Decision of the 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

Christopher Hampton, 37 Bowman's View, Newmills Road, Dalkeith EH22 1EZ ("the Applicant")

First Port Property Services Scotland, 3rd Floor, Troon House, 199 St Vincent Street, Glasgow G2 5QD ("the Respondent")

Chamber Ref: FTS/HPC/PF/19/0216

Re: 37 Bowman's View, Newmills Road, Dalkeith EH22 1EZ ("the Property")

Tribunal Members:

John McHugh (Chairman) and Robert Buchan (Ordinary (Surveyor) 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 the Property.

2 The Property consists of a flat within a development of retirement properties known as Bowman's View ("the Development")

3 The Respondent was at all relevant times the factor of the Development and continues as factor at present.

4 The property factor's duties which apply to the Respondent arise from the Deed of Conditions by McCarthy & Stone (Developments) Limited dated 30 April 2007.

5 The Deed of Conditions creates a Contingency Fund which fund is to be used for the cost of future maintenance and repairs.

6 The Deed of Conditions provides the Respondent as Managing Agent with authority and discretion as to how much should be charged to owners by way of a contribution to the Contingency Fund.

7 On 4 April 2018 an Accounts Meeting took place between representatives of the Respondent and the owners at which owners were informed that the Contingency Fund balance was low and that a contribution would be included in the Common Charges budget for the year.

8 On 31 July 2018 at a Budget Meeting between representatives of the Respondent and the owners, it was advised that a total of £7000 had been included by the Respondent in the budget as a contribution towards the Contingency Fund.

9 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 (1 November 2012).

10 The Applicant has, by his correspondence, including his solicitor's letter of 9 November 2018, notified the Respondent of the reasons as to why he 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.

11 The Respondent has not failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at George House, Edinburgh on 2 May 2019.

The Applicant was neither present at the hearing nor represented, having indicated that he would rely on written submissions.

The Respondent was represented by its Regional Manager, Roger Bodden and its Estates Coordinator Team Leader, Kirsty West.

There were no other witnesses called by either party.

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 1 November 2012 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 "Statement of Services & Delivery Standards" which we refer to as the Written 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 identifies as the source of the duties the Deed of Conditions by McCarthy & Stone (Developments) Limited dated 30 April 2007 ("the Deed of Conditions").

The Code

The Applicant complains of failure to comply with Section 2.4 of the Code.

The element of the Code relied upon in the Application provides:

"...SECTION 2: COMMUNICATION AND CONSULTATION

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

...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)..."

The Matter in Dispute

The single factual matter complained of relates to the Respondent's conduct concerning a decision to allocate increased funding into the Development's Contingency Fund. The Respondent advised owners at its annual Accounts Meeting on 4 April 2018 that the Contingency Fund balance was low and should be increased. At the Budget Meeting of 31 July 2018, the Respondent advised owners that a contribution of £7000 to the Contingency Fund had been included in that year's budget of Common Charges. This was confirmed to owners by the Respondent's letter of 28 August 2018. There was no vote of owners on the matter at the time. The Applicant complains that the Respondent did not have the power to make this decision.

The Deed of Conditions creates the Contingency Fund. It is referred to in Clause 2.3.13. That clause makes provision for a contribution to the Contingency Fund to be made on the occasion of the sale of any dwelling within the Development. The contribution required is 1% of the sale or open market value at the date of sale. The clause provides that:

"*Such sums shall be used to provide a contingency fund for or towards the costs and anticipated costs and expenses of items of capital expenditure including without prejudice to the generality the repainting and renovation of the exterior of the Building, the replacement of the lift or repair of the roof and generally for meeting costs and expenditure incurred less frequently than once in each year.*" ("Building" is the definition given to the Development in the Deed of Conditions).

The definition of Common Charges in the Deed of Conditions incudes:

"...1.2.2 a reasonable provision (to be determined by the Managing Agent) for future costs of inspection, maintenance, painting, repair and renewal of the Common Parts and the House Manager's Office..." (The Respondent is the Managing Agent).

Clause 2.1.6.1 provides that the Managing Agent "*shall estimate the Common Charges for the coming Year and...notify the Proprietor of the amount estimated by the Managing Agent as payable by such Proprietor in respect of that coming Year.*" Clause 2.1.6.2 contains the obligation upon proprietors to pay the Common Charges in instalments.

