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

Property Factors (Scotland) Act 2011, section 17

The First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017 ("the 2017 Regulations")

Chamber Ref: FTS/HPC/PF/17/0336

Flat 8, 112 Hillpark Grove, Edinburgh, EH4 7EF
("the Property")

The Parties: -

Mr Michael Sturgeon, residing at the Property
("the Homeowner")

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD
("the Factor")

Tribunal Chamber Members

Maurice O'Carroll (Legal Member)
Sara Hesp (Ordinary Member)
Anne Mathie (Legal Member) (observing only)

Decision of the Chamber

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal") unanimously determined that the Factor has failed to comply with sections 2.5 and 7.1 of the Code of Conduct for Property Factors ("the Code") as required by section 14(5) of the Property Factors (Scotland) Act 2011 ("the Act"). It further found that it had failed to carry out the property factor duties as required by section 17(1)(a) of the Act.

Background

1. By application dated 31 August 2017, the Homeowner applied to the Tribunal for a determination on whether the Factor had failed to comply with sections 2.1, 2.5 and 6.3 of the Code as imposed by section 14(5) of the Act. He also wished to complain that the Factor had failed to comply with various other duties not specifically provided for in the Code as detailed below.

2. By decision dated 10 October 2017, a Convenor on behalf of the President of the Tribunal (Housing and Property Chamber) decided to refer the application to a Tribunal for a hearing.

3. A hearing of the Tribunal was held on 12 January 2018 at George House, 126 George Street, Edinburgh. The Homeowner appeared on his own to give evidence. The Factor was represented by Karen Jenkins, Team Leader who also gave evidence.

4. The Homeowner intimated his concerns regarding the alleged failures in duty on the part of the Factor by letter dated 29 August 2017, in compliance with the requirements of section 17(3) of the Act.

Tribunal findings

The Tribunal made the following general findings in fact pursuant to rule 26(4) of the 2017 Regulations:

5. The Homeowner's complaints were comprehensively detailed in his letter of notification to the Factor dated 29 August 2017. This was used as the basis of discussions at the hearing. The letter was ordered in terms of subject headings, rather than successive headings in terms of the Code. This method of consideration is adopted by the Tribunal in the present decision.

6. The Homeowner purchased the Property in April 2011. The Factor was appointed by the house builder who constructed the block, Mactaggart and Mickel. The Factor took over property management duties in April 2013. The block development consists of 156 households comprising detached town houses and four blocks of flats. The Property is a flatted dwelling.

7. The Homeowner receives invoices from the Factor on a quarterly basis. Some residents receive their invoices by post. However, it is possible, as the Homeowner does, to log onto the Factor's internet portal and pay the invoices online.

8. The development has a Residents' Association in order to assist with the management of the development as a whole. As part of the core services within the Written Statement of Services ("WSS"), the Factor calls Annual General Meetings at which votes on important issues affecting the development are taken. Minutes are thereafter normally produced by the Factor and circulated to all homeowners so that they may be informed as to what had been agreed upon at such meetings. The Residents' Committee had in fact been dissolved in 2016, but AGMs continued to be held for individual homeowners to attend if they wished.

Maintenance of fire equipment within common areas

9. The Homeowner received a letter from the Factor dated 19 June 2017 advising that a maintenance requirement had been identified with respect to fire detection and prevention and smoke ventilation in the common stair in which the Property is situated. Miss Jenkins explained in evidence that the requirement became apparent after she was appointed. The previous property manager, Fraser McIntosh had left the Factor's employment in March 2017. The implication appeared to be that Mr McIntosh ought to have taken action in relation to this requirement but did not do so. Miss Jenkins required to carry

out an audit of service requirements in April or May following Mr McIntosh's departure.

10. A site inspection was carried out by the Factor in May 2017 and it was at that point it was realised that no maintenance contract was in place. In light of recent events in London, it is perhaps obvious to note the importance of having fire prevention measures in place within apartment blocks. Fortunately, the requirement was finally picked up and it was this that prompted the letter to the Homeowner of 19 June 2017.

