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

Proposed Property Factor Enforcement Order ("PFEO"): Property Factors (Scotland) Act 2011 Section 19(2) (the 2011 Act")

Chamber Ref: FTS/HPC/PF/17/0081 and FTS/HPC/PF/17/0082

Units 6 and 8, 270 Bath Street, Glasgow, G2 4JR ("The Properties")

The Parties:-

Dr Rita Ahmad,
The Peppermint Group,
270 Bath Street, Glasgow,
G2 4JR
("the Homeowner")

Redpath Bruce Property Management Limited,
103 West Regent Street,
Glasgow,
G2 2DQ
("the Property Factor")

Members of the tribunal:

Martin J. McAllister, legal member and Andrew Murray, surveyor, ordinary member.

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

The Property Factor is to pay compensation of £650 to the Homeowner within twenty one days of service on it of the PFEO. The said compensation is inclusive of the sum of £323.37 already offered by the property factor and is not in addition. The compensation is to be paid by the Property Factor crediting the said sum to the Homeowner's account for common repairs and maintenance which it has with the Property Factor.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a give notice of the proposal to the property factor, and

(b allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2) (a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Under Section 24(1) of the Property Factors (Scotland) Act 2011, a person who, without reasonable excuse, fails to comply with a property factor enforcement order commits an offence.

Martin McAllister

Legal Member and Chair

10/11/17

Date

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

Decision: Property Factors (Scotland) 2011: Section 19(1) (a)

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Units 6 and 8, 270 Bath Street, Glasgow, G2 4JR ("The Properties")

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Members of the tribunal:

Martin J. McAllister, legal member and Andrew Murray, surveyor, ordinary member.

Decision

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

The decision is unanimous.

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the Act" and the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code".

The Property Factor became a Registered Property Factor on 7th December 2012 and itsduty under section 14(5) of the 2011 Act to comply with the Code and to perform the property factor's duties arises from that date.

Background

The Homeowner made two applications. One is in respect of Unit 6, 200 Bath Street, Glasgow and the other is in respect of Unit 8, 200 Bath Street, Glasgow. The applications were received by the tribunal on 6th March 2017. The applications allege that the property factor has breached clauses 2.5, 6.3, 6.6 and 6.9 of the Code of Conduct for Property Factors and has failed to carry out the property factor's duties.

On 28th March 2017, a legal member of the tribunal, acting as a Convener with delegated powers, referred the applications to the tribunal to determine.

The Property Factor intimated to the tribunal that it considered that the applications by Dr Ahmed to be flawed since she is not a homeowner as defined in the Act.

The tribunal held a Hearing to consider this preliminary matter and on 7th June 2017 issued a Decision determining that the applicant was a homeowner in terms of the Act although she operated the Properties as commercial premises and the matter was set down for further procedure. The two applications were considered by the Tribunal together as one application.

Matters of Agreement between the parties

The units which are the subjects of the application are situated in a tenement at 268 and 270 Bath Street and 59 Elmbank Street, Glasgow. The ground floor unit is occupied by Dr Ahmed as a dental surgery and the first floor unit is owned by Dr Ahmed and occupied by a tenant who operates a fitness studio. The basement is occupied by offices and other units in the tenement are occupied by commercial and residential occupants. At the rear of the tenement there is a car park area which is used by residential and commercial occupants of the tenement. The property factor manages the tenement for the owners.

Hearing

A Hearing was held on 11th October 2017 at which both parties were represented. Dr Ahmed was present and was represented by Mr John Catterson. She was also accompanied by Ms Donella McLennan who is a member of her staff.
The Property Factor was represented by Mr Robert Campbell, a director and Mrs Margaret Reid.

