although the exact content of the two groups might change from time to time because, for example, certain properties might stop or start being factored by the Respondent, there was never any movement of properties between the two groups so that, for example, the Block had remained at all relevant times within the group referred to Bluefin as opposed to that referred to AON.

Mr Doran explained that each year the Respondent included the Block in the group of properties which it requested Bluefin to obtain insurance in respect of. Bluefin would then perform the usual function of an insurance broker ie they would approach the insurers' market and identify the best available cover having regard to the suitability of the cover on offer and price. Bluefin would recommend a suitable policy and the Respondent would accept that advice. The Respondent trusted to Bluefin's experience and would not become involved in the choice of insurer.

A single insurance policy would be obtained in respect of a group of properties in respect of which the Block was one. The premium payable would be a single amount calculated by adding together the premiums for each property included.

The broker would receive a commission from the insurer in the normal way and this would be at the level of 30% of the premium.

Bluefin would then share commission with the Respondent by paying to the Respondent a payment equivalent to 25% of the premium. Mr Doran explained that this payment was a payment to the Respondent in return for the Respondent providing policy administration services which the broker would otherwise have to provide. These services included the reporting of claims on behalf of owners, policy administration such as on a change of property owner and the recovery of premiums from individual owners. He believed that insurance brokers would find it unattractive to have to correspond with individual homeowners in respect of these policies which is why they contracted with the Respondent to deal with these aspects and were prepared to pay for the service.

He advised that the Respondent would never invoice the broker for the provision of these administration services but that the agreement was that the 25% payment should be made. Mr Doran explained that was because the payment was regarded as a "commission".

Mr Doran believes these arrangements to be very common in the property factoring market.

Mr Doran advised that he had no knowledge of the level of commission paid to the Respondent by AON.

The Respondent would write to property owners such as the Applicant annually with certain basic information regarding the insurance obtained. The Respondent's letter of July 2015 was an example of one such letter.

Mr Doran advises that the Applicant's option if he is unhappy with the insurance as obtained via the Respondent to get together with the required number of fellow owners in the Block and to vote to make their own insurance arrangements. He explained that most blocks factored by the Respondent also involve the arrangement of insurance by the Respondent in the manner described above but that some arranged their own insurance. If the owners within the Block decided to do that, he advised that the respondent would still be able to provide its other factoring services.

Mr Doran could not say how long either Bluefin or AON had been in place as the Respondent's brokers, nor how they had been chosen in the first place. He was unaware of any process for periodically reviewing the Respondent's broking arrangements or any tendering or other competitive processes which were followed. His recollection was that Bluefin had been place for at least the previous five years but could not say how long before that they might have been appointed. We note that Bluefin state in their letter of 3 May 2016 they have been dealing with the Respondent for over ten years.

Complaints

Code Section 3

The Applicant complains of a lack of transparency on the part of the Respondent in relation to insurance matters. He referred to the opening paragraph of Section 3 of the Code.

The Respondent considers that Section 3 of the Code is not relevant to the current complaint since Section 3 is concerned with financial obligations as opposed to insurance. We disagree. Although Section 5 of the Code deals specifically with insurance, we consider that payment arrangements in respect of insurance are as suitable for inclusion in Section 3 as any other payment and we see no basis to exclude the current complaint from the ambit of Section 3.

The Applicant considers that the Respondent has not been transparent in respect of its failure to provide certain information to him including deficiencies in the information supplied in the Respondent's letters of 13 April 2015, July 2015 and 11 December 2015.

He complained that the Respondent's letter of 13 April 2015 failed to advise the total premium applicable to the Block. The standard form annual renewal letter of July 2015 also failed to include this information.

The Respondent's letter of 11 December had enclosed a redacted invoice from the insurance broker to the Respondent dated 17 May 2015. All figures had been redacted from the invoice. The Respondent had done this on the basis that the figures related to the totals payable in respect of the group of properties insured together of which the Block was only one. The Respondent's letter of 11 December had enclosed a letter from Bluefin dated 9 December 2015 which contained certain relevant information regarding the insurance including a figure of £3639.17 which was the premium said to relate to the Block.

