Housing and Property Chamber
First-tier Tribunal for Scotland

First-tier Tribunal (Housing & Property Chamber) ("the Tribunal")

Property Factors (Scotland) Act 2011 ("the Act")

Decision under Section 19(1)(a) of the Act

Chamber Ref: FTS/HPC/PF/18/1584

Re: Property at Flat 0/1, 65 Cherrybank Road, Merrylee, Glasgow G43 2NL ("the Property")

Parties:

Mr Nathan Murdoch, residing at the property ("the homeowner")

and

YourPlace Property Management Ltd, registered under the Companies Act 1985, No SC245072 and having its Registered Office at Wheatley House, 25 Cochrane Street, Glasgow G1 1HL ("the factors")

Tribunal Members:

David Preston (Legal Member) and Carol Jones, Surveyor (Ordinary Member) ("the tribunal").

Decision

The tribunal, having made such enquiries as it saw fit for the purpose of determining whether the factors had complied with the Code of Conduct for Property Factors ("the Code") and its property factors' duties as defined in the Act determined that the factors had breached Sections 6.1 and 6.2. of the code.

The tribunal determined to impose a Property Factor Enforcement Order.

The decision was unanimous.

Background:

1. By application dated 25 June 2018 the homeowner applied to the First-tier Tribunal for Scotland (Housing & Property Chamber) ("the Tribunal") alleging a failure on the part of the factors to comply with: Sections: 2.1; 2.4; 2.5; 5.4; 5.6; 5.7; 5.8; 6.1; 6.2; 6.3; 6.6; 6.9; 7.1; and 7.2 of the Code; and their duties under the Act.

2. The homeowner alleged that the factors: do not value properties for insurance as per title deed requirement and deny their responsibility; do not manage the property as they claim as they don't inspect the asset or review it to carry out repairs; have failed to manage a health and safety risk and left owners living with a smell of sewage at the property for months and saying it wasn't a risk to health without assessing it; have provided false and misleading information from the information they publish to e-mail/ letters all the way from YourPlace up to the Wheatley Group.

3. The President of the Tribunal referred the application to this tribunal for determination.

4. On 15 November 2018 a case Management Discussion ("CMD") took place before the tribunal in respect of which a Note of Discussion was issued to the parties on 20 November 2018. The Note outlined: the parts of the application which had already been determined in application number pf/18/0293; those parts which the homeowner confirmed he was content to regard as settled; and those elements of the application in respect of which he continued to seek a determination by the tribunal. On 2 December 2018 the homeowner submitted written responses in which he specified the documents upon which he relied in support of the remaining issues. He confirmed that he was happy for the tribunal to proceed on the written representations and documents identified without his further attendance at a hearing. On 19 December 2018 the factors submitted their response to the homeowner's representations and also confirmed that they were happy for the tribunal to proceed on the written representations and documents identified without their further attendance at a hearing.

5. The tribunal convened on 13 February 2019 in the Glasgow Tribunal Centre to resume its consideration of the application in the absence of both parties. The issues remaining to be determined related to Sections: 2.1; 5.8; 6.1; and 6.2 of the Code.

6. *Section 2 of the Code: Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:*

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

   a. The homeowner argued in his letter of 25 June 2018 [Document A4(4) of the homeowner's Inventory] that FAQ 6 in the factors' booklet "Repairs and Consent - What you Need to Know" [Document T] was completely false in saying that "the contract was agreed through a Europe-wide tender and meets all procurement rules". He said that the factors had been unable to show what procurement rules this contract meets as the tender is out of date and misleads customers who think they are getting the most 'value for money service' possible when they are not as the tender is 10 years old and prices have been rising for these 10 years without question.

   b. The factors argued that this had been covered in their response to the Direction issued after the hearing in Case number pf/18/0293 and had been decided upon in the subsequent Decision in that case. They also said that the booklet referred to [Document T] is an older document and had been the subject of previous discussions with the homeowner. They suggested that the homeowner simply raised the same issue under a different section of the Code.