Both parties were in agreement that the issue before the tribunal was focused and that was the Property Factor's conduct in dealing with a fire alarm system which served the tenement where the Properties are situated. The application stated that the Homeowner believes that she had been paying management charges and costs for a

fire alarm system for a period when the Property Factor had not been doing its job in relation to replacement of the fire alarm system and when charges were being paid to a contractor which would not have been necessary had the system been replaced.
Mr Catterson said that the fire alarm had been faulty and that the Homeowner had initiated its replacement. Mr Campbell said that the property factor acknowledged that it could have been quicker in dealing with the matter and that it had compensated proprietors in respect of this delay. Mr Campbell referred to the written representations made by the Property Factor and Mr Catterson said that neither he nor the Homeowner had had sight of these representations dated 23rd August 2017
The tribunal allowed an adjournment to facilitate the reading of the representations by the Homeowner and Mr Catterson.

When the Hearing reconvened it was pointed out to Mr Catterson that the homeowner must have had sight of the representations because the Homeowner had referred to them in her email of 10th September 2016.

Written Representations

The Property Factor summarised its position in a letter by Mr Campbell dated 23rd August 2017. It stated that it had paid a contribution of £900 towards the cost of replacement of the fire alarm system. It also stated that the Property Factor had also undertaken to credit the sum of £323.37 to the Homeowner. The letter referred to Minutes of meetings of owners of the tenement. The Minutes of the meeting of 29th July 2014 referred to the fire alarm system and Mr Campbell's letter indicated that this Minute evidenced that the fire alarm system was still operating and "provided a level of comfort to the various proprietors." The letter stated that the fire alarm system, though obsolete, was still functioning. The letter refers to the Minutes of 11th February 2016 where there is reference to the fire alarm system not being fit for purpose and owners noting that the costs for getting the then system up and running was £3,500 plus VAT. The Minutes state that Chubb, the contractor responsible for work on the fire alarm system, was not prepared to reimburse any charges but that Redpath Bruce, as a goodwill gesture were prepared to contribute £900 as compensation to the owners of the tenement. The Minutes disclose that Redpath Bruce accepted that matters could have been progressed more quickly. The Minutes disclose that Mr Catterson had stated that he held the Property Factor responsible for the state of affairs the owners found themselves in and indicated that he felt that more compensation should be given by the Property Factor. The Minute of 11th February referred to by Mr Campbell in his letter disclosed that Mr Catterson had obtained a cheaper alternative quotation to upgrade the fire alarm system which was to be actioned with a contribution of £900 from the Property Factor.
Mr Campbell's letter stated that there was a meeting of proprietors on 24th November 2016 at which the agreement with owners to replace the fire alarm system was re-affirmed and there was a vote of confidence in the present factoring arrangements.
Mr Campbell's letter stated that he does not consider that Redpath Bruce has breached sections 6.3 ,6.6 or 6.9 of the Code. It goes on to state that they Redpath Bruce had various meetings with the proprietors and therefore had not breached Section 2.5 of the Code. The letter states " Redpath Bruce Property Management Ltd have already recognised various failings in having this necessary work to the fire alarm system progressed...."

The letter states that the Property Factor had been financially disadvantaged because various proprietors had not paid common charges invoices resulting in an overall debt of around £20,000 for the building. The letter of Mr Campbell was accompanied by a number of documents including copy invoices, copy Minutes of meetings and copy emails. One email from Kenny McQuade of Chubb dated 22nd August 2017 states " I can concur that the system was reported to be obsolete and in need of upgrade. Chubb continued to carry out regular checks in accordance with Chubb's contractual obligations. During the course of the period in which Chubb were contracted to maintain the system, the system remained in working order."

The Homeowner's written representations are contained in her email dated 10th September 2017. It states that she considers the Property Factor to have overcharged by thousands of pounds in the past.
The email refers to charges made by Chubb which could have been avoided had the Property Factor replaced the alarm when "first instructed to do so by his contractor in May 2013. The Homeowner refers to charges made by Chubb to test the fire alarm and which were not for maintenance. The Homeowner refers to the fire alarm was known to be malfunctioning from May 2013 until it was replaced in 2016.
The email refers to the Property Factor's negligence that could have caused serious injury or loss of life. It also refers to the factor having made aware of the need to change the fire alarm and doing nothing about it. There is reference in the email to weekly bell testing being carried out by a contractor when it could have been done by a proprietor. The Homeowner stated that she was not aware a quotation had been obtained for replacement of the system. The email states the factor had been aware of dangerous wiring relating to the fire alarm system and had done nothing about it.
The Homeowner said that if the fire alarm system had been replaced sooner, call out charges for the malfunctioning system could have been avoided.
The email stated the Homeowner considers she is due a settlement figure of £2526 plus adviser costs of £1200 "which is a minimum settlement for the money wasted by the factor due to negligence and mismanagement."