We consider that the documentation provided by the Respondent is sufficient to meet the terms of Section 3 of the Code. In particular, given that the Respondent provided the letter from Bluefin dated 9 December 2015 providing details of the insurance arrangements, this appears to be sufficient to comply with Code Section 3.3. Given this letter was provided, it appears to us to avoid the need to provide an unredacted invoice.

(We do however pause to observe that redaction of the invoice in the way it was done may have been unnecessary. We understand that the invoice would have related to a number of unrelated properties and so the financial figures would have been higher than if it had related to the Block alone. If the redaction had left in the financial figures, it would have given away no information specific to any other property. It would simply have shown the total premium paid for an unspecified and unquantified group of properties.)

Similarly, we cannot identify that the arrangements employed by the Respondent in this regard were so deficient as to constitute a breach of the general obligations of clarity and transparency imposed by the opening paragraphs of Section 3 of the Code.

The Applicant also criticised the July 2015 letter in that it referred to a commission figure of 25% which he thought homeowners would generally relate back to the individual premium figure of £454.90. He thought they would consider that a relatively small amount. If owners realised that there were eight flats in the Block all paying the same, they would have appreciated that the commission received by the Respondent was around £900. If that figure were presented to them, the Applicant thought that owners would be more likely to question whether this represented value for money and might challenge the Respondent on the matter. While we understand that argument, we do not consider the presentation of the information in this way to constitute a breach of the Code.

The July 2015 letter is somewhat unclear in that it refers to "25% commission" without specifying who is to receive that commission. There is a risk that the recipient of the letter might take this as a reference to the commission paid to a broker. The recipient might however reasonably infer that the commission was payable to the Respondent. That would be more obvious to the recipient if they had been made aware that a commission was paid to the Respondent by the insurers for providing policy administration services although we have not been provided with any information as to how that fact is made known to homeowners in the position of the Applicant. The Core Factoring Services in the Written Statement of Services include placing insurance via a broker and intimating claims. We had only the first page of the Written Statement of Services (and in fact one which related to a different property although Mr Doran advised that it was a standard document which would apply equally to the Property) and asked Mr Doran whether the second page would advise further information about insurance. He could not recall.

The Applicant felt that the situation was clouded which raised a reasonable basis to infer that there might be something which the Respondent wished to hide.

We consider that the terms of the July 2011 letter are sufficiently clear such that there is no breach of the introductory provisions of Code 3 or of Code Section 3.3.

Code Section 5.2

The Applicant complained that, contrary to Section 5.2 of the Code, he had not been provided with information about how his share of the premium had been calculated and the premium paid. As regards the share, that is shown on the Respondent's invoices as a 1/8 share so we consider that that is sufficient to comply with this provision of the Code. The Applicant had some recollection that the bills may not

always have been set out in this way although Mr Doran advised that they had been and the Applicant accepted that that may be correct. We accepted Mr Doran's evidence on this point.

As regards being advised of the premium, the Respondent's bill advised the premium which applied to him although none of the correspondence seems to have confirmed in terms the total premium amount relating to the Block at least until the letter of 9 December 2015 from Bluefin. Nonetheless, the premium amount for the Block was easily calculable as eight times the amount charged to the Applicant.

We do not identify a breach of Code section 5.2.

We note, as an aside, that the letter of July 2015 would have breached Code section 5.2 in that it fails to advise the excess which applies to the policy although that is not something complained of in this case.

Code Section 5.3

The Applicant complains of a breach of Code Section 5.3 in respect that the information provided by the letter of July 2015 is unclear in relation to the amount paid by the insurance broker to the Respondent.

We have dealt with this letter in detail above and refer to our comments there. We do not consider there to be a breach of Code Section 5.3.

Code Section 5.6

The Applicant complains of a breach of Code Section 5.6. The Respondent's view is that the reference to "insurance provider" in Code Section 5.6 is to the insurance company and not to the broker. If that is correct, the Respondent has certainly explained how the insurer is chosen (by the broker making appropriate investigations of the insurance market). If the reference is intended to be to the insurance broker then the position is much less clear.

