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

Decision on Homeowner's application: Property Factors (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: FTS/HPC/PF/18/3490

26 Kelvin Court, Claythorn, Glasgow G12 0AD
("the Property")

The Parties:-

Mr Andrew Paul Rowe, 26 Kelvin Court, Claythorn, Glasgow G12 0AD
("the Homeowner")

Ross and Liddell Limited, 60 St Enoch Square, Glasgow G1 4AW
(represented by their agent Anderson Strathern LLP, Solicitors, George house, 50 George Square, Glasgow G2 1EH
("the Factor")

Tribunal Members:
Graham Harding (Legal Member)

DECISION

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

The Factor has not failed to comply with its duties under section 14(5) of the 2011 Act.

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 2016 are referred to as "the Rules"

Background

1. By application dated 20 December 2018 the Homeowner complained to the Tribunal that the factor was in breach of Section 2 of the Code and had failed to carry out its property factor's duties. The Homeowner submitted a written statement detailing his complaint together with copy correspondence between the parties and a copy of the Service Level agreement.

2. Following correspondence from the Tribunal administration the Homeowner confirmed that his complaint was in respect of an alleged breach of Section 2.4 of the Code.

3. By Minute of Decision dated 4 March 2019 a Convenor with delegated powers accepted the application and a hearing was assigned.

4. By letter dated 21 March 2019 the Factor's then representatives Hardy MacPhail, Solicitors, Glasgow submitted written representations claiming that the application was in identical terms to an application by Mr Charles Duncan against the Factor under the reference FTS/HPC/PF/18/1978. The Factor's representatives provided the Tribunal with a copy of Mr Duncan's complaint, the Factor's submissions and a copy of the decision in that case. The Factor's representatives advised that an application for review and an application for permission to appeal to the Upper Tribunal had been made by Mr Duncan and that the application in this case should be paused pending the outcome of these matters.

5. After some further correspondence in response to directions issued by the Tribunal the application was paused pending the outcome of a final decision in Mr Duncan's application.

6. The application for review was refused by the Tribunal dealing with Mr Duncan's case but the application for permission to appeal to the Upper Tribunal was granted insofar as it related to the issues around the data protection breach. The Tribunal's decision with regards to the alleged breach of Section 2.4 of the Code remained as decided by it.

7. The Upper Tribunal upheld Mr Duncan's appeal and remitted the case back to a differently constituted Tribunal. In its decision of 20 February 2020 that Tribunal determined that it could not consider Mr Duncan's application under Section 2.1 of the Code but that the matters giving rise to that complaint could be considered under the property factor's duties. The Tribunal went on to determine that the Factor had not failed to comply with the property factor's duties.

8. A hearing was assigned to take place on 20 March 2020.

9. By correspondence dated 27 January and 12 March 2020 the Factor's representatives sought an adjournment of the hearing in light of the decisions in Mr Duncan's case and this application was granted.

10. Following a delay due to the Covid-19 pandemic a fresh hearing was assigned to take place by teleconference on 21 October 2020.

11. By email dated 12 October 2020 the Factor's representatives requested that in light of the decisions in Mr Duncan's case that the hearing assigned for 21 October 2020 be discharged and a Case Management Discussion assigned in

its place. The Tribunal determined that this request was reasonable in the circumstances and acceded to the request.

The Case Management Discussion

12. A Case Management Discussion was held by teleconference on 21 October 2020. The Homeowner attended personally and was supported by his wife Mrs Karen Rowe. The Factor was represented by Ms Francesca Allanson from the Factor's representatives.

13. The Tribunal Legal Member explained that the Ordinary Member of the Tribunal had recused herself from attendance due to a potential conflict of interest but as this was a Case Management Discussion and not a full hearing of the Tribunal it could proceed with a single member in attendance.

14. The Tribunal explained that it had determined to hold a Case Management Discussion in light of the Factor's representatives' submission that the issues raised in the application were identical to those in the application by Charles Duncan under case reference FTS/HPC/PF/18/1978. The Tribunal further explained that it was not bound by the decision in that case.

15. The Homeowner submitted that there were differences in the two cases and the Tribunal sought to establish by reference to the Findings in Fact in the other case and the factual position in the current application what facts could be agreed between the parties.

The Data Breach and the Property Factor's Duties

16. It was agreed that the Factor managed the property between 2015 and 2018. It was also agreed that in October 2017 the Factor breached data protection legislation by disclosing the Homeowner's personal information. That personal information consisted of the Homeowners name, address, account number and how many instalments the Homeowner intended to pay for his share of the cost of replacing the heating system. It was further agreed that the Factor reported the breach to the ICO on 23 May 2018 using a standard pro forma document issued by the ICO that required the Factor to report "potential consequences of the breach".

