Housing and Property Chamber
First-tier Tribunal for Scotland

Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber)
In an Application under section 17 of the Property Factors (Scotland) Act 2011

by

Anne Boyd, 40/12 Littlejohn Road, Edinburgh EH10 5GJ ("the Applicant")

James Gibb Residential Factors, 4 Atholl Place, Edinburgh EH3 8HT ("the Respondent")

Re: 40/12 Littlejohn Road, Edinburgh EH10 5GJ ("the Property")

Chamber Ref: FTS/HPC/PF/20/1400

Tribunal Members:

John McHugh (Chairman) and Ahsan Khan (Ordinary (Housing) Member).

DECISION

The Respondent has failed to comply with its property factor's duties.

The decision is unanimous.

We make the following findings in fact:

1 The Applicant was at all material times the owner and occupier of a flat at 40/12 Littlejohn Road, Edinburgh EH10 5GJ ("the Property").

2 The Property is located within a larger block of flats and common areas ("the Development").

3 The Development contains mews blocks which comprise garages, stores and flats.

4 The Respondent owned a garage within one of the mews blocks known as Block C.

5 Block C comprises mews flats, garages and a store.

6 In June 2018, the Applicant reported to the Respondent that the charging being applied for common charges in Block C was not in accordance with the Deed of Conditions.

7 The Respondent had apportioned maintenance and electricity charges relating to the common areas of Block C among the proprietors of the garages, store and mews flats within Block C on the basis of 1/20 each.

8 The Respondent had failed to apply the apportionment set out in Clauses Sixteenth and Twenty First of the Deed of Conditions.

9 The Applicant made a formal complaint on 18 July 2019.

10 The Respondent replied in acknowledgement of the complaint on 26 July 2019.

11 The Respondent confused the handling of the Applicant's complaint of 18 July 2018 with a similar complaint which the Applicant had made to the Respondent.

12 The Applicant has, by her correspondence, including that of 22 March 2020 notified the Respondent of the reasons as to why she considers the Respondent has failed to carry out its obligations to comply with its property factor's duties.

13 The Respondent has failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place by telephone conference on 12 January 2020.

The Applicant was present at the hearing and assisted by her husband.

The Respondent was represented at the hearing by its Angela Kirkwood and Jeni Bole.

Neither party called additional witnesses.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as “the 2011 Act”; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as “the Code”; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as “the 2017 Regulations”.

The Respondent became a Registered Property Factor on 23 November 2012.

The Tribunal had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent.

The documents before us included the Respondent’s Written Statement of Services dated June 2019 which we refer to as the "Written Statement of Services". They also included a Deed of Conditions by Morrison Construction Ltd recorded 29 June 2000 which we refer to as "the Deed of Conditions".

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 sources of the duties relied upon are the Written Statement of Services and the Deed of Conditions.

The Code

The Applicant does not complain of failure to comply with the Code.

History

The Development is a modern one and includes flats and mews style houses. The Respondent's flat was at the block known as number 40.

The Respondent also owned a garage located within Block C. Block C is a block containing garages and a store with four mews flats above.

The Applicant bought the Property in 2006 but has sold it recently.

The Respondent has apportioned maintenance and electricity charges relating to the common areas of Block C among the proprietors of the garages, store and mews flats within Block C on the basis of 1/20 each.

In 2018, the Applicant realised that the apportionment being applied by the Respondent was wrong and that Clause Twenty First of the Deed of Conditions provided a different apportionment.

Clause Twenty First provides that 50% of Block C's common costs are to be paid by the owners of the mews flats, with the remaining 50% shared among the owners of the garages and the store within the Block.

The Applicant believes that the store is in the ownership of the mews flat owners. She calculates that her share should have been calculated by the mews flat owners paying the first 50% and the next 50% being divided by the number of garages and the store to give her a share of 1/42.

As regards the charges for electricity, she calculates that she should have been charged a 1/21 share based on the charges being apportioned among the garage and store owners as per Clause Sixteenth of the Deed of Conditions.

As a result of the Respondent's application of a 1/20 share, she believes that she has been overcharged.

The focus of the Applicant's complaints has been the apportionment of electricity charges in relation to Block C. The sums involved are relatively small although the Applicant is concerned that applying the 1/20 charging basis would be more seriously detrimental to her interests when applied by the Respondent to all maintenance costs.

Failure to comply with Clause 5.2 of the Written Statement of Services

Clause 5.2 of the Written Statement of Services provides that the Respondent will share costs in relation to communal works and services "as appropriate" and provides that: "The split (or apportionment of costs is normally determined by the Deed of Conditions" (Clause 5.2.2). The Deed of Conditions makes provision for costs (as noted above).