We take the reference to "insurance provider" to relate to both the broker and the insurer. The Respondent referred us to two earlier cases involving it which had been considered by Committees of the Homeowner Housing Panel (Case References: HOHP/PF/14/0019 and HOHP/PF/15/0089) as examples of situations where those Committees had found Section 5.6 only to relate to insurers and not to brokers. With respect to the Committees in those cases, we have not found either case helpful in this matter. While it appears by implication that in those cases Section 5.6 has been taken to refer to insurers, neither case offers any detailed reasoning for that position having been adopted.

The purpose of this Section of the Code is to provide confidence to the homeowner that the arrangements for placing insurance are appropriate and we see no reason why that should not include the two steps of a chain involving a broker and an insurer as opposed to only a direct placing of insurance by a factor. If the Code were applied only to the latter, then it would exclude the arrangements between the broker and the factor from scrutiny and we can see no reason why that would have been the intention of the authors of the Code, particularly as Mr Doran's evidence was, not surprisingly, that the use of brokers by factors was commonplace.

In this case, the Respondent considers that by indicating at paragraph 16 of its Written Statement of Services that it will place insurance "through HPMS's broker" it has indicated that it will only place the insurance through a single broker of its choice. Of course, we can appreciate why a homeowner in the position of the Applicant might find the Respondent's approach unattractive and consider opting for an alternative arrangement which involves placing insurance using a process where brokers are subject to periodic review and competition. However, we consider the Respondent's process to comply with Code Section 5.6.

Code Section 5.7

The Applicant complains that, contrary to Code Section 5.7, he has not been given any tender or selection documentation concerning the appointment of Bluefin. That Section only applies to documentation regarding such processes "if applicable" and it appears that no formal selection or tender process has been followed by the Respondent. Accordingly, there is no such documentation and we do not consider Code Section 5.7 to be applicable.

Other Matters

The Applicant indicates that if his only remedy of he is unhappy with the current insurance arrangements is to take the placing of insurance away from the Respondent, this is hard for him to do (as he is only 1 of 8 proprietors in the Block with a say in the matter). Mr Doran, however, considers that it is generally easy to change factor.

The Applicant explains that he has no objection to the use of brokers nor them receiving commission for their work. He believes that insurance brokers commonly reduce their commission element in order to win business. He believes that it would be hard for a broker to discount its commission if the Respondent takes a cut. The Applicant does, however, accept that other factors probably adopt a similar system.

The Applicant complained of a delay in providing information to him although the Respondent referred to it having provided information on 13 April 2016 in response

to the Applicant's letter of 30 March 2016, which appears relatively prompt. The Applicant refers to an earlier period when he had been advised to complain to the FCA although ultimately that appears to have been a dead end. He refers to a period of 18 months pursuing the matter although he acknowledges that he has not lodged earlier correspondence relating to the period in question and ultimately advises that he is not insisting upon the point but wanted to illustrate as part of the wider background that it had been difficult for him to obtain from the Respondent the information which he had been looking for. We have not identified any breach of the Code in respect of these matters.

Observations

The Applicant remarked during the hearing that it was a pity that the Respondent had not been more open in relation to the insurance dealings earlier in his attempts to obtain information from it. He suggested that had that been the case, the hearing might not have been necessary.

It was disappointing that the representative chosen by the Respondent to represent it at the hearing was Mr Doran. Although he is a director of the Respondent, he explained that his role does not involve insurance matters and therefore he was frequently unable to provide any information on relevant matters raised during the hearing as he advised these matters to be outwith his knowledge. It would have been more helpful to have heard from one of the Respondent's directors or employees who deals with insurance matters.

PROPERTY FACTOR ENFORCEMENT ORDER

As we have identified no relevant breach of the Code or of property factor's duties, no property factor enforcement order ("PFEO") will be made.

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: 13 February 2017