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

Catherine Crossan, Flat 7, Charlotte Court, 37 East Princes Street, Helensburgh G84 7DF
("the Applicant")

91BC Property Services, Garscadden House, 3 Dalsetter Crescent, Glasgow G15 8TG
("the Respondent")

Chamber Ref: FTS/HPC/PF/19/0553

Re: Flat 7, Charlotte Court, 37 East Princes Street, Helensburgh G84 7DF
("the Property")

Tribunal Members:

John McHugh (Chairman) and Andrew Taylor (Ordinary (Surveyor) Member).

DECISION

The Respondent has failed to comply with its duties under section 14 of the 2011 Act.

The Respondent has not failed to comply with its property factor's duties.

The decision is unanimous.

We make the following findings in fact:

1 The Applicant is the owner and occupier of a flat at Flat 7, Charlotte Court, 37 East Princes Street, Helensburgh G84 7DF ("the Property").

2 The Property is located within a block ("the Development") consisting of 15 flats.

3 The Respondent acted as the factor of the Development from 4 December 2018.

4 The Respondent resigned as factor with effect from 28 February 2019 by giving notice on 29 January 2019.

5 The Development was constructed by Proven Properties (Scotland) Limited.

6 12 of the 15 flats within the Development remain in the ownership of Proven Properties (Scotland) Limited.

7 A Mr Prow is a director of Proven Properties (Scotland) Limited.

8 The first factor of the Development, B & B Property Management, was appointed by Proven Properties (Scotland) Limited.

9 In 2011, B & B's appointment was terminated and Mr Prow himself assumed the role of property manager of the Development.

10 During 2017, Mr Prow approached the Respondent and expressed an interest in it being appointed as factors of the Development.

11 This was followed up by Mr Prow in late 2018.

12 The Respondent advised Mr Prow on the voting requirements under the Deed of Conditions for the appointment of a new factor.

13 In December 2018, Mr Prow exhibited to the Respondent the signature of 12 flat owners approving the Respondent's appointment as factor.

14 There was no connection between the Respondent and Mr Prow/Proven Properties (Scotland) Limited prior to these events.

15 The Respondent received little co-operation from Mr Prow and was unable to obtain information regarding relevant contracts and to obtain keys for the Development.

16 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 (13 September 2018).

17 The Applicant has, by her correspondence, including that of 20 December 2018, 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 and its duties under section 14 of the 2011 Act.

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

Hearing

A hearing took place at the Glasgow Tribunals Centre on 15 May 2019.

The Applicant was present at the hearing and assisted by her daughter, Aileen Bell.

The Respondent was represented at the hearing by its Doug MacSween and its solicitor, Andrew Park.

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 13 September 2018 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

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 undated "Written Statement of Services under the Property Factors (Scotland) Act 2011" which we refer to as the "Written Statement of Services". They also included a Deed of Conditions by Proven Properties (Scotland) Limited registered 17 September 2008 which we refer to as "the Deed of Conditions".

The Deed of Conditions refers to the appointment of a "Property Manager" as opposed to a "factor" but we use both terms interchangeably in this Decision.

Preliminary Matters

The Respondent tendered some late documents being (1) Companies House documents showing no apparent connection between the Respondent and Mr Prow/Proven Properties Scotland Ltd; (2) emails showing an apparent lack of co-operation by Mr Prow with the Respondents leading to their decision to resign as factors; and (3) a document bearing to appointing the Respondent as factors and containing 12 signatures as owner against 12 of the 15 flat numbers. The signature in each case was that of Mr Prow as the owner of those twelve flats.

The Applicant and her representative were given the opportunity to consider the content of the documents and indicated that they did not object to the documents being considered by the Tribunal although late. Mrs Bell indicated that she accepted that there was no connection between the Respondent and Mr Prow or Proven Properties. The Tribunal considered that the documents would be of assistance in determining the application and, accordingly, allowed the documents to be lodged although late.

On 17 May 2019 (ie after the date of the hearing) the Tribunal received an email which had been sent by Mrs Bell. We propose to have no regard to that email. The parties were given ample opportunity to make all representations they wished at the hearing and did so fully. Only in the most exceptional circumstances would the Tribunal be prepared to consider submissions made after the date of the hearing. To give any effect to the email of 17 May 2019, the Tribunal would then have to seek further representations in response from the Respondent. In reaching this conclusion we have had regard to the overriding objective contained in Rule 2 of Schedule 1 to the 2017 Regulations and the need to avoid delay and to deal with the proceedings in a proportionate manner.

