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

Decision on homeowner's application: Property Factors (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: FTS/HPC/PF/17/0304

190A Paisley Road, Renfrew, PA4 8DS
("the property")

The Parties:-

MR BRIAN McCAIG, residing at 190A Paisley Road, Renfrew, PA4 8DS
("the Applicant")

LINK HOUSING ASSOCIATION, Watling House, Calendar Business Park, Falkirk, FK1 1XR
("the Respondent")

Tribunal Members:
GRAHAM HARDING (Legal Member)
JOHN BLACKWOOD (Ordinary Member)
("the tribunal")

Decision

The tribunal unanimously determined that the Respondent has failed to comply with Section1 of the Code of Conduct for Property Factors ("the Code") as required by Section 14 (5) of the Property Factors (Scotland) Act 2011. In all the circumstances of the case, the tribunal did not consider it necessary to make a Property Factor Enforcement Order.

Background

1. By Application dated 31 July 2017, the Applicant applied to the tribunal for a determination on whether the Factor had failed to comply with parts of Sections 1, 2 and 3 of the Code of Conduct for Property Factors ("the Code"). The Application did not raise any issues regarding the Property Factor's duties arising from any source other than the Code. Both parties made written representations to the tribunal and these were considered along with oral submissions at the initial Hearing on 20 October 2017 and subsequently at a further Hearing on 9 February 2018.

2. Following the initial Hearing on 20 October 2017 the tribunal issued directions to the Respondents to further consider the Applicant's liability to contribute to the cost of repairs and services attributable to those areas of the block to which the Applicant did not have access or gain any benefit; to discuss with the remaining owners in the block in which the property is located to see if any agreement could

be reached that would result in a reduction of the Applicant's liability to contribute to the cost of common repairs and services. Following on from these directions the Respondent lodged further productions with the Tribunal in advance of the Hearing on 9 February 2018 at Wellington House, Glasgow. G2 2XL. The Hearing was attended by the Applicant and the Respondent was represented by Mrs Lorna Dunsmore and Ms Ronni McMenemy. Following the hearing on 9 February the tribunal issued verbal directions to the parties for the Applicant to produce details of the insurance quote he had received in about March 2017 and for the Respondent to lodge any comments thereon within two working days thereafter. The tribunal considered these further written representations before issuing its decision.

Summary of Submissions

3. At the commencement of the adjourned Hearing the Applicant intimated to the Tribunal that he was no longer insisting on that part of his complaint relating to the charges levied by the Respondent in respect of maintenance and insurance of the common parts. The Applicant accepted that according to his title deeds and in light of the decision of the other owners in the block, he was obliged to pay a one fifth share of the costs incurred.

4. The Applicant confirmed that he was still insisting on the remaining parts of his complaint that related to alleged breaches of Section 1 and 2.1 of the Code.

5. The Applicant had explained to the tribunal at the original Hearing and again at the adjourned Hearing that for some reason when he moved in to his property in March 2014 he had not received a letter that had been sent by the Respondent advising that owners could arrange their own buildings insurance. As a result, the Applicant was included in the block insurance policy arranged by the Respondent. The Applicant did not seek to blame the Respondent for not receiving this letter.

6. The Applicant was subsequently made aware by a neighbouring owner that he had arranged his own buildings insurance at a lower cost. The Applicant as a result contacted the Respondent but was advised in 2015 that he was too late to do anything about it that year and he therefore remained on the block insurance policy.

7. In September 2016 the Applicant made enquiries with the Respondent to ask if he could arrange his own buildings insurance and was advised by the Respondents Factoring Manager, Fiona McFarlane, that "as Links provision of building insurance is a Clause of the Occupancy Agreement for shared ownership properties, we have been advised by our Solicitor that sharing owners cannot obtain their own Policy".

8. The Applicant was of the view that the response from the Respondent was misleading as it did not make clear that it was not just sharing owners that were obliged to be party to the block insurance but that it applied to all owners.

9. The Applicant was further concerned that those owners who had been able to avail themselves of arranging their own Insurance were initially told by the Respondent once it had take legal advice that they would be able to continue to arrange their own insurance until their property was sold.

10. The Applicant submitted that he became aware that the Respondent had further reviewed its position after the complaint to the tribunal had been made and that all owners were being brought into the block insurance policy on the renewal dates.

11. Nonetheless the Applicant was of the view that he had been disadvantaged by the Respondent by not being able to take advantage of the lower cost of independently arranging his own buildings insurance.

12. The Applicant produced documentation to show that the cost of arranging his own insurance would have been about £100 per year less than the costs of the block insurance.