17. After some discussion with the Homeowner and Mrs Rowe it was accepted by him that the Factor had reported the potential consequences as having had "little or no impact on the data subjects".

18. It was further accepted that the ICO had concluded that no further action had been required on its part as:-

- The incident affected a relatively low number of people.
- The data appears to have been limited to basis personal identifiers.
- You believe that the individuals affected are unlikely to be at risk as a result of this breach.

- You have notified the affected individuals, so they can mitigate any risk they feel present.
- This breach appears to have been caused in part by human error.

19. Mr Rowe submitted that there were significant differences between his application and that of Mr Duncan. Whilst it had been suggested that Mr Duncan had been very angry and very upset at the information about him had been disclosed to others, Mr Rowe said that in his case it went further. He said that he was not only upset and annoyed but that the disclosure had a social impact and was the subject of gossip within the development. He said he felt it was a personal violation as it reflected his ability to pay in front of his neighbours. It was explained that because he had chosen to pay by three instalments it would appear that he was less able to pay for the replacement heating than others in the development who could pay in one instalment. It was a breach of his liberties. Mrs Rowe spoke of it having an adverse effect on her and others mental health but the Tribunal reminded the parties that it could only take account of how any failure on the part of the Factor had impacted on the Homeowner and not on others.

20. Mr Rowe also submitted that he had not received the Factor's letter of 6 June 2018 but had seen the letter sent to a neighbour Mrs Christine Martin.

21. For the Factor Ms Allanson submitted that it was not disputed that the data breach would have had an impact on the Homeowner but that there was no substantial difference between the issues in Mr Duncan's application and that of Mr Rowe's. Furthermore, Mr Rowe would have had an opportunity to put forward his views to the ICO as to how the breach had impacted upon him. **Section 2.4 of the Code**

22. The Tribunal referred the parties to the evidence in paragraph 3 of the decision in FTS/HPC/18/1978 dated 4 March 2019. It was accepted by both parties that these facts were correct.

23. The Homeowner explained that his objection was that the fee payment made by the Factor to W S Millar ought to have been transparent and not done without the express consent of the owners. The Homeowner said that in the past it had always been the practice that owners would agree through a series of proposals funding for a project up to a certain amount. At each point there would be an EGM or AGM of the Kelvin Court Proprietors Association ("KCPA") to agree any further funding. The Homeowner suggested that in this case there had been a palpable failure where fees had been paid without authority.

24. The Homeowner submitted that there had been no agreement of owners to make the payment taken by the Factor to pay W.S. Millar and the Factor following the decision to cease work on the proposed replacement heating system at the development. In addition, there was no minute of a KCPA Committee meeting at which payment had been agreed. The Homeowner went on to say that the Chairman of the committee did not have executive

authority vested in him to authorise such a payment. The Homeowner objected to the payment as it was not authorised.

25. The Homeowner went on to say that the work done in respect of the proposed replacement heating system by the heating engineer W.S. Millar had been inadequate. The Homeowner confirmed that there had been an agreement to instruct Clancy Consulting Limited ("Clancy") to carry out feasibility study works and that Mr Gilroy of the Factor had been appointed to assist and advise the owners in respect of the heating project. The Homeowner said that Mr Millar had come in to the project at the last minute and the owners were unaware of his appointment and only the owners can approve expenditure. The owners were not aware until the EGM on 22 January 2018 and at that time Mr Millar had not produced any significant drawings to justify the expenditure subsequently paid.

26. The Homeowner went on to say that following the decision not to proceed with the heating project the Chairman and Sub-committee members had resigned and he had joined the Committee and had become aware of the issues now being raised.

27. Ms Allanson submitted that the Homeowner's dispute was with the Committee rather than with the Factor. She suggested that Mr Gilroy was entitled and had authority to instruct W.S. Millar to proceed with the work. She went on to say that following the decision taken at the EGM on 22 January 2018 the Factor was entitled to submit its account to owners as it had done. Any failure was that of the Committee to convey to the decisions that had been taken to the owners.

28. The Tribunal sought to establish if the evidence before the Tribunal in FTS/HPC/PF/1978 and detailed in paragraphs 4 to 21 fairly reflected the evidence that would be presented to the Tribunal at a hearing and both parties agreed that this was the case.