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 Deed of Conditions and the Written Statement of Service.

The Code

The Applicant complains of failure to comply with Sections 1 A.a and b, B.d, C.h, i and j; 2.1; 2.4; 2.5; 5.4; 5.6; 5.7; 6.1 and 7.2 of the Code.

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

" **SECTION 1: WRITTEN STATEMENT OF SERVICES...**

...1.1a For situations where the land is owned by the group of homeowners
The written statement should set out:

A. Authority to Act
a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group3;
b. where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation;

B. Services Provided

d. the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a —menu of services) and how these fees and charges are calculated and notified;...

...C. Financial and Charging Arrangements

...h. any arrangements relating to payment towards a floating fund, confirming

the amount, payment and repayment (at change of ownership or termination of service);

i. any arrangements for collecting payment from homeowners for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service);

j. how often you will bill homeowners and by what method they will receive their bills;...

...SECTION 2: COMMUNICATION AND CONSULTATION...

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

... 2.4 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 the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).

...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 (Section 1 refers)...

...SECTION 5: INSURANCE...

...5.4 If applicable, you must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly. If homeowners are responsible for submitting claims on their own behalf (for example, for private or internal works), you must supply all information that they reasonably require in order to be able to do so...

...5.6 On request, you must be able to show how and why you appointed the insurance provider, including any cases where you decided not to obtain multiple quotes.

5.7 If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) should be available for inspection, free of charge, by homeowners on request. If a paper or electronic copy is requested, you may make a reasonable charge for providing this, subject to notifying the homeowner of this charge in advance...

...SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE...

...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...

SECTION 7: COMPLAINTS RESOLUTION...

...7.2 When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel."

During discussion at the hearing it became apparent that the Applicant's reliance upon Section 1 of the Code was based on the common misconception that it relates to the conduct of the property factor whereas it actually relates to the content of the property factor's Written Statement of Services. The Applicant confirmed that the content of the Respondent's Written Statement of Services was not the subject of complaint.

The Matters in Dispute

The factual matters complained of relate to:

(1) The failures of the Respondent to establish their authority to act.

(2) Failure to Communicate with the Applicant.

(3) Failure to deal with Necessary Repairs

(4) Obtaining insurance without the Applicant's consent

We deal with these issues below.

(1) The failures of the Respondent to establish its authority to act.

The Applicant complains that the Respondent failed to ensure that it was properly appointed. In particular, she complains that the Respondent did not ascertain that a meeting of owners had been called in the terms required by the Deed of Conditions. The Respondent then took up its appointment without explaining the basis of its appointment when asked to do so by the Applicant.

Clause 3.11 of the Deed of Conditions allows a majority of owners (ie 8) at a competently called meeting to appoint a Property Manager. The Applicant complains that Mr Prow called a meeting on a reduced period of notice from the 14 days' notice required by Clause 3.10 of the Deed of Conditions. The Applicant was abroad as Mr Prow is said to have known and so did not receive the notice of the meeting or attend the meeting. The Applicant believes that the meeting was in any event cancelled.

The Respondent explained that Mr Prow had originally approached it in 2017 with a view to it being appointed as the factor of the Development. There had then been a gap before Mr Prow had come back to it in October 2018. Mr MacSween had looked at the Deed of Conditions and advised Mr Prow on how to proceed. In particular, he advised of the need to call a meeting of all owners. The next the Respondent heard was when Mr Prow had produced a document confirming the Respondent's appointment as property manager, signed 12 times by Mr Prow on behalf of Proven Properties (Scotland) Limited as owner of those properties. Mr MacSween had accepted this and made no further enquiry into whether a meeting had been called.

It was accepted by the Applicant that even if a meeting had been called in accordance with the terms of the Deed of Conditions and she had been

present, she would have been outvoted by Mr Prow and so the practical situation would have remained exactly the same ie the Respondent would have been appointed.