Oral evidence

Both parties confirmed that the fire alarm system has now been replaced. Mr Catterson said that the work had been done by AC Fire and Security Services, a contractor which had been engaged after the occupiers of the building had obtained a price. Mr Catterson accepted that the Property Factor had paid £900 from its own funds and Mr Campbell said that the Property Factor had settled the account for replacement of the system amounting to £1835 plus VAT. Mr Catterson said that he did not agree that the Property Factor had paid £900 in a goodwill gesture but rather because it recognised that it should have done something about the faulty wiring which was dangerous and which he said the Property Factor had been aware of since an assessment carried out in 2014.
Mr Campbell said that the arrears position had improved and that the Homeowner had previously not paid several half years' invoices but that she was now up to date. In answer to a question, Mr Catterson said that the Homeowner had not paid and that this was because she was not getting a service from the Property Factor. He conceded that the invoices did not just cover management services but also things like repairs,

insurance and common lighting. Mr Campbell said that, at one point, the arrears owed by the Homeowner were more than £9500.

Mr Campbell said that the Property Factor had recognised that the fire alarm system required to be upgraded but that it could only progress the work if the proprietors agreed. He reiterated that the Property Factor had delayed in achieving a resolution of the issue but referred the Tribunal to the Minutes of meetings of the proprietors.
Mr Catterson said that Chubb regularly called at the building and that the homeowner and other proprietors thought that the contract with them included maintenance and upgrades but that it did not. He said that the costs paid to them included weekly bell checking and that when this was discovered the proprietors had assumed responsibility for doing this themselves. Mr Catterson said that it was not appropriate that Chubb were being paid to carry out work on a system that was obsolete. Mr Campbell referred to the email of Kenny McQuade of Chubb dated 22nd August 2017 which confirmed that the system was in working order. Mr Campbell said that a system could be obsolete, not up to current standards and not fit for purpose but still operational. Mr Catterson stated that he did not agree with the concept advanced by Mr Campbell.
Mr Campbell said that the sum of £323.37 which it is proposed to be credited to the Homeowner has been calculated to reflect compensation for costs incurred by the Homeowner in respect of some of the invoices from Chubb.

The parties addressed the specific alleged breaches of the Code;

2.5 *You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement.*

No evidence was led by the Homeowner in relation to delay in responding to specific enquiries or complaints. Mr Campbell referred to the Minutes which he said demonstrated ongoing engagement with the proprietors although he accepted that the whole matter of the fire alarm system could have been dealt with more promptly.

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.*

Mr Campbell said that the contract with Chubb was historic. Mrs Reid said that the Property Factor had looked after the building for thirty years and that Chubb had been the contractor for a significant number of years. She said that a colleague had carried out a competitive price exercise price for the maintenance contract and that Chubb had been the cheapest.

6.6 *If applicable, documentation relating to any tendering process excluding and 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.*

Mr Campbell said that any quotations were provided to the homeowners in the building. Mr Catterson accepted this but said that the quotations were too expensive.

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.*

Mr Catterson said that the new contractor dealing with the fire alarm system was able to tell the proprietors that there was dangerous wiring in the property and that there was no way he could install a new alarm system without dealing with the wiring. Mr Catterson said that a Fire Risk Assessment had previously identified this. Mr Catterson queried what homeowners were paying for if matters such as this were not being dealt with by the contractor and the Property Factor. He said that the Property Factor should have pursued Chubb who had stated that they had no responsibility in this regard. Mr Catterson said that Chubb had provided a quotation in September 2013 but that he had only seen it a year and a half later when he had had a meeting with Chubb.
Mr Catterson said he thought it had been a failure of Chubb but had been told by them that they carried out maintenance and not repairs.
Mr Campbell said that the system had a finite life but that, prior to it being replaced, it had not been posing a danger to individual proprietors.

