Proposal regarding the Making of a Property Factor Enforcement Order

Following Upon a
Decision of the the First-tier Tribunal for Scotland Housing and Property Chamber
In an Application under section 17 of the Property Factors (Scotland) Act 2011

by

Kirsty McElhinney, Flat 1/1, 9 Celtic Street, Glasgow G20 0BU ("the Applicant")

FirstPort Property Services Scotland Ltd, 183 St Vincent Street, Glasgow G2 5QD ("the Respondent")

Chamber Ref: FTS/HPC/PF/17/0094

Re: 1/1 , 9 Celtic Street, Glasgow G20 0BU
("the Property")

Tribunal Members:

John McHugh (Chairman) and Helen Barclay (Ordinary (Housing) Member).

This document should be read in conjunction with the Tribunal's Decision of the same date.

The Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

"Within 31 days of the date of the communication to the Respondent of this property factor enforcement order, the Respondent must:

1 Pay to the Applicant the sum of £100.

2 *Refund to the Applicant all administration or other charges relating to late payment which have been imposed relating to the Applicant's delayed or non-payment of common charges since January 2017.*

3 *Confirm in writing to the office of the Tribunal that steps 1 and 2 above have been carried out."*

Section 19 of the 2011 Act provides as follows:

"...(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a) give notice of the proposal to the property factor, and

(b) allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order..."

The intimation of the Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the Tribunal office by no later than 14 days after the date that the Decision and this proposed PFEO is intimated to them. If no representations are received within that timescale, then the Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a property factor enforcement order may have serious consequences and may constitute an offence.

J McHugh

JOHN M MCHUGH

CHAIRMAN

Date: 20 July 2017

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DECISION

The Applicant's application is not premature.

The Respondent has 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 a flat at 1/1, 9 Celtic Street, Glasgow G20 0BU ("the Property").

2 The Property is located within a development known as Lennox Gardens ("the Development").

3 The Development includes six separate buildings and associated common areas.

4 Each building consists of six flats.

5 There are a total of 36 individual dwellings within the Development.

6 The Applicant purchased the Property in December 2008.

7 The Respondent is the factor of the Development.

8 The owners of flats within No.9 have attempted to dismiss the Respondent as factor of their block and there remains disagreement between the parties as to the extent to which that attempt has been successful.

9 A Deed of Conditions by Barratt West Scotland Limited recorded 26 June 1995 ("the Deed of Conditions") governs the arrangements which apply among the Respondent and homeowners within the Development including the Applicant.

10 The Deed of Conditions provides for the Development's common charges to be allocated among the owners of the individual flats.

11 The Deed of Conditions makes no provision for the reallocation of non-paying owners' shares.

12 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).

13 The Applicant has, by her correspondence, including that of 12 and 18 January and 12 and 27 February 2017 notified the Respondent of the reasons as to why she considers the Respondent has failed to carry out its obligations to comply with its duties under section 14 of the 2011 Act.

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

Hearing

A hearing took place at Wellington House, Glasgow on 18 July 2017.

The Applicant was neither present nor represented at the hearing, having confirmed in advance that she was unable to attend.

The Respondent was represented at the hearing by its Credit Control Manager, Steven Maxwell and its Area Manager, Andrew Fisher. Another employee of the factor, Roger Bodden, was present as an observer.

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 2016 as "the 2016 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 a Deed of Conditions by Barratt West Scotland Limited recorded 26 June 1995 which we refer to as "the Deed of Conditions" and the Respondent's undated Statement of Services & Delivery Standards which we refer to as the "Written Statement of Services".

Incidental Matters

The current application is similar to a second application by a neighbouring proprietor (FTS/HPC/PF/17/0087). Accordingly, we directed that the two cases be heard together.

REASONS FOR DECISION

Preliminary Matters

The Respondent complained that the Applicant had failed to exhaust its Complaints Procedure. The Applicant had completed stage 1 but had not proceeded with a stage 2 complaint before making her application to the Tribunal.

Mr Maxwell felt that there was a point of principle to be defended in that unhappy homeowners should not be entitled to go directly from stage 1 of the Complaints Procedure to the Tribunal. He did, however, accept that it probably would have made no practical difference to the outcome. This is because the complaint is practically the same as that made by Ms Motaleb in case no FTS/HPC/PF/17/0087 and so the outcome of the stage 2 complaint would almost certainly have been the same in this case as it had been in that one.

It therefore seemed almost inevitable that an application to the Tribunal would have followed. Mr Maxwell argued that the Respondent's director who would have dealt with the second stage complaint had been denied the opportunity to respond.

We observed that the fact of the Application had been intimated to the Respondent by the Tribunal on 23 May 2017 and therefore we considered that the Respondent had had ample opportunity to correspond with the Applicant prior to the hearing of the case. It had not done so. We could identify no practical prejudice to the Respondent in our hearing the Application without the second stage of the Complaints Procedure having been completed. Mr Maxwell similarly identified none.

Section 17(3) of the 2011 Act requires only that an applicant must before making an application to the Tribunal have notified the factor in writing as to why the applicant considers the factor has breached its Code duties and that the factor has refused or unreasonably delayed in resolving the applicant's concern. In this instance, the Respondent has been given ample written notice of the complaint and has not resolved it. We do not find the Applicant's failure to exhaust the Complaints Procedure to be of any practical effect in the circumstances of this case. We therefore do not consider the Application to be premature.