We instigated some discussion at the hearing about the meaning of Clause 3.11 and whether the exclusive power to appoint the Property Manager remained with Proven Properties (Scotland) Ltd or whether the deed intended to limit that power for a period of five years with the appointment of the Property Manager thereafter to be by a majority of the owners. The Applicant brought to our attention a later Clause in the Deed (Clause 4.1) which does seem to have that effect. Whatever the position regarding the wording of the Deed, we also note the terms of Section 63 of the Title Conditions (Scotland) Act 2003 which imposes a five year time limit upon a "Manager Burden" of this kind. The matter is therefore beyond doubt in that Proven Properties (Scotland) Ltd had lost its ability to appoint the Property Manager and that the matter fell to be dealt with by a vote of owners at a properly constituted meeting in terms of Clauses 3.10 and 3.11.

We also note that the Respondent is assisted by the terms of Section 4(8) of the Tenements (Scotland) Act 2004 which applies Rule 6 of the Tenement Management Scheme.

Rule 6.1 provides: "Any procedural irregularity in the making of a scheme decision does not affect the validity of the decision". It would therefore appear that the decision to appoint the Respondent as factor would be capable of being valid even though there had been a procedural irregularity in relation to the intimation of the owners' meeting.

It appears to us that the Respondent was in possession of sufficient information to allow it to be satisfied as to its appointment and we can identify no breach of property factor's duties or of the Code in this respect.

(2) Failure to Communicate with the Applicant

The Applicant complains that the Respondent failed to provide information regarding its appointment.

Mr MacSween advises that a welcome pack was sent to the owners explaining the appointment and providing access to an online portal. Mrs Bell advised that she had received an email which allowed access to an online portal which had taken her to the Statement of Service and to bills which were said to be due to the Respondent by the Applicant. She had not found the content to be welcoming and thought it contained little by way of introduction of the new factor.

The Applicant also complained that she had been in contact with the Respondent prior to its appointment and she had expected the Respondent to be in touch with her to confirm its appointment. She had expected a full explanation from the Respondent as to its appointment and its intentions for the Development at or before the date of its appointment. The Applicant was evidently concerned given the past factoring problems that the new arrangements (having been arranged by Mr Prow, the same person who she considered had behaved badly as the factor previously). The Applicant had been advised by Mr Prow in October 2018 that the Respondent would be commencing as factor with effect from 1 November 2018. The Respondent had responded to the Applicant's correspondence at that time to advise that at that stage it had not agreed to take on the role of factor but was simply dealing with an enquiry as to whether it might do so.

The Applicant wrote to the Respondent on 5 December 2018 asking why there had not been a meeting and vote of the owners to appoint the Respondent as factor. She advises that she raised that again at the meeting in her flat on 12 December 2018 and again in her letter of 20 December 2018.

We note that Mr MacSween responded to the Applicant's letter of 20 December 2018 by letter of 28 December 2018. Both letters dealt with a number of concerns but in relation to the circumstances of the appointment, it explained that there had been no collusion with Mr Prow and that the Respondent had advised him of the need for a vote.

The Applicant considers that the Respondent has failed to respond to her repeated questions regarding certain matters including the circumstances of its appointment and to explain why there was no vote.

We do not consider that the Respondent has failed in any of its property factor's duties in relation to its communications.

As regards the Code, neither Section 2.1 nor Section 2.4 appear to be of any relevance to the complaint. In relation to Code Section 2.5, we consider that the Respondent has offered satisfactory replies within a reasonable timescale and that there is no breach.

As regards Section 7.2 of the Code, Mr MacSween acknowledges that his letter of 28 December 2018 was intended to be a final response to a complaint and that it should have made reference to the right to refer the matter to the First-tier Tribunal and that the letter failed to do so. We therefore consider that there has been a breach of Code Section 7.2 in this respect. We would observe that the whole matter seems not to have been

dealt with formally as a complaint at all when it probably would have been obvious that it should have been so treated. This is more a comment concerning the need to follow a formal complaints procedure rather than a comment that the substance of the response to the Applicant's complaint was deficient.

(3) Failure to deal with Necessary Repairs

The Applicant complains that from the point of its appointment until its resignation,the Respondent failed to carry out repairs despite the Applicant having brought the need for those repairs to its attention.

In particular, the Applicant complains that there has been a long standing issue with water ingress which it had brought to the Respondent's attention. The Applicant highlights that a representative of the Respondent called at her flat for a pre-arranged meeting on 12 December 2018 to discuss the matter with her and advised that he had found no evidence of a damp problem in the common stair. The Applicant reports that Mr Prow had, shortly before, painted over the mould which was present making it hard to see. The Applicant also complains that the Respondent was not in a position to deal with maintenance issues since it did not have all keys to the property including the electrical cabinet.