11. In response to that, the Homeowner immediately sent an email to the Factors querying why the requirement had only been identified so recently. He contended that the Factor had failed in its duty to arrange for maintenance of fire safety and smoke ventilation equipment for a period of over four years. He did not receive any reply to that email, or indeed to the notification letter of 29 August 2017 where the matter was raised again formally.

12. The absence of a response was explained by Miss Jenkins as an oversight and that the response to the query "fell through the net." The Factor was busy catching up with all requirements in relation to all properties previously managed by Mr McIntosh and this was missed. It was accepted that no substantive response had been given to the Homeowner. In fact, nothing was lodged to demonstrate any response at all had been provided to him.

13. In the circumstances, the Tribunal agreed with the Homeowner: The Factor had failed in its duty to ensure maintenance of a very important aspect of safety provision, namely the fire safety and smoke ventilation equipment for a period of over four years. Further, it had failed in its duty under section 2.5 of the Code in failing to respond to the Homeowner's initial query and subsequently his letter of notification promptly, or at all.

Residents' AGM minutes

14. The 2017 Residents' Association AGM took place on 29 March 2017. That meeting was attended by the Homeowner. The minutes were not circulated to the Homeowner until 12 May. Soon after receiving them, he sent an email to the Factor pointing out what he considered to be two significant omissions and requesting that the minutes be amended to more fully reflect the discussion which took place. That email was acknowledged on 31 May 2017, a copy of which was provided to the Tribunal at the hearing.

15. That particular AGM was important because it discussed an issue with drainage at the development. There was ponding occurring in common green areas, to the rear of the development and in gardens demonstrating defective land drainage. The Homeowner had seen a CCTV survey of the drains commissioned by the Factor which appeared to indicate that the drainage issue was being caused by builder debris, including bricks, in the drainage pipes serving the development. At the AGM, homeowners were asked to contribute to remedial works which might have been in the region of £20-26,000.

16. The crucial point, according to the Homeowner was that since only approximately 20 out of 156 homeowners were represented at the AGM, the majority of homeowners were being asked to make a payment without possession of the full facts. Had they known that there was a possibility that Mactaggart and Mickel were responsible for the problem and therefore liable to remedy it, they might have been less willing to pay the money to remedy it themselves.

17. In response, Miss Jenkins produced the minutes of the 2017 AGM. They set out the drainage issue and narrated that quotes had been obtained to rectify the problem. The minutes also contained the following passage:
"Homeowner asked if costs incurred could be directed to the developer – Karen said that until we have findings of the survey and an idea of the issues we could not yet comment but lines of communication with Mactaggart and Mickel were still open."

18. The Homeowner referred to was the present applicant. The possibility of the developer being responsible was in fact therefore narrated in the original minutes, although not in the precise terms which the Homeowner might have wished. For example, there was no mention of bricks creating an obstruction as set out in his email of 12 May 2017. Miss Jenkins stated in evidence that the issue with the drains had also been raised in the Factor's April newsletter. At the meeting, she considered that the Factor did not have full knowledge of what the defects were so could not state matters in the terms wished by the Homeowner. This was confirmed in the email to the Homeowner dated 31 May 2017 which was also produced at the hearing. In that, Miss Jenkins stated:
"As for the minutes of the meeting, Pam was taking notes as we were actively discussing issues, so apologies if there were any omissions. I know the responsibility of the developer was raised and I said we couldn't comment until we knew what we were dealing with. Developers normally have a 2 year defect period and then NHBC will provide cover beyond this."

19. Miss Jenkins further stated that agreement of the final terms of the minutes was to be left over until the next homeowners' meeting on 23 October 2017 due to difficulties in getting that task done in the meantime. In the view of the Homeowner that was too late because the decision on the part of the main body of homeowners to pay for the works would have already been taken by then. They were therefore misled contrary to section 2.1 of the Code and the failure to respond to his request regarding the minutes was a breach of section 2.5.