Although Clause 1.2.2 makes no specific reference to the term "Contingency Fund", what is described there appears to the Tribunal to be exactly the type of expenditure to which the Contingency Fund relates.

It therefore appears (on reading Clause 1.2.2 in conjunction with Clauses 2.1.6 and 4.3 (Powers of the Managing Agent)) that the task of determining the amount which owners are required to pay into the Contingency Fund is a task delegated to the Respondent as part of its exercise in setting the Common Charges.

The Respondent's representatives explained at the hearing that the Contingency Fund is split into two notional accounts, one which they describe as the Redecoration Fund and the second the Contingency Fund (which is for future repairs other than in relation to redecoration). That distinction is said to have been made for historical reasons. In truth, there is only one Contingency Fund but the Respondents have found it convenient for communication purposes to describe the single Contingency Fund as split into these two separate notional headings.

The Applicant complains that the voting formalities required by the Deed of Conditions were not followed at the meeting of 31 July 2018 in relation to the decision to set the Contingency Fund contribution at £7000. The Respondent disagrees and describes the show of hands which took place as merely intended to be indicative of owners' views. The Respondent regards itself (as opposed to the owners) as the party which makes the decision as to the appropriate level of contribution required to the Contingency Fund as part of the exercise of setting the Common Charges.

The Respondent advises that it respects the views of owners and that it has suggested a further vote of owners in relation to future contributions to the Contingency Fund. The Respondent considers that future maintenance requirements for the Development are likely to be significant and that it has acted prudently in setting the Contingency Fund contribution. It believes that its conducts meets with the approval of most owners but, as part of its commitment to customer service, it wishes to communicate well with owners, to explain its approach and to seek the owners' approval of that approach, even if that is not strictly required. That is what the meeting of 31 July 2018 and the various communications with owners concerning the contribution to the Contingency Fund were intended to achieve.

On the basis of the wording of the Deed of Conditions, we agree that the setting of the contribution to the Contingency Fund is an exercise purely for the Respondent and is not a matter which requires the approval of owners via the voting scheme contained in the Deed of Conditions.

We therefore find there to have been no breach of property factor's duties in this respect.

The Applicant complains of the Respondent's alleged failing by reference to Section 2.4 of the Code. However, that section relates to a requirement for the Respondent to have a procedure to seek approval "before providing work or services which will incur charges or fees in addition to those relating to the core service". In the current situation, no work or services are being provided; the Respondent is simply requiring that contributions are made by owners into the contingency Fund for future repairs and maintenance. We therefore consider Section 2.4 to be of no relevance.

The Respondent attempted to carry out his own ballot of owners on the issue of the Contingency Fund contribution although this seems to have been unsuccessful as other owners declined to take part. He criticises the Respondent for its failure to assist him in those efforts, but we can identify no duty upon the Respondent to have done so and therefore no breach of any duty by the Respondent in this respect.

We would observe that the term Contingency Fund may have provoked some confusion. The name suggests that the need for the fund is contingent upon an event which may or may not happen, whereas, in truth, it is a general fund for significant future repairs and maintenance, requiring prudent financial planning and the need for which is a certainty.

It may be thought as undesirable that the Managing Agent has the apparently unfettered power to set the contribution to the Contingency Fund as there is a risk that it might do so unreasonably (although there is no evidence of that having happened in this case). Of course, it is unlikely that any Managing Agent would wish to impose unnecessarily high contributions to the Contingency Fund. It would have no interest in recommending anything other than a prudent figure having regard to the condition and age of the building. Additionally, if, for some reason, a Managing Agent's behaviour in the setting of the contribution was considered inappropriate by the owners, they would have the option to dismiss and replace the Managing Agent.

In summary, we identify no breaches of the Code. We identify no breaches of property factor's duties.

PROPERTY FACTOR ENFORCEMENT ORDER

As we have identified no relevant breach of the Code or of property factor's duties, no property factor enforcement order ("PFEO") will be made.

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.

J McHugh

JOHN M MCHUGH

CHAIRMAN

DATE: 8 May 2019