It is therefore evident that in applying a different apportionment than is provided for in the Deed of Conditions, the Respondent is in breach of its duty under Clause 5.2.

The Respondent advises that the total electricity charge apportioned to the Applicant in the last 12 months was £7.75. The amounts involved are therefore small.

The Respondent advised that it did attempt to address the Applicant's concerns by engaging with her and by obtaining legal advice. The Respondent had inherited the previous method of apportionment from the previous factor and had simply continued to apply it. No concerns were expressed until 2018 when the Applicant complained of incorrect apportionment.

The Respondent attempted to resolve the issue but faced the practical difficulty that it did not know who owned the various garages and stores.

A further difficulty was that the installation of electricity meters did not appear to reflect the shares as expressed in the Deed of Conditions and so the Respondent considered that new meters would require to be installed in order to implement apportionment as per the Deed of Conditions.

The Respondent sought to resolve the issue of ownership by taking legal advice. The Respondent's solicitors advised that title searches should be carried out at a cost of £3.60 per property. For a further fee, the solicitors would then review and report as to which garages and stores were owned by which property owner.

The Respondent had initially tried to ascertain the ownership by writing to all owners asking them to confirm which garages/stores they each owned but some had not responded.

The Respondent then conducted a ballot of owners as to whether solicitors should be instructed to report on the ownership position. The majority of owners (including the Applicant) voted against this course and so it was not followed.

The Applicant explained that she had some concerns that the ballot was not correctly organised and, more particularly, that there was no need to incur the expense of obtaining full title sheets from Registers of Scotland when plans were available from Registers of Scotland online free of charge which showed the ownership of the garages.

As noted above, we consider that the application of charges on a basis different from that set out in the Deed of Conditions constitutes a breach of the property factor's duty created by Clause 5.2 of the Written Statement of Services.

Complaint Handling

The Applicant complains that the Respondent has failed to follow its own Complaints Procedure. Her first complaint was made by email dated 12 July 2019. This was treated as an informal complaint until she confirmed by email of 18 July 2019 that she wished it to be treated as a formal complaint.

The complaint was responded to by the Respondent's letter of 26 July 2019.

The obligation in terms of the Complaints Procedure was for this letter to be issued within five working days. The letter of 26 July was therefore late.

The letter of 26 July 2019 created a reference number for the complaint: 2019-42. The Applicant has made other complaints to the Respondent including one which was allocated reference number 2020-06.

At a meeting on 26 September 2019, it was agreed to put the complaint on hold. On 18 January 2020, the Applicant asked for the complaint to be recommenced. On 20 January 2020, the Respondent's Michelle Blake responded in relation to the progress which the Respondent was making as regards the apportionment/garage ownership issue and indicating that the Applicant would have to follow the Respondent's Complaints Procedure. Further correspondence ensued with the Respondent being of the view that formal title investigations were necessary to identify the owners of the various garages and the Applicant expressing the view that that was unnecessary.

The Respondent's stage 4 response letter was issued on 30 March 2020. The Respondent advises that it did not understand the Applicant to be unhappy with the stage 4 response, so no further action was taken at that time. Confusion seems to have arisen at that time between the current complaint and Complaint Reference 2020-006, not least of all because that heading appeared on the Respondent's letter of 30 March 2020, although the letter also sought to deal with Complaint 2019-42.

A Stage 5 response was issued by the Respondent's Nic Mayall on 15 June 2020 again with reference 2020-006. That letter did however attempt to explain how the Respondent had treated Complaint Reference 2019-42.

We consider that the Respondent has failed in its property factor's duties in that it has failed to follow its Complaints Procedure in terms of Clause 7.0 of the Written Statement of Services.

This failure was, firstly, the failure to respond to the complaint dated 18 until 26 July 2019 and, secondly, the Respondent's failure to define each of the two complaints separately and ensure that each followed their own separate course through the Complaints Process. To be fair to the Respondent, its staff do seem to have tried to answer both complaints but the two seem to have become conflated such that it was not clear to the Applicant which stage she was at in relation to each formal complaint.

Observations

Both parties made representations by email to the Tribunal after the date of the hearing. While the intention of both emails was undoubtedly to assist the Tribunal in its determination, the Tribunal has elected not to give any weight to the content of those emails. This is because allowing evidence after the hearing has ended often creates further procedure and the need for comment and counter comment by the parties and questions by the Tribunal. For this reason, the hearing normally represents the final opportunity to present evidence.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

We have a wide discretion as to the terms of the PFEO we may make. In this case we consider it appropriate to order the Respondent to recognise its failure by making a payment to the Applicant of £200. We are aware that the Applicant reported having suffered considerable distress as a result of the Respondent's actions/inaction as factors over the years including in relation to other complaints. However, the award in this case reflects the relatively minor nature of the breaches established.

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: 1 February 2021