c. In relation to Document N being the letter from Euan Dollar dated 17 May 2018 the homeowner argued that there had been a deliberate attempt to mislead him by saying that his requests would be looked at as a freedom of information request, which he also then stated was not applicable to the factors. He said that this had been done to prevent the factors from having to comply with sections 6.3 and 6.6 of the Code.

d. The factors denied that the letter was such an attempt. They said that the letter had advised that the homeowner's complaint about his request to view tender documents would continue to be progressed through the complaints procedure.

e. In relation to Document T, the tribunal was satisfied that the issue of producing the tender and procurement information had been covered by the factors in their response to the Direction and in the Decision under case number pf/18/0293. It also noted the consultation exercise in relation to the way forward under the 10-year old arrangements under advice from professional advisors. However as appears to be the case with the factors' booklets generally, they neither identify the date of issue nor version number of the documents and readers are unable to identify the current version. In addition, the tribunal considers that question 6 in the booklet, Document T, issued by the factor needs to be changed by the factor (if not already done) to reflect the current position in this regard.

f. In relation to Document N, the tribunal determined that the letter of 17 May 2018 was neither false nor misleading. It stated that they were treating the request as if it had been made under the Freedom of Information (Scotland) Act 2002 even although it did not apply to the factors (which is true) but that in the interests of openness and co-operation they would apply the principles of that Act and provide such information as could be released. This was also covered in case number pf/18/0293.

The tribunal found no breach of Section 2.1 of the Code but expects the factor to regularly review all documents provided to homeowners to ensure that accurate information is communicated.

7. *Section 5.8 of the Code*: *You must inform homeowners of the frequency with which property revaluations will be undertaken for the purposes of buildings insurance and adjust this frequency if instructed by the appropriate majority of homeowners in the group.*

a. The homeowner said that he had been told that the factors do not carry out property revaluations for buildings insurance. He questioned the factors' ability to obtain value for money in the absence of valuation reviews and that it does not comply with paragraph Seven (iii) of the Deed of Conditions which requires the factor to determine the insurance value 'from time to time'.

b. The factors said that they advise homeowners annually of the property valuation for insurance purposes. Their Written Statement of Services ("WSS") says that their approach to this is to provide cover up to a rebuild value of £400.000 for all properties with advice to homeowners to obtain their own valuations if they think the rebuild value is in excess of this. They contend that their building insurance is an affordable and competitive

product for their customers and their approach to rebuild valuations enables them to keep costs of providing home insurance as low as possible.

c. The tribunal had some difficulties with the factors' position. Paragraph Seven (iii) of the Deed of Conditions is in clear and unambiguous terms that the factors shall "*effect insurance of the Property against damage or destruction by fire and other risks for the full replacement of all dwellinghouses other than those owned by the District Council. The amount for which such insurance is effected shall be determined from time to time by the Factor but the proprietor or proprietors of any dwellinghouse in the Property, if he or they consider that such amount is excessive or inadequate, shall be entitled to have the amount fixed by the Arbiter."* (underlining added).

d. The tribunal determined that the factors' approach to insurance calculations does not comply with the Deed of Conditions. The Deed of conditions requires a determination of the full replacement value of the property to be made by the factors. The tribunal finds that such a determination requires to be based on some form of evidence upon which the factors reach a conclusion as to the appropriate value. The factors have neither provided such evidence nor an explanation of how they arrived at the rebuild value of £400,000. It appears that they have passed the responsibility for fixing the value to homeowners who must assess the rebuild value and tell the factors 'if the rebuild value exceeds £400,000". The Deed of Conditions provides that if homeowners 'consider' that the factors' determination is either inadequate or excessive, they are entitled to have the amount fixed by the Arbiter appointed in terms of Clause 11.

e. The tribunal noted that the section of the WSS which deals with Buildings Insurance states: 'We recommend that homeowners get regular valuations of their properties, especially if they are in areas with rapidly increasing property prices…" the tribunal fails to see the relevance of property prices in the context of reviewing rebuilding values for properties.

Having reached its conclusion, however, the tribunal determined that as the factors no longer manage the property, there is no order which it can usefully make under the Act. The tribunal is not in a position to determine the insurance valuation of the property which can only, in the circumstances of the present case, be done by the Arbiter. The homeowner should have challenged the factors' determination in that way to have the appropriate value fixed.