Property Factor's Duties

Mr Catterson said that the Property Factor was notified in May 2013 that the fire alarm system was obsolete and he said that no one has given a satisfactory explanation as to why the fire alarm system was not replaced sooner. He said that a quotation dated 26th September 2013 to replace the system had been obtained. He said that recommendations to the Property Factor had been ignored. He said that repairs to an obsolete system had been paid for and that these would not have been necessary if the Property Factor had replaced the system sooner. Mr Catterson said that he believed that people had been at risk.
Mr Campbell said that it is entirely possible for something to be obsolete but still in working order.

Mr Catterson said that the Homeowner was looking for compensation for money she had spent on management fees. He said that the fire alarm system had been declared obsolete in May 2013 and that, from that time until the fire alarm system was replaced, the Property Factor was not properly carrying out its duties.

Mr Campbell referred the Tribunal to the Minutes of the meetings of proprietors and said that the Property Factor had tried to engage with the proprietors.

Ms McLennan said that she wanted the Tribunal to know how stressful the matter of the fire alarm system had been for Dr Ahmed.

The Tribunal considered The Minutes of meetings of the proprietors which had been lodged:

29th July 2014:
It refers to concerns being raised by Mr Catterson with regard to the fire alarm system and to "call out charges, monthly charges and maintenance cover from Chubb" Reference is made to the charges made for weekly bell tests, to obtaining quotations from an alternative contractor and to having a survey of the system done. Reference is made to the fire alarm system "reaching its lifespan."

4th December 2014:
There is reference to the fire alarm system needing replaced and it is minuted that one of the proprietors would assist with the specification and ingathering of estimates for the necessary works.

23rd September 2015:
Mr Catterson raises concerns about overcharging by Chubb. There was discussion about the weekly bell tests and the fact that this does not require to be done by an engineer and could be done by a proprietor. This was agreed. It is minuted that the Property Factor had "provided owners with multiple quotations for the ongoing maintenance contract however have not had sufficient response in order to change contractor." The Minute states that Chubb's call out charges are competitive but that their annual maintenance costs are higher. There is reference to possible arbitration to provide an independent assessment and conclusion.
The Minute refers to quotations for replacement of the fire alarm system and Mr Catterson undertaking to clarify position regarding faulty wiring.

11th February 2016:
There were further discussions about replacement of the fire alarm system and the Property factor acknowledging that it could have been more proactive in progressing matters with the offer of a payment by them of £900 as a goodwill gesture. The Minute discloses that Mr Catterson stated that he considered the Property Factor to be responsible for the position proprietors were in with regard to replacement of the fire alarm system. This was not accepted by Mr Campbell of The Property Factor who stated that it was the proprietors who were responsible for ensuring that the building was properly protected and that the owners had been aware of the condition of the system since 2014. The Minute discloses that the proprietors instructed replacement of the fire alarm system by ACS at a price of £1835 plus VAT.

24th November 2016:
The Minute discloses that proprietors consider that the historic issue of the fire alarm system had been resolved and the proprietors present reconfirmed the appointment of Redpath Bruce as Property Factor.

The Tribunal makes the following finding:

The Property Factor did not properly carry out the Property Factor's duties in relation to the Properties.

Reasons for Decision and Disposal

The Tribunal considered all the written representations, documents lodged and oral evidence. It was greatly assisted by the parties who had focused their evidence and representations to the issues to be determined.

The crux of this application is regarding a common fire alarm system contained within the building of which the Properties form part. The Tribunal accepted from the evidence before it that the system was obsolete. This was not a matter of dispute between the parties. What was in dispute was whether the Property Factor should have been more proactive in dealing with the charges made by Chubb for checking and maintenance and also in relation to replacement of the system.