13. The Applicant submitted that he should be recompensed for the difference in the cost of the insurance he had paid and the cost he could have paid if he had been permitted to take advantage of arranging his own insurance as other owners had.

14. Miss Dunsmore on behalf of the Respondent acknowledged that there had been a failing on behalf of the Respondent to comply with its written statement of service by offering owners the option of opting out of the common block policy but that the Respondent had taken steps to remedy the breach firstly by stopping further opt outs as in the case of the Applicant and then by rescinding its decision to allow opted out owners to continue to arrange their own Insurance by taking steps to end the opt out at the earliest opportunity when Policies were due for renewal.

15. Miss Dunsmore told the tribunal that the Applicant had not had to pay any greater a share of the cost of insurance than he would have if all the owners had been parties to the Block Policy.

16. Miss Dunsmore on behalf of the Respondent did not accept that the e-mails sent to the Applicant on 15 and 17 March 2017 were intended to provide misleading or false information to the Applicant. Rather the Respondent had explained the reason for refusing the Applicant's request to opt out and that this was consistent with any requests of a similar nature received from any other owner.

17. The Respondent had realised it had made a mistake in allowing owners to opt out of the block insurance policy and on becoming aware that it should not have done so in terms of the title deeds had taken steps to remedy the situation.

18. Miss Dunsmore said it was the Respondent's position that whilst some owners had been able to benefit from its mistake by arranging its own insurance, the Applicant had in fact been billed correctly for his share of the block insurance. It would not be appropriate for the Applicant to be compensated for the loss of opportunity to arrange his own insurance at a lower cost when it was clear that he and all other owners were not entitled to arrange their own insurance.

Findings in Fact

19. As the Applicant withdrew his complaint relating to the charges levied by the Respondent in respect of the cost of maintenance and insurance of the common

parts, the tribunal did not find it necessary to make any findings in fact in that regard.

20. The Applicant was unable to arrange his own buildings insurance in respect of his property in March 2017 as by that time the Respondent had received legal advice to the effect that all owners were obliged to participate in the block insurance policy and could not opt out.

21. The reason given by the Respondent in an e-mail dated 15 March 2017 that all sharing owners were required to particular in the block insurance policy was correct.

22. The Respondent did not make it clear in that e-mail that the block insurance applied to both owners and sharing owners.

23. By permitting some owners to opt out of the block insurance policy the Respondent was in breach of its obligations in terms of its written statement of service.

24. Following receiving legal advice the Respondent took steps the end the opt out provision.

25. The Respondent was initially prepared to allow owners to continue to opt out until their property was sold but subsequent to the Applicant initiating these proceedings took further steps to bring all owners back into the block insurance policy.

26. Although the Applicant would have been able to arrange his own buildings insurance at a saving of about £100 per year, the Applicant has not suffered any loss as by the time he applied to the Respondent to be allowed to opt out of the block policy, the Respondent had obtained advice to the effect that all owners had to be party to the block policy and could not opt out.

Reasons for decision

27. It was clear that the Respondent had erred in allowing owners (both sharing and full) to opt out of the Block Insurance Policy. On receiving legal advice that it should not have allowed owners to opt out, the Respondent took steps to end the opt out scheme by not permitting any new opt outs.

28. Whilst the Respondent could have been clearer in explaining its position to the Applicant in the e-mail of 15 March 2017, the fact that a reference was made to sharing owners rather than all owners was not in itself false or misleading as the Applicant was the sharing owner. With the benefit of hindsight, it would have been preferable if the Respondent in its e-mail had simply referred to owners rather than sharing owners. However the tribunal was not persuaded that this amounted to the Respondent providing information that was misleading or false in terms of Section 2.1 of the Code.

29. Whilst the Applicant was unable to avail themselves of any savings by arranging his own insurance he did not have to pay any more than his share would have been

had all owners been participating in the block policy. The tribunal was not persuaded that the Applicant should be compensated by recovering from the Respondent the potential difference between what he was charged for his share of the block Policy and what he might have been charged if he had been able to arrange his own Policy. Whilst the tribunal accepted that some owners had as a result of the error by the Respondent been able to make a saving on their Insurance for a period of time, it did not following that the Applicant should be able to obtain such a windfall at the expense of the Respondent.

30. The tribunal therefore while finding that the Respondent had breached Section 1 of the Code it had not breached Section 2.1 and as the Respondent had taken steps in advance of the Hearing to remedy its breach of Section 1, the tribunal did not find it necessary to propose to issue a Property Factor Enforcement Order.

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.

G Harding

Legal Member

Graham Harding

27 February 2018 Date