29. The Tribunal sought to establish from the Homeowner what he thought ought to have happened following the decision to cease the project at the EGM on 22 January 2018. The Homeowner suggested that there ought to have been a discussion between the Committee and the Factor as to how much W.S. Millar should be paid for the work done and an agreement reached. He suggested that if agreement could not be reached then the parties could perhaps have gone to arbitration.

30. The Tribunal referred the Homeowner to the minute of the EGM of 22 January 2018 and to Mr Bradley's comment that "it was better to write off the funds expended now than to multiply them in pursuit of an unnecessarily *idee fixe"*. The Homeowner submitted that was just the position of one owner at the EGM and did not reflect the position of the meeting as a whole.

31. The Tribunal sought the parties' positions on whether a further hearing was necessary. For the Factor Ms Allanson submitted that the Tribunal had heard detailed submissions over three hours at the Case Management Discussion

and had the benefit of the decisions in FTS/HPC/PF/1978 in which the evidence was largely the same. There was also a further difficulty in that Mr Gilroy no longer worked for the Factor and therefore bringing him to a Tribunal would add extra expense. For his part the Homeowner accepted that the Tribunal had sufficient information before it to make a decision but that at a hearing it would have an additional member to assist in making a decision.

32. The Homeowner indicated that he was looking for an apology from the Factor together with a payment in respect of all the fees charged in respect of the aborted heating project.

33. The Tribunal determined it had sufficient information before it to allow it to make a decision without the need for a hearing.

Findings in Fact

34. The Homeowner is the co-owner of the property along with Mrs Karen Rowe.

35. The property is a flat within the development known as Kelvin Court, Claythorn, Glasgow.

36. The Factor managed the property between 2015 and May 2018.

37. That in October 2017 the Factor breached data protection regulations by disclosing the Homeowner's personal information in an email from the Factor to Mr Harrison and into which Mr Semple and Mr Frew were copied.

38. That the information disclosed was the Homeowner's name, address, account number and by how many instalments the Homeowner intended to pay for his share of the heating project.

39. That the Homeowner was upset and annoyed and felt it was a personal violation as it reflected his ability to pay in front of his neighbours.

40. That the Factor reported the breach to the ICO on 23 May 2018.

41. That the report was completed on a standard pro forma document issued by the ICO.

42. That the document required the Factor to report "potential consequences of the breach."

43. That the Factor reported the potential consequences as having had "little or no impact on the data subjects."

44. That Mr Gilroy was the Factor's named contact for the heating project.

45. That by their usual custom and practice the KCPA Committee and sub-committees had authority to instruct the Factor on behalf of the development owners.

46. That the KCPA sub-committees reported to the KSPA Committee and that it in turn reported to the development owners.

47. That in respect of the heating project the KCPA committee and the Fabric and Finance Sub-committee had authority on behalf of the development owners by their usual custom and practice to instruct Mr Gilroy to appoint and dismiss contractors and engineers.

48. That Mr Gilroy had authority to appoint W.S. Millar to replace Clancy following its dismissal in October 2017.

49. That Mr Gilroy kept the Fabric and Finance Sub-committee and the KCPA Committee fully informed as regards the ongoing heating project and was entitled to assume that the KCPA Committee would inform the development owners of the progress of the project including any costs involved.

50. That the Homeowner may not have been aware of the information provided to the Sub-committee and Committee by Mr Gilroy prior to the EGM of 22 January 2018.

51. That following the decision of the owners to cease the heating project at the EGM on 22 January 2018 the Factor was entitled to treat the work carried out to date as being at an end.

52. That the work undertaken by the Factor and W.S. Millar having ended the Factor was entitled to make payment to W.S. Millar for the work done and to take payment for their own work done up to that point from the funds previously allocated by the development owners.

Reasons for Decision

The Data Breach and Failure to Carry Out Its Property Factor's Duties

53. The Homeowner was entitled to expect that the Factor would maintain personal information in a manner which met the requirements of the General Data Protection Regulations. On its own admission the Factor breached the regulations by sending an email to an employee and another development owner to which was attached the Homeowner's personal information. The Tribunal is satisfied that a failure to properly manage owner's personal data held by the Factor may well constitute a failure to carry out its property factor's duties. This would certainly be the case if it could be shown that such failures were systemic, repeated and serious.