8. Section 6.1 of the Code: You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. 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.

a. The homeowner provided examples of repairs which had been reported to the factors which had been signed off as completed when there was still work outstanding. These examples related to:

Document I: a waste pipe cover being left with duct tape. This is an exchange of emails between the homeowner and Shannon McGeechin, Business Advisor in May 2018. The homeowner complained that a downpipe cover had been broken during an

inspection and rather than being repaired, it had been left with duct tape. Ms McGeechin explained that in order to carry out the survey of the drain, the inspection plate had to be removed, but due to its age and condition it had to be broken off. It was temporarily repaired while consent was sought for the work which had been identified to be carried out. Agreement was not forth-coming, and a further repair was carried out using 'flash-banding' which was said to be standard practice where a pipe is fractured to prevent spillage. Due to the lack of consent the job was closed off. This is a further example of the problems raised in case number pf/18/0293 and was covered in that Decision so far as closing off incomplete jobs is concerned, which results from the computerised system. The tribunal does not consider it reasonable for a damaged sewage pipe to have been left with a temporary repair, albeit with flash-band. The permanent repair or replacement of the pipe could presumably have been carried out at a cost which was within the agreed limit, even if the full repair did not proceed. Alternatively, if that cost did exceed the agreed limit, consent should have been obtained for what would certainly have been a lesser sum;

Document J: scaffolding being left; This is an exchange of emails between the homeowner and the factors in May 2018 regarding a job being closed off before the scaffolding was removed. The factors said that they were told that the repair was completed on 19 April 2018. They had inspected on 23 April 2018 and instructed the contractor to remove the scaffold on 24 April 2018, however it was not until the homeowner contacted the factors on 14 May 2018 that they realised that their instruction had not been implemented. While the tribunal did not consider it to be unreasonable for the factors to believe that their instruction would have been followed, they should not depend on owners to have to tell them if there are still outstanding works. The factors should carry out an inspection and not close the job until they are satisfied that there is no obvious outstanding work to be carried out;

Document L: work orders being closed off 'fraudulently'; This exchange of emails is a further case of the job being closed off before it had been completed, in this case due to weather conditions. The repair had been intimated in January 2018. The factors acknowledged that this was not communicated to the homeowner which was said to have resulted in a delay in the repair being raised once the weather improved. They said that once their error had been highlighted, they raised a new job which was booked in for the work to be carried out on 16 May 2018. That is a delay of around four months and seems to be partly attributable again to the 'closing off' problem already identified. Having closed off the job, there is nothing to alert the factors to the fact that the job is not, in fact, complete. They seem to depend upon being reminded of the need for the work at some point in the future by the owners. The tribunal determines that there is no question of any fraudulent actions by the factors. However, it is a breach of Section 6.1 of the Code since, although there are procedures in place to allow homeowners to notify the factors of matters requiring repair, maintenance or attention, the procedures for keeping homeowners informed of progress etc is non-existent in cases where the job is

closed off before completion or does not start for whatever reason and depends entirely on the homeowners reporting the problem afresh. In this case, the factors accept that the owners were not informed that the job had not been attended to because of the weather conditions, but even if they had been, the procedures should ensure that the work proceeds without further intervention from owners, apart from necessary agreement as to costs.; and

Document O: being emails allegedly showing that Tom Cuthill was unable to manage repairs. The homeowner refers to two email exchanges to evidence this. Firstly an exchange between 17 and 25 May 2018 dealing with the issue of the lack of painting following roughcast repairs. Mr Cuthill's email of 17 May 2018 was sent to update the owners that the roughcast had been repaired and that it would be painted due to the size of the affected area. The homeowner was of the view that the painting should have been done as part of the roughcast repair. On 18 May 2018 Mr Cuthill explained that painting did not form part of the standard spec for this type of work, but that in view of the area involved, he had undertaken to have it painted at no cost to the owners. The second exchange on 8 June 2018 related to the sewage pipe issue detailed above and dealt with the closing of the job and its re-opening after consent was obtained. He explained that some irrelevant emails had been sent out after the job had been closed, The tribunal found that there is nothing in these emails which suggests that Mr Cuthill was in any way unable to manage repairs and finds no substance to this allegation.