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant made a complaint in her original application form in relation to a breach of property factor's duties. She later amended this to include a complaint under the Code in respect of the same subject matter. The Applicant has not identified the source of any property factor's duty upon which she relies. It appears to us that it was the Applicant's intention to rely solely upon the Code and we have proceeded upon that basis.

The Code

The Applicant complains of a failure to comply with Section 4.6 of the Code.

It provides:

"4.6 You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation)."

The Matters in Dispute

The factual matter complained of relates to the Respondent having allowed arrears to have built up because of the non-payment of common charges by another owner within the Development without intimation to the other owners including the Applicant.

The Applicant first became aware of the matter upon receipt of the Respondent's letter of 22 December 2016. This letter was sent to all owners of flats within the Development. It advised, firstly, that the float of £200 per property was becoming inadequate and, secondly, that there was a level of irrecoverable debt relating to the Development of £8600. The letter suggested dealing with the former issue by either increasing the float level or by moving from six monthly to quarterly billing. It advised that the second issue would be dealt with by allocating the non-paying owners' liability among the remaining owners. This would be done by demanding the first half ie £4300 was paid owners in the six monthly bill to be issued in January 2017 and the remainder in July 2017.

The Applicant took immediate exception to this and complained of to the Respondent that she was being asked to pay debts of a third party which related to a long period including a two year prior to her purchase of the Property. She thought this unfair and complained that she had been given no notification of this in terms of Code Section 4.6.

The Respondent followed the first stage of the Respondent's two stage Complaints Procedure but no resolution acceptable to her resulted. She was in close communication with her co-owner and neighbour Mrs Motaleb whose near identical complaint was not resolved after completion of the full Complaints Procedure.

The Applicant feels that the Respondent was inconsiderate in its approach.

She knew nothing of the non-payment by the third party owner. She had remained unaware of any issue until receipt of the letter of 22 December 2016. She was left with an unexpected bill to pay.

The debts related to a single owner who had not made a payment on his account since 2006. Mr Maxwell explained that various procedures had been followed: court action was raised; decree was obtained; a Charge for Payment was served; and a petition for sequestration raised, although in the event another creditor had presented a petition just ahead of the Respondent. The non-paying owner was sequestrated and a Notice of Potential Liability had been served. The sequestration had been granted in 2014.

The decision that the non-paying owner's debt should be reallocated among the other owners had been taken at the point when the non-paying owner's mortgage lender had taken possession of the flat and had agreed to pay a portion of the future common charges. At that point, the Respondent considered that (subject to any possibility of payment coming eventually by way of the Notice of Potential Liability) recovery from the non-paying owner was now doubtful and that reallocation was necessary. Mr Maxwell explained that although steps towards recovery had been made, the Respondent had been anxious to avoid bringing the matter to the attention of other owners because of the upset it would cause them and that this was why intimation had not been given sooner. He accepted that the Respondent had "not covered itself in glory" in this respect and that it would have been possible to inform owners of the matter sooner, albeit the delay in providing information had been with the best of intentions. If owners receiving the unexpected bill had expressed difficulties in paying, they would have been offered the option of payment by instalment.

Mr Maxwell advised that the Deed of Conditions made no provision for reallocation of the unpaid charges and so reallocation had been made in accordance with the Tenements (Scotland) Act 2004.

Mr Maxwell advised that the delay in notification had caused the Applicant no financial loss.

We consider that the terms of Code Section 4.6 require the issue of non-payment and potential reallocation to be brought to the attention of owners relatively early (the Section requires only that the non-payment *could* have an effect upon those owners). While a sensible construction may not require immediate intimation to owners of minor delays in payment by other owners, there were a number of stages at which events had obviously taken a concerning turn including the time at which it was decided to raise court action; the obtaining of decree; the service of a Charge for Payment; the expiry of the Charge without payment; the lodging of the Notice of Potential Liability; the decision to petition for sequestration and the granting of the sequestration of the non-paying owner. At all and any of those points the Respondent had had to give serious consideration to the matter and it would have been obvious that the non-payment was significant and could result in a reallocation to the detriment of the other owners such that intimation to them in terms of Section 4.6 was appropriate.

We consider the Respondent's failure to provide this information to constitute a breach of Code Section 4.6.

The duty under the Code arises only from the date of the Respondent's registration and our decision relates to the period from that date only.

The Applicant has also raised the payment of reallocated charges in 2015. This was something she had noticed when checking her old statements in the context of complaining about the 2016 reallocation. Mr Maxwell advised that this debt related to a different non-paying owner and that around £4000 had subsequently been recovered from this owner and credited to the Development account. We have no information available to us to enable us to determine that there was any delay in intimation to the Applicant and her fellow owners in relation to this debt and we find there to have been no breach of the Code in this respect.

Observations

A number of other issues remain contentious between the parties including the circumstances surrounding the attempt by the Applicant and other owners to end their factoring relationship with the Respondent. These issues are mentioned in some of the papers available to us. These, however, are not the subject of the Application and, accordingly, we have not heard any evidence or made any findings in respect of them.

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.

Having regard to the failures of the Respondent which we have identified and the distress caused to the Applicant, we have decided that the Respondent should be ordered to pay to the Applicant the sum of £100 and to refund any charges imposed in respect of late payment.

Section 20 of the 2011 Act provides the Tribunal with a wide discretion as to the terms of any PFEO. In particular, section 20(2) allows us to award such sum as we consider to be reasonable. In all the circumstances of this case, we consider payment of these sums to be reasonable.

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: 20 July 2017