



**Decision of the Homeowner Housing Committee
In an Application under section 17 of the Property Factors (Scotland) Act 2011
by**

Ross Fraser, 7/16 Hopetoun Street, Edinburgh EH7 4GH (“the Applicant”)

**Life Property Management, Regent Court, 70 West Regent Street,
Glasgow G2 2OZ (“the Respondent”)**

Reference No: HOHP/PF/15/0051

**Re: Property at 7/16 Hopetoun Street, Edinburgh EH7 4GH.
 (“the Property”)**

Committee Members:

John McHugh (Chairman); Andrew Taylor (Surveyor Member) and Colin Campbell (Housing 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 7/16 Hopetoun Street, Edinburgh EH7 4GH (hereinafter “the Property”).
- 2 The Property is a flat within a modern development of 49 flats known as Bellevue Apartments (hereinafter “the Development”).
- 3 The Development was completed in or around 2007.
- 4 The Applicant bought the Property from the developer of the Development in around 2008.
- 5 The flats within the Development were purchased with the benefit of an insurance policy against construction defects.
- 6 Construction defects in the Development came to light after the Applicant’s purchase of the Property.
- 7 A claim was made against the insurance company in respect of the construction defects.
- 8 Remedial works were carried out by the insurance company.
- 9 The remedial works have proved to be unsuccessful.
- 10 The Respondent is the property factor appointed by the owners of the flats within the Development.
- 11 The Respondent has been involved in assisting the owners to address the construction defects and to pursue litigation against the insurance company.
- 12 The majority of owners have elected to take part in a litigation scheme.
- 13 The litigation scheme involves the owners instructing BTO solicitors to investigate the defects and to pursue a court action against the insurance company.
- 14 Buildings Investigation Centre were instructed by the Respondent, via BTO, to carry out investigation works in support of the claim against the insurance company.
- 15 On 13 November 2013, Buildings Investigation Centre issued an invoice to the Respondent. The invoice amount was twice that originally quoted.
- 16 A meeting of proprietors to discuss the claim against the insurance company was called by the Respondent and took place on 18 November 2013.
- 17 The Respondent did not tell the Applicant and the other proprietors present at the meeting about the invoice from Buildings Investigation Centre.
- 18 Decisions were taken by the proprietors at the meeting on 18 November 2013 in the absence of information about the invoice.
- 19 The property factor’s duties which apply to the Respondent arise from the Statement of Services. The duties arose with effect from 1 October 2012.
- 20 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 (7 December 2012).
- 21 The Applicant has, by his correspondence, including that of 28 October 2014, notified the Respondent of the reasons as to why he considers the Respondent has failed to carry out its property factor’s duties and its obligations to comply with its duties under section 14 of the 2011 Act.

Hearing

A hearing was held at George House, Edinburgh on 8 October 2015.

The Applicant was present at the hearing, and accompanied by Jason Watt, another resident from the Development, who provided support to him.

The Respondent was represented by David Young, solicitor of BTO, by David Reid, one of its directors and by Sandra Maitland, its Business Development Manager. The Respondent led evidence from Rob Muir, Chairman of the Residents' Association of Bellevue Apartments.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as “the 2011 Act” and the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as “the Code”.

The Respondent became a Registered Property Factor on 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Committee had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent including the application form.

The documents before us included the Respondent’s Written Statement of Services, which we refer to as “the 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 Applicant relies upon the Statement of Services as the source of those duties.

In particular, he refers to the section headed "Limitation of Liability", which indicates that the Respondent will *"...aim and will endeavour to provide an experienced, professional and competent service.."*

The Code

The Applicant complains of failure to comply with Sections 3 and 6 of the Code.

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

"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*

3.1 If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

3.2 Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor.

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.

3.4 You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property).

If you are a private sector property factor:

3.5a Homeowners' floating funds must be held in a separate account from your own funds. This can either be one account for all your homeowner clients or separate accounts for each homeowner or group of homeowners.

3.6a In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest-bearing account must be opened in the name of each separate group of homeowners.

If you are a Registered Social Landlord or local authority property factor:

3.5b Homeowners' floating funds must be accounted for separately from your own funds, whether through coding arrangements or through one or more separate bank accounts.

3.6b In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest-bearing account or accounting structure must be used for each separate group of homeowners.

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, 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.”