20. In this instance, the Tribunal could not agree with the Homeowner. Far from the absence of any consideration of the developer's liability at the AGM as suggested by his evidence, the minutes of the AGM revealed that the issue was raised, albeit not in the terms wished by the Homeowner. Further, the matter had already been raised in the April newsletter. The comment about lines of communication with Mactaggart and Mickel being open, appeared to the Tribunal to be a clear indication that they could yet be brought in to remedy the flooding issue and, potentially, could ultimately be the subject of legal action in

the future if homeowners wished. Further, the email of 31 May 2017 directly addressed the Homeowner's questions in relation to this issue.

21. Accordingly, the Tribunal found that the Factor had not failed in its duty under either section 2.1 or 2.5 in relation to this issue.

Garden Maintenance Tender Process

22. The Homeowner stated that he had first raised this issue in 2016. A tender process for the contract for gardening works was carried out in relation to the development. The contract was worth in the region of £12,000 so required the consent of the general body of homeowners. The Homeowner considered that the tendering process was not carried out correctly, in that it was not possible to compare the tenders on a like for like basis since some of them offered different services to others submitted. That view had initially been shared by Andy Bough, Chairmen of the Residents' Association. As a result of his doubts, share by Mr Bough the Homeowner had not voted on who the contract should be awarded to.

23. The next thing that happened was that the Homeowner received a letter from the Factor dated 24 June 2016 advising that the contract for the gardening works had been awarded to Hunters Gardening Services. Hunters was in fact not the cheapest tender which had been presented. The Homeowner raised his concerns in an email dated 25 July 2016 stating that he would refer the matter to this Tribunal if the appointed were to be progressed. The appointment of Hunters did in fact proceed. The Homeowner sent another email to the Factor dated 18 August 2016 stating that his concerns had not been listened to, that the tendering process had been flawed and that the Factor was obliged to cancel the contract awarded. The alleged failure in duty, as set out in that letter, was to carry out the gardening tender process correctly.

24. Miss Jenkins gave evidence that Mr Bough had visited the Factor's offices in order to discuss the contract tendering process. As a result of that meeting, he had been satisfied that it had been carried out correctly and withdrew his objection. Unfortunately, Mr Bough did not communicate the outcome of that meeting to the Homeowner, leaving him with the mistaken impression that Mr Bough continued to share his concerns.

25. What happened in terms of the process was that four contractors were invited to tender. The tenders were delivered in sealed envelopes which were opened in front of some of the homeowners within the development. It was noted that some of the tenders were incomplete but it was considered to be inappropriate to go back to those firms as it would cast doubts on the transparency of the process. In the event, Hunters Gardening Services was chosen after 43 of the homeowners voted in its favour. Significantly, Hunters Gardening Services was not the Factor's preferred contractor. However, it abided by the decision of the homeowners who had voted on behalf of the main body of homeowners and appointed that firm.

26. The Tribunal considered that the approach taken by the Factor to the gardening services tender was open and fair. It considered that the fact that the contractor chosen was not the one favoured by the Factor further demonstrated that a fair procedure had been followed. Accordingly, it found that the Factor had not failed in its duty to carry out the tendering process correctly.

Invoicing

27. The Homeowner gave evidence that he would like to have faith in the Factor's invoicing system so that he can treat them at face value and trust that they are correct. More often than not, however, he finds that they contain inaccuracies which require him to pursue in order to have them corrected. In particular, when he accesses his account through the Factor's portal, he often sees an invoice against his account which he is unsure that he is liable to pay. This has wider implications because the Factor's debt recovery procedures in terms of its WSS states that the arrears procedure is triggered within 21 days of non-payment of the service charge from the date of the original invoice. Since he is required to pay quarterly (apart from interim invoices for exceptional items), it might mean that he falls foul of the Factor's debt recover process before he is even aware that an invoice has fallen due for payment. This was stated to be a failure in the Factor's duty to provide proper invoices.