These are further examples of the shortcomings of the factor's systems for ensuring that repairs etc are properly completed before being closed off which are additional to and arise from the same circumstances as were covered in case number pf/18/0293, in respect of which it is understood that the factors have taken or are in the process of taking action to remedy. The tribunal considers that this amounts to a continuing breach of section 6.1 of the Code.

9. *Section 6.2 of the Code: 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.*

    a. The homeowner referred to a number of documents (Documents F, K, R, U, V, Z, AA and AB) relating to the problems which had arisen in relation to the drains and waste pipes. He complained that the factors had refused to regard the repairs to the foul drains as a health and safety issue or an emergency repair. He complained that the owners had been left with a smell of sewage at the property for over 4 months, despite repeated reports to the factors. Unfortunately, the homeowner tended to personalise the issue and complained about the competence and qualifications of the staff. The tribunal disregarded these comments and restricted its deliberations to the issue at hand under the Code.

    b. The factors' response to this complaint referred the tribunal to their 24-hour contact centre to enable customers to report complaints at any time of the

day or night. They said that the homeowner's complaints had been dealt with in their complaints process and by email correspondence. They referred to the temporary repair which had been carried out with the flash-band and said that the permanent repair was started on 11 June 2018.

c. The tribunal found that the factors' response to this issue did not deal with the point made in the email from Shannon McGeechin of 18 May 2018 that because a majority of owners had not given consent for any further work by 13 May 2018 the job had been cancelled. In the email exchange (Document I), the homeowner pointed out that the request for consent had been issued on 3 May 2018 with the deadline for a response of 13 May 2018 and that: one owner had been on holiday; one had been dealing with a bereavement; and another had not received the request. It was only after this exchange that a further consent letter was issued on 24 May 2018.

d. The tribunal accepts the evidence in the documents that there was a smell of sewage at the property and also accepts that the owners were entitled to regard this as a health issue and consequently as an emergency. Any procedure for dealing with emergencies must go beyond simply a mechanism for reporting issues. It must ensure that any repair which can be classed as an emergency is dealt with as such and owners are kept informed of progress. The factors appear to take the view that an emergency repair refers only to those which are intimated out with normal business hours and require instant action to be taken. They do not seem to include repairs of the sort required here, which should be prioritised before other routine jobs. The tribunal does not accept that it is good enough for the factors to decide that a particular issue relating to sewage is not an emergency without a full explanation and justification of their decision as opposed to a statement by Angela Lanigan in an email of 9 May 2018 in Document K that "there is no current Health & Safety risk", particularly in the face of the homeowner's persistent complaints that there is such a risk. In any event, the tribunal considers that problems related to sewage seeping or smelling are not unreasonably regarded as health issue and should be dealt with as emergencies.

e. The tribunal noted that some of the Communications from YourPlace (Document R) in relation to the drain repairs are inconsistent in terms of the job descriptions and job numbers. It also noted the time delay of 6 - 7 weeks from the date of the CCTV report, 21 March 2018 and the date of the letter detailing the description of the works and the cost involved, 3 May 2018. The tribunal accepts some time would be required to have the survey interpreted but the factors should have kept the homeowners informed meantime particularly in light of the nature of this repair. This production is more relevant under the code section 6.1 above and is another example of the factor not keeping the homeowners informed of progress or providing timescales for completion of works.

In this case the tribunal considers that there has been a breach of section 6.2 of the code and a payment should be made to the homeowner to reflect the inconvenience and distress occasioned by a continuing smell of sewage and an apparent unwillingness on the part of the factors to regard the problem as a potential health hazard. This type of emergency ought not to be dealt with under the normal procedures for repairs exceeding the 'agreed levels' or at least any request for consent to proceed should highlight the importance of the issue in view of the nature of the problem.

Property Factors Enforcement Order (PFEO):

The tribunal noted that the factors were no longer responsible for managing the property but determined that a PFEO would be appropriate to order the factors to make a payment to the homeowner in the sum of £500 within a period of 30 days from the date of service of the PFEO.

.... Chairman 25 February 2019

David Preston