The Applicant provided clarification at the hearing that he relied upon sections 1 and 3 of the Code in their entirety, as well as sections 6.3 and 6.6. He thought that the overriding objective referred to in the introduction to Section 3 was the most relevant part of that Section.

He also sought at the hearing to rely upon Code paragraph 2.1, which relates to the provision of false or misleading information.

The Factual Complaints

The factual matters underlying the complaint are:

- 1 The passing on by the Respondent of costs relating to negligent mismanagement of a contractor, Buildings Investigation Centre.
- 2 The engagement of Buildings Investigation Centre by the Respondent without appropriate authority.
- 3 The failure of the Respondent to impose measures to manage the cost of the further work being undertaken by Buildings Investigation Centre.

We deal with these issues below.

1 The passing on by the Respondent of costs relating to negligent mismanagement of a contractor, Buildings Investigation Centre.

The Development had been constructed in around 2007. After construction had been completed, it was noted that construction defects were present. The owners of flats within the Development had made a claim against an insurance policy which provided cover for the defects. Remedial works had been carried out by contractors instructed by the insurance company.

The remedial works were found to have been unsuccessful. The insurance company had been invited to have its contractors return to site to complete the remedial works satisfactorily but was not prepared to do so voluntarily.

As a result, the owners of properties within the Development have been obliged to instruct certain works themselves to address the building defects and the allegedly inadequate remedial works and to investigate the matter with a view to pursuing a claim for compensation against the insurance company in respect of their alleged failures.

The Respondent has assisted the owners in dealing with these matters. This has included working with the proprietors in the creation of a litigation scheme to allow the proprietors to band together to pursue court action against the insurance company.

BTO Solicitors have been engaged to advise the proprietors.

BTO Solicitors, on the instruction of the Respondent on behalf of the proprietors, had instructed investigations to be carried out and a report to be produced in support of the owners' claim, by Mr Gargaro of Buildings Investigation Centre ("BIC").

An invoice dated 13 November 2013 had been issued to the Respondent by BIC. The invoice was for £12,410.45 plus VAT, an amount more than double the amount originally quoted.

A meeting of proprietors was held on 18 November 2013 to discuss the claim against the insurance company and the further steps which ought to be taken. The Applicant and his fellow proprietors did not become aware of the existence of the invoice until several months later.

This was because the Respondent had chosen to withhold its existence from the proprietors.

The Applicant and all other proprietors have received full reimbursement of the BIC invoice from the insurance company. The Applicant is therefore clear that he is not seeking to pursue payment for any financial loss.

Equally, the Applicant confirmed that he does not dispute the competence of BIC, nor does he claim that their work is lacking in any respect. He does not complain that BIC have produced a report which fails to represent value for money. He does not dispute that BIC have completed the works which are the subject of their invoice nor that they have worked the hours for which they have invoiced.

The Applicant's concern is simply that the Respondent delayed in advising about the receipt of BIC's invoice, and its unexpectedly high level, for several months. In particular, it did not raise the matter at the meeting on 18 November 2013.

In response, Mr Young explained the circumstances. He confirmed that his firm had instructed the BIC report. Because of BIC's prior involvement with the Development, they had seemed the best placed contractor to instruct. A quotation had been obtained. It was acceptable. There had been regular communication between Mr Young and BIC during the course of the work during which there had been no indication that BIC were exceeding the amount originally quoted. The level of the invoice had been a shock to Mr Young.

Mr Young advised that he queried the invoice with BIC. Further information was obtained from BIC and, after some investigation, it appeared that the invoice was justified in that BIC had worked in excess of the hours charged for in the invoice. A modest discount had been agreed with BIC before the invoice had been accepted as appropriate for settlement. That process took several months. The Residents' Association had been kept informed.

The general body of proprietors had not been informed of the invoice until around April 2014. In particular, the Respondent accepted that the proprietors had not been informed of the matter at the meeting on 18 November 2013. The Respondent had deliberately kept this information from the proprietors. It was explained that this was done in good faith as it was felt that the meeting would have been distracted by the issue of the invoice and, further, that, at the time of the meeting, the invoice level had not been accepted and was in need of investigation. It was not thought desirable to raise concerns unnecessarily at the time of the meeting.

The Applicant indicated at the hearing that he found it reassuring to learn, for the first time, that the Residents' Association had been involved in the matter at a relatively early stage. He had been unaware of that because the Respondent had never mentioned this previously.