The Respondent agrees that it did not have all the keys required. Mr Prow retained these. He did not attend the Development to provide access as arranged. Further, Mr Prow had, despite requests, not provided details of the maintenance and cleaning contractors employed.

The Respondent's representatives present at the meeting had not been able to observe the mould because of the recent painting. It had always been the Respondent's position that the building required to be inspected by a qualified building surveyor who should report on the repairs which were needed. The Respondent considers that it was not sensibly in a position without such a report to start attempting to address the water ingress issue.

The inspection was never carried out. The Respondent reached the point where it was obvious that it could not obtain Mr Prow's co-operation so decided to resign as factor.

We do not consider there to have been any breach of property factor's duties.

We identify no breach of Code Section 6.1.

(4) Obtaining insurance without the Applicant's consent

Clause 3.12 of the Deed of Conditions requires that the owners maintain a policy insuring the Development.

The Applicant's main concern was that she had apparently been told by Mr Prow in 2017 that she would not be covered by a policy for the whole Development and so she should make her own insurance arrangements which she had done. She now finds herself with double insurance because of the policy taken out by the Respondent.

The Applicant also complains about the suitability of the policy in that she has concerns that it is labelled as "Commercial" policy as opposed to a residential one; that Hart Insurance brokers have not conducted an appropriate exercise in identifying the best insurer and that the insurers had not been made aware of the condition of the building before the policy was obtained, with the result that a subsequent claim might be prejudiced and that the page numbering of some of the insurance documentation relating to a quotation from the insurer is suspicious.

In addition, the Applicant advises that Mr Prow had stated that it was he who was taking out the policy and the Applicant therefore has concerns about the information given by the Respondent that it undertook the obtaining of insurance cover.

The Respondent explained that it had approached Hart Insurance Brokers and accepted their recommendation that a policy be obtained with AXA. A policy was effected. The policy documentation notes the commencement of cover as 3 December 2018, whereas the Respondent began its appointment on 4 December 2018. The Respondent could not explain the discrepancy in dates and this seems to us to be immaterial.

The Respondent explained that it thought it was important to ensure that cover was in place as a priority so that the owners were not left without cover.

The Respondent has no knowledge of any representations made by Mr Prow as to the previous insurance policy or to any more recent representation made by him to the Applicant that he was arranging cover. The Respondent confirmed that Mr Prow had not been involved in the obtaining of insurance cover.

The Respondent had sought to obtain cover as quickly as possible and had provided the information available to it about the condition of the building and

the claims history on the basis of the information available to it. Mr Prow had not been co-operative in providing information.

The Respondent had appointed responsible independent brokers, had taken their recommendation as to the provider and believed that the policy taken out was suitable.

We have sympathy for the Applicant's position. It was sensible of her to have taken out her own cover in circumstances where there was uncertainty as to whether Mr Prow had obtained suitable cover.

However, we can identify no basis to criticise the Respondent for its actions. It appears that the Respondent was conscious of the need to obtain insurance immediately and took appropriate steps to do so. The Deed of Conditions Clause 3.12 obliges the owners to obtain insurance. The same clause confirms that the Respondent as Property Manager may obtain the cover and that the owners are obliged to pay for it. The Respondent's actions appear to be in accordance with the terms of the Deed of Conditions. We have identified nothing suspicious or inappropriate regarding the form of the insurance documents. We therefore identify no breaches of property factor's duties.

As regards the Code, the Applicant complains of the Respondent's failure to have a process for submitting claims. Mr MacSween explained that this would simply be for the homeowner to report the matter relating to any claim to the Respondent but he was unsure whether that policy was written down anywhere. He thought that it might be on the Respondent's website. During a break, he checked the website and confirmed that the information was present there. It therefore seems to us (whether or not the information was present on the website) that the Respondent has a system for submitting claims and that there is no breach of Code Section 5.4. We note, in any event, that there is no practical issue in this case concerning the making of any claim.

As regards Code Section 5.6, the Respondent appears when asked to have explained to the Applicant the basis for selecting the insurance provider. This was that it had instructed a competent, independent insurance broker to carry out the exercise and that appears to us to comply with Section 5.6. Similarly, as regards Clause 5.7, the Respondent has no tendering document since the exercise of identifying the insurance provider was carried out by the broker and we identify no breach of Code Section 5.7.

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 takes steps to ensure it complies with its Complaints Handling Procedure and the Code.

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: 29 May 2019