28. The only invoice produced by the Homeowner was the advance charge for the drainage issue dated 30 November 2011. It was therefore not possible for the Tribunal to consider the allegation that the invoicing system in general was defective and therefore in breach of any duty on the part of the Factor. It further appeared to the Tribunal that the problem was more apparent than real.

29. Miss Jenkins in her evidence explained that there are two types of charges: those that are "diarised" which is to say routine; and those which arise *ad hoc* in relation to specific repairs. These are all entered onto the system operated by the Factor and are thus available to view. However, the point at which payments from homeowners fall due is when an email is sent to individual homeowners attaching the quarterly invoice, not from when a particular invoice is viewable on the portal. There had been an error in the past but the statements are checked for inaccuracies and mistakes before they are sent out in order to avoid a repetition of that.

30. Miss Jenkins agreed that the use of the word "original" at page 18 of the WSS might be misleading and was amenable to changing the wording of that part of the WSS to make the actual practice followed clearer by omitting that word. For his part, the Homeowner stated that he was reassured by the explanation provided in respect of that aspect of the Factor's invoicing process.

31. In light of the above, the Tribunal did not find that the Factor had failed in any factor duty in relation to invoicing. It does recommend, however, that consideration be given to revising the terms of the WSS at page 18 to make clear when the 21-day period for non-payment of invoice, hence debt recovery procedures, is triggered. That is to say, only after the email attaching the quarterly invoice is sent to homeowners.

Window cleaning

32. The Homeowner gave evidence that following a previous ruling by the Homeowner Housing Panel the Factor was required to arrange for regular window cleaning of the block in which the Property is located. At page 4 of the WSS, it is stated that the Factor will "arrange for a contractor to regularly and routinely clean the communal windows of the development." The Homeowner did not provide a copy of that particular decision. However, this appears to have been accepted by the Factor in that it had provided an undertaking to ensure monthly window cleaning. Monthly window cleaning of the communal windows is therefore part of the Factor's property factor duties.

33. On 10 August 2017, the Homeowner was informed by the Factor that the window cleaning contract had expired. From his own observations, he could see that the windows had not been cleaning since the end of 2016, a period of at least 9 months. Miss Jenkins explained that the original window cleaner retired at the beginning of 2017. The contract for window cleaning for the block ought to have been renewed but that requirement was not picked up as it "fell of the list." During the inspection in May 2017, she saw the state of the canopies at the development and realised that the cleaning was not being done.

34. It was established in evidence that while the communal windows at the block in which the Property is situation were not being done, no charge was being made for window cleaning. The Tribunal therefore questioned why that omission would not simply have been evident from a desk-based analysis of contractor invoices, rather than taking an on-site survey before this was noticed. The answer to that appeared to be that certain windows within the development were being cleaned and invoices in respect of those were being paid. As a result, it was not noticed that the Homeowner's block was in fact being missed. It appeared to be accepted that as a result of that oversight, the Homeowner Panel's decision was not complied with for a period of at least 8 months.

35. In those circumstances, the Tribunal finds that the Factor failed in its duty, as set out in its WSS and as required by the Panel, to ensure regular and routine cleaning of the communal windows at the development.

Communication with the Homeowner

36. The Tribunal has already noted certain instances of a failure to comply with section 2.5 of the Code above, including in relation to the main letter of complaint dated 29 August 2017.

37. At page 19 of the WSS, the standards which can be expected in relation to communications are set out. These include electronic and paper correspondence being acknowledged within 48 hours and to respond to both of these forms of communication within 5 working days. In the Homeowner's experience, the Factor generally does not respond to queries within these timescales. In his letter, the Homeowner provides an instance of an email received by him on 25 April 2017 which was in response to a complaint raised 4

months prior to that. He thereafter provided 8 further examples of emails which had only been responded to after very lengthy periods of delay.

38. For her part, Miss Jenkins could not refute any of those examples and fully accepted that the delays in response there listed (and those set out above in relation to other claims) had occurred.