Mr Young took issue with the Respondent's reliance upon Clause 2.1 and his complaint of delay on the basis that the Applicant had not provided notification to the Respondent as he is required to do in terms of section 17(3) of the 2011 Act. We find these submissions to be well founded.

Nonetheless, even if notification had been provided in relation to these Sections of the Code, we would not have found there to have been a breach of them.

We accepted the evidence of the Respondent on the matter of the way in which the invoice of BIC had been dealt with.

It appeared that reasonable steps had been taken. The Applicant was understandably concerned about the unexpectedly high invoice and the fact that the issue had been concealed from him for a considerable length of time when it could have (and in his opinion, should have) been made known to him and all of his fellow proprietors without delay. Nonetheless, we do not consider that the Respondent's actions in delaying the provision of information about the invoice would constitute a breach of its property factor's duties or of the Code.

We find there to have been no breach of the property factor's duties or of the Code.

2 The engagement of Buildings Investigation Centre by the Respondent without appropriate authority.

The Applicant was concerned that the Respondent had instructed BIC to carry out works relating to zinc cladding. The Respondent had sought, and received, the proprietors' approval to instruct BIC at the meeting on 18 November 2013. The proprietors who provided that authorisation were unaware of the issue regarding the unexpectedly high invoice from BIC because the Respondent had chosen not to disclose its existence to them.

The Applicant regards the authorisation given by the proprietors at the meeting on 18 November 2013 to be tainted by the withholding of information about the invoice. He considers that there was a probability that had the position regarding the invoice been known to the proprietors, they may not have authorised the further employment of the services of BIC.

While that may be true, there is no way to know what the result would have been. More importantly, we are unable to identify any aspect of the Code or of the Statement of Services which the actions of the Respondent breach.

The Applicant further complains that when he asked for information regarding this matter, the Respondent and BTO refused to provide it. He relies, in particular, upon Sections 6.3 and 6.6 of the Code.

The Respondent observes that information regarding the tender process for the relevant works was provided. This was demonstrated by Mrs Maitland's email of 20 June 2014 to the proprietors generally which sets out the tendering process and rationale.

We agree with that assessment and do not consider that there has been a failure to provide relevant information.

We find there to have been no breach of the property factor's duties or of the Code.

3 The failure of the Respondent to impose measures to manage the cost of the further work being undertaken by Buildings Investigation Centre.

The Applicant considers that the Respondent should have built in certain safeguards to its contractual arrangements with BIC post November 2013 to reduce the risk of recurrence of another unexpectedly high bill and complains that the Respondent failed to do this.

The Applicant relies upon the general undertaking contained in the Statement of Services to "provide an experienced, professional and competent service" and the requirement to protect homeowner's funds set out in the introduction to Section 3 of the Code.

We do not find that there is any evidence of a failure by the Respondent in this regard. There is no evidence that the contractual arrangements with BIC were on anything other than appropriate commercial terms.

We find there to have been no breach of the property factor's duties or of the Code.

Observations

Although we have found there to have been no breach of the Code or of the property factor's duties, we do consider that the actions of the Respondent may be subject to some criticism. The whole complaint arises from a deliberate decision of the Respondent to withhold information (about the unexpectedly high BIC invoice) from proprietors including the Applicant. We accept that the Respondent's motives in proceeding in this way were entirely without bad faith of any kind. Nonetheless, in circumstances where a decision is taken to withhold information of this kind, it is understandable that persons such as the Applicant may become concerned that there has been a less than full disclosure by the Respondent and may suspect, albeit incorrectly in this case, that there had been some kind of failure or misconduct which the Respondent had sought to conceal.

It would, in our opinion, have been better for the Respondent to have disclosed the issue surrounding the invoice to all of the proprietors at an earlier stage and to have managed that issue. While that may have had an unsettling effect upon the proprietors and may have distracted them somewhat from the central issue of the pursuit of the claim against the insurance company, it was information which was relevant to the proprietors and to which they might reasonably be thought to have been entitled.

APPEALS

The parties' attention is drawn to the terms of section 22 of the 2011 Act regarding their right to appeal and the time limit for doing so. It provides:

“(1) An appeal on a point of law only may be made by summary application to the sheriff against a decision of the president of the homeowner housing panel or a homeowner housing committee.

(2) An appeal under subsection (1) must be made within the period of 21 days beginning with the day on which the decision appealed against is made...”

JOHN M MCHUGH

CHAIRMAN

DATE: 27 October 2015