54. The Tribunal was satisfied that the Factor took appropriate steps to acknowledge its failings by reporting the breach to the ICO in May 2018. The

Tribunal also accepts that the description of the breach used by the Factor in reporting to the ICO is an accurate assessment of the facts. In particular the Homeowner's personal information that was disclosed was restricted to his name, address, Factor's account number and the number of instalments he intended to adopt for payment of the replacement heating system. The information was wrongly sent to two individuals. The information did not contain sensitive information such as bank account or credit card details.

55. The Tribunal was concerned to note that the Homeowner had not received the Factor's letter of 6 June 2020 although it appeared from the correspondence submitted that the Factor understood a letter had been sent to all affected owners.

56. The Tribunal accepted that the Homeowner was upset and annoyed and considered it a personal violation but had some difficulty in accepting that the breach would have led to him being the subject of gossip throughout the development simply because he had chosen to pay for the replacement heating in three instalments particularly when the information had only been sent to Mr Harrison and copied to Mr Semple and Mr Frew.

57. The Tribunal was ultimately satisfied that the matter had been appropriately dealt with by the ICO and that in reaching its decision the ICO would have considered any submissions made to it by any interested parties.

58. On balance the Tribunal concluded that given that no substantive financial information had been disclosed although there was a failure on the part of the Factor to carry out its property factor's duties by failing to protect the Homeowner's personal data it had taken appropriate steps to acknowledge and remedy its failure and therefore no further action was required.

Section 2.4 of the Code

59. The Tribunal was satisfied that the Factor accepted instructions from the KCPA Committee and Sub-committees and reported back to them. In turn the Committee kept the development owners informed.

60. It was apparent to the Tribunal that there had been discussions ongoing amongst the owners for a considerable period regarding the replacement of the heating system within the development. Furthermore, the owners had given their approval for the Committee to instruct the Factor to instruct Clancy to prepare a feasibility study on various options for replacing the heating system and a budget for this had been allocated for the project.

61. At an EGM of development owners held on 5 July 2017 the owners voted to proceed with installing decentralised multiple common gas boilers at roof level at the development. At a meeting of the KCPA Committee held on 18 October 2017 the Committee determined to dispense with Clancy's services and employ W. S. Millar in their place. Following concerns by some owners a further EGM was arranged to take place on 22 January 2018 and in advance of that meeting the Factor provided the Fabric and Finance Sub-committee

with the costs the project had incurred to date and likely future design costs. At the EGM the owners decided to pause all work on the heating project. The issue for the Tribunal to decide was whether in light of these facts was the Factor entitled to take payment from the funds allocated for the project or did it require the owners to agree payment.

62. W.S. Millar had submitted a fee quotation for his services to the Factor who in turn had submitted this to the Sub-committee. W.S Millar's appointment had been approved by the KCPA committee. It therefore follows that W.S Millar and indeed the Factor were entitled to payment for all work done on the heating project up to the point at which it was paused.

63. The Tribunal considered the Homeowner's argument that the fee was taken on 2 February 2018 although the W. S. Millar invoice was dated 3 February 2018. The Tribunal did not consider this to be a significant issue. The Factor may well have been aware of the amount required to be paid in advance of the invoice being issued. The Tribunal also considered the Homeowner's argument that before taking its fee and paying W.S. Millar the Factor ought to have reached an agreement with the new KCPA Committee and potentially gone to arbitration if no agreement could be reached. However, the Tribunal was satisfied that the Factor was entitled to make payment to W. S. Millar for his services up to the point the project was paused and to charge for its own services in connection with the project. The Service Level Agreement submitted with the case papers makes no provision for disputed charges being referred to arbitration and in any event the funding of the design stages of the project had already been agreed with the owners.

64. Section 2.4 of the Code requires that: *You must have a procedure to consult with the group of Homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to core services. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of Homeowners up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).* The Tribunal was satisfied that there was such a procedure in place and that the Factor accepted instructions from the KCPA Committee and Sub-committees. It followed that the Factor was not in breach of this section of the Code. It may well be the case that the Homeowner has a grievance with the previous members of the KCPA Committee and the Fabric and Finance Sub-committee for their failure to keep him informed of the decisions being made on his behalf but the Factor cannot be held accountable for any such failures and any dispute between the Homeowner and the Committee is outwith the jurisdiction of the Tribunal.

65. Having carefully considered the written representations and all the documents submitted by the parties the Tribunal determined that whilst the Factor had failed to carry out its property factors duties with regards to the data breach it did not merit the imposition of a Property Factor Enforcement Order and that it had not been in breach of Section 2.4 of the Code.

Appeals

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.

Graham Harding Legal Member and Chair

2 November 2020 Date