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

Gary and Deborah Bryson, 21 Fourth Avenue, Auchinloch, Kirkintilloch G66 5DU ("the Applicant")

Newton Property Management, 87 Port Dundas Road, Glasgow G4 0HF ("the Respondent")

Reference No: HOHP/ PF/15/0017

Re: Property at 1/2, 1 Tullis Gardens, Bridgeton, Glasgow G40 1JA ("the Property")

Committee Members:

John McHugh (Chairman) and Liz Dickson (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 the flat at 1/2, 1 Tullis Gardens, Glasgow G40 1JA (hereinafter "the Property").

2 The Property is one of approximately 190 located within the St John's Mews Development (hereinafter "the Development").

3 The Respondent is the property factor appointed by the owners of the properties within the Development.

4 The relationship between the Respondent, the Applicant and the other proprietors of properties within the Development is governed by a Deed of Conditions by Barratt Homes Ltd dated 22 December 2005 (hereinafter "the Deed of Conditions")

5 The Respondent charges for the provision of services to the proprietors of properties within the Development and apportions its charges among the proprietors in accordance with the terms of the Deed of Conditions.

6 Some proprietors of properties within the Development have failed to pay their apportioned share of the Respondent's charges.

7 The Respondent has employed the terms of the Deed of Conditions to re-apportion to paying owners the non-payers' shares.

8 The property factor's duties which apply to the Respondent arise from the Deed of Conditions. The duties arose with effect from 1 October 2012.

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 their correspondence, including that of 29 December 2014, notified the Respondent of the reasons as to why the Applicant 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 Wellington House, Wellington Street, Glasgow on 31 August 2015.

The Applicant was not present at the hearing. Confirmation was received from Mrs Bryson on the morning of the hearing that she would be unable to attend but that the Applicant wished the hearing to go ahead in any event.

The Respondent was represented by Derek MacDonald, one of its directors. No other witnesses were led.

As the Applicant was not represented at the hearing, the Committee took special care to ensure that the points raised in the Applicant's documents were considered

and that questions based upon the content of those documents were put to the Respondent's representatives.

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 Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 as "the 2012 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 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 Deed of Conditions and the correspondence which had passed between the Applicant and the Respondent on the question of re-apportionment of charges.

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 Deed of Conditions as the source of the Respondent's property factor's duties.

The Code

The Applicant complains of failure to comply with paragraphs 4.1, 4.4 and 4.7 of the Code.

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

"...Section 4: Debt Recovery

... 4.1 You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts...

...4.4 You must provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations...

...4.7 You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs..."

Jurisdiction

The Respondent has raised two challenges to the Committee's jurisdiction as follows:

1 The Respondent considers that the complaint contained in the Applicant's application form differs from that notified to the Respondent by the Applicant's letter of 29 December 2014. The Respondent considers that the decision of the President of the HOHP to refer the application to this Committee was incompetent.

This matter may be dealt with shortly.

The Respondent had open to it the right to appeal under section 22 of the 2011 Act against the President's Decision under section 18(1) to refer the application to a Committee, but did not exercise its right. This Committee has no jurisdiction to review the Decision of the President to refer the Application.

2 The Respondent considers that there has been an absence of notification in terms of section 17(3) of the 2011 Act. The Respondent considers that because the complaint now being pursued by the Applicant is materially different to that notified by the Applicant's letter of 29 December 2014, it has not been afforded the opportunity to respond to the Applicant's complaint via its own complaints handling procedure.

We consider that this matter has already been adequately dealt with. Earlier in these proceedings, the Respondent had asked for additional time to address the Applicant's complaints and the Committee allowed such additional time by its Direction of 13 June 2015. In our view, the Respondent has accordingly received adequate notification and opportunity to address the Applicant's complaints. We consider that there has been no prejudice to the Respondent and, when asked, Mr MacDonald was unable to identify any such prejudice.

The Factual Complaints

The factual matters underlying the complaint are:

1 The failure of the Respondent to comply with the terms of the Deed of Conditions in respect of re-apportioning sums owed and unpaid by other proprietors.
2 The Respondent misleading the Applicant in relation to the Respondent's relevant obligations.

We deal with these issues below.

1. The failure of the Respondent to comply with the terms of the Deed of Conditions in respect of re-apportioning sums owed and unpaid by other proprietors.

The Applicant was concerned that the Respondent had reallocated responsibility for the payment of charges relating to the factoring of the Development from certain non-paying proprietors to paying proprietors such as the Applicant. The Applicant believed that the Respondent would only have been entitled to do so had the Respondent followed the provisions of the Deed of Conditions. The Applicant believes that the Respondent has failed to do so.