The Homeowner's evidence as submitted in her written representations and as provided by Mr Catterson was that the charges made by Chubb, the existing contractor were too high. It is clear from the evidence and, in particular from the terms of the Minutes of the meeting of proprietors of 23rd September 2015 that this included weekly bell testing which could be carried out by a proprietor. This seems reasonable and it seemed to the Tribunal that this is something that could have been investigated earlier by the Property Factor. The possibility of a proprietor undertaking the bell testing is something that the Tribunal considered should have been within the knowledge of the Property Factor.

The Tribunal accepted the fire alarm system was operational although obsolete and the evidence of Mr Campbell in this regard and the relevant email from Chubb was accepted. No contrary evidence was led other than Mr Catterson stating that the system was obsolete. The Tribunal considered that it was entirely possible for something to be obsolete and not fit for purpose but still functioning.

The Tribunal found that the Property Factor had delayed in addressing the issue of replacement of the fire alarm system. The Minutes of the meetings of proprietors show that the matter was discussed in July 2014 and that in September 2015 the matter had not materially progressed.

Mr Campbell did not dispute that the Property Factor had delayed.

The Tribunal considered the alleged breaches of the Code.

Sections 6.3, 6.6 and 6.9 were considered.

The Property Factor explained that the contract with Chubb was long standing and that it had carried out an exercise to determine the costs for the maintenance. The

Minutes disclose that the proprietors had been kept apprised of the situation with Chubb.

No evidence was led by the Homeowner that it had asked for any information under Section 6.6 of the Code.

Mr Catterson's position was that Chubb should have been pursued. This was clear from his evidence and also the terms of the Minutes of the meetings of proprietors. No evidence was led to support the contention that Chubb had provided inadequate work or an inadequate service. It was clear to the Tribunal that the limited nature of Chubb's contractual obligations was such that it would be unlikely that there would be anything to pursue and the matters which concerned Mr Catterson did not fall into the obligations of Chubb.

The Tribunal found no breach of Section 6 of the Code.

Section 2.5 of the Code deals with issues of communication. There was no evidence led by the Homeowner that the Property Factor breached this section. The Property Factor accepted that there had been delay in dealing with the fire alarm system but there was no evidence before the Tribunal that there had been delay in dealing with specific enquiries or complaints raised by the homeowner. The Minutes of the meetings of proprietors demonstrate that there was ongoing engagement with the homeowners although this could have been more frequent and productive.

The Tribunal found no breach of Section 2 of the Code.

The tribunal considered whether or not it is appropriate for the Property Factor to pay compensation to the Homeowner. There had been delay and the Tribunal accepted that this caused stress, inconvenience and worry to the Homeowner. In determining the level of compensation, the Tribunal took into account the share of the goodwill payment of £900 which the Homeowner would have received. To its credit the Property Factor made no issue about the fact that the Homeowner had been in arrears to the extent of over £9,500 but the Tribunal did consider that this was a matter that it should take into account in fixing the level of compensation to be paid to the Homeowner. The Homeowner did not only withhold payment of management charges but did not pay the invoices which included other matters. In the short term the Property Factor had to finance this deficit although in the longer term it would have fallen to the other proprietors in the building. The Property Factor had offered to pay £323.37 to the Homeowner. In her written representations the Homeowner had stated that she wanted compensation of £2526 together with adviser costs of £1200. No specification of this had been given and the homeowner led no evidence on the matter at the Hearing and made no relevant submissions to support this claim other than the statement that the Homeowner wanted return of management fees paid.

The Tribunal considered that, in all the circumstances, it would be appropriate for a sum of £650 to be paid in compensation to the Homeowner and that this be inclusive of the £323.37 already offered by the Property Factor. The Tribunal determined that the compensation be paid by the Property Factor crediting the Homeowner's account for common repairs and maintenance which it has with the property factor

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

NOTE
Subsequent to the Hearing, the Homeowner sent written submissions requesting that these be considered by the Tribunal. These were completely disregarded and did not form part of the deliberations of the Tribunal. It would not have been appropriate to consider submissions by either party subsequent to the Hearing.

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.

Martin McAllister

Legal Member and Chair

10/10/17

Date