39. In the circumstances, the Tribunal had no difficulty in finding that the Factor had acted in breach of section 2.5 of the Code. Moreover, those breaches appeared to be commonplace and systemic. This also represents a breach of section 7.1 of the Code. That section requires there to be a clear written complaints resolution procedure in place which sets out a series of steps with reasonable timescales which factors will follow.

40. Whilst it is clear from the WSS that there is indeed a written complaints resolution procedure in place, it is not in practice followed. The requirements of section 7.1 of the Code would be a meaningless if the written procedures are not actually followed as the section intends. Therefore, the Tribunal finds that section 7.1 has also been breached by the admitted failures identified under this particular heading.

Decision

41. The Tribunal finds that the Factor has breached its duty to comply with the Code in respect that it failed to adhere to the terms of sections 2.5 and 7.1 thereof in relation to the particular headings and to the extent set out above. Separately, in terms of section 17(1)(a) of the Act, it finds that the Factor did not comply with the following duties:
(i) To arrange regular window cleaning as agreed following an earlier hearing of the Homeowner Housing Panel (predecessor to the current Tribunal) and
(ii) To have the fire safety equipment for the block maintained for a period of four years between taking over the management of the development in April 2013 and June 2017.

42. In terms of section 19(2) of the Act, the Tribunal is required to propose a Property Factor Enforcement Order. This will follow this decision under separate cover. However, the Tribunal would also like to make the following observations.

43. The above failures were in part blamed on a turnover in staff and audits requiring to be carried out in order to ascertain the duties which require to be fulfilled in relation to the development in which the Property is located. In this respect, similar comments were made in respect of an earlier application by the Homeowner in relation to Factor under reference HOHP/PF/16/0131. That decision in turn commented on a failure to comply with an undertaking provided in a case prior to that under reference HOHP/PF/15/0003, issued on 5 August 2015. Here again, in relation to the window cleaning issue, there has been a failure to comply with an Enforcement Order issued by this Tribunal's predecessor. It therefore appears to the Tribunal that the Factor has systemic failings which mean that important information is not maintained with the

Factor's organisation to ensure that Tribunal rulings are adhered to. It also appears to be at the mercy of staff changeovers and where members of staff leave the Factor's organisation, the information held by that individual is then lost and gaps in service appear as a result. The Tribunal had the following to say in relation to the 2016 case:

44. "This [an inaccurate letter being sent out in breach a previous undertaking] gave rise to some serious concern for the Tribunal. Not only was inaccurate information provided by the Factor to the previous hearing, the undertakings given there were not honoured. Further, it appeared to the Tribunal that the Factor did not take either their duties or the role of the Tribunal (in its earlier form as a Panel) seriously. This could be the only explanation for the earlier decision of the HOHP not being uppermost in their consideration and for it being overlooked and only brought to mind by the persistence of the Homeowner. The Factors ought to have had a system in place for passing on the outcome of Tribunal decisions, given that the Tribunal is there to ensure that property factors comply with their duties and therefore the integrity of the property management industry. It is no excuse that an internal audit was being undergone and that Miss Jenkins the Team Leader had only just joined the Factor. If adequate systems were in place to ensure that such vital information is passed on, then such internal difficulties would have no bearing on the proper observance of Tribunal decisions and undertakings made in the course of them."

45. It would appear that many of the observations contained within that paragraph remain pertinent a full year later on. The consequence is that the Homeowner is put to the time and effort required in order, once again, to seek redress from this Tribunal for the Factor's persistent and repeated failings. In light of this, a higher amount of compensation is proposed in order to mark this particular systemic failure and in the hope that genuine steps will be taken on the part of the Factor to prevent instances of the breaches found occurring in the future. This is particularly so in relation to section 2.5 of the Code, where the Tribunal has found serious and repeated failures to respond promptly to legitimate enquires and complaints made by the Homeowner.

Appeals

46. 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 within 30 days of the date the decision was sent to them.

Signed: M O'Carroll
Chairman

Date: 23 January 2018