The dispute comes down to a difference of opinion as to how the relevant clause of the Deed of Conditions (CLAUSE ELEVENTH) is to be construed.

The relevant section reads:

"in the event of any Proprietor or Proprietors so liable failing to pay his, her or their proportion of such maintenance or other charges or such expenses, charges or remuneration within one month of such payment being demanded the Factor ....shall (without prejudice to the other rights and remedies of the Proprietors) be entitled to sue for and to recover the same in his or her own name from the Proprietor or Proprietors so failing together with all expenses incurred by the Factor..., PROVIDED ALWAYS that it shall be in the option of the Factor... before or after taking any action to call a meeting of the Proprietors to decide if and to what extent such action should be pursued and that in the event of failure to recover such payments, and/or the expense of any action, then such sums will fall to be paid by the Proprietors of all of the other plots within the Development Area as the Factor shall determine;"

It is the case that a number of proprietors have failed to pay the charges due by them and that the Respondent has attempted to reallocate such charges to the paying proprietors including the Applicant. It relies upon the terms of Clause ELEVENTH as its entitlement to do so.

The Applicant understands the quoted wording of Clause ELEVENTH to impose an obligation upon the Respondent to first hold a meeting of proprietors before a decision to re-apportion the debts of non-paying proprietors to the remaining proprietors can be made.

The Respondent's position is that the wording creates no such obligation.

We agree with the Respondent.

We construe the relevant sentence to create no obligation upon the Respondent to call or hold a meeting of proprietors. It merely provides to the Respondent such an option. Indeed, the purpose of any meeting appears only to be to determine what action is appropriate against the non-paying proprietors and not whether re-apportionment should take place.

The fact that no meeting was held in this case has no bearing upon the Respondent's right under the Deed of Conditions to re-apportion the debts of non-paying proprietors.

Our construction of the words is based upon a reading of their plain meaning. Nothing in the context of the document or the circumstances suggests that any other construction is appropriate.

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

2 The Respondent misleading the Applicant in relation to the Respondent's relevant obligations

The Applicant complains of misleading conduct by the Respondent in relation to the re-apportionment process. In particular, the Applicant complains that in its letter to the Applicant dated 30 December 2014, the Respondent refers to Clause TWELFTH of the Deed of Conditions instead of Clause ELEVENTH. The Applicant accuses the Respondent of, in the same letter, quoting selectively by excluding from its quotation (incidentally of the correct clause ie ELEVENTH) the section relating to the calling of a meeting.

Mr MacDonald explained that the reference to the wrong Clause number in the letter of 30 December was simply an error and we accept that to be the case.

The exclusion of the part of the Clause relating to meetings was explained as the Respondent having excluded irrelevant material from the quotation. We accept that explanation. Given that the Respondent believed at the time of the writing of the letter that the meeting provisions were irrelevant to the matter of re-apportionment, it is very hard to imagine that it would attempt to hide these words from the Applicant. We infer no intention to mislead. We find the information provided by the Respondent to the Applicant not to have been misleading in any material respect.

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

Other Issues

The Applicant relies upon paragraph 4.1, 4.4 and 4.7 of the Code although there is little supporting information to explain why the Applicant considers these paragraphs to be of relevance.

Paragraph 4.1 of the Code relates to the Respondent's obligation to have a debt recovery policy. There is no specific allegation in the Application that the Respondent does not have a debt recovery policy but we took the opportunity to ask Mr MacDonald about this and he confirmed that there is such a policy and that it is issued to homeowners when requested or when its terms require to be implemented.

As regards paragraph 4.4 of the Code, Mr MacDonald's position is that the Respondent would only be required to communicate the consequences of non payment (being reduction or withdrawal of service) in the event that such a situation became likely, which it had not in this case. The Respondent would be slow to issue letters threatening reduction/withdrawal of service as that would unnecessarily alarm homeowners.

As regards paragraph 4.7 of the Code, the Respondent's position is that it has taken reasonable steps to recover unpaid debts before re-allocation. The correspondence produced by the Respondent appears to support this and there is no evidence to the contrary.

Accordingly, we have identified no breaches of these paragraphs of the Code.

As regards the suggestion that the Respondent had resisted attempts to call a meeting to discuss the issue, Mr MacDonald rejected this. He advised that a meeting would have achieved little since the Respondent would have followed the terms of the Deed of Conditions in any event. However, he advised that when it became apparent that the Applicant wanted a meeting to be called, forms inviting proprietors to express an interest in attending were sent to the 191 proprietors in the Development, with only four responding positively. He therefore rejected the suggestion that there was an unmet demand among proprietors for a meeting.

Observations

We found Mr MacDonald to be a credible and reliable witness.

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: 17 September 2015