Housing and Property Chamber
First-tier Tribunal for Scotland

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

Evelyn Boyle, Flat 0/1 , 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/17/0089

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

Tribunal Members:

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

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 0/1, 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 2010.
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 13 January and the correspondence issued by Mrs Motaleb on 14 and 15 February and 2 March 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 4 October 2017.

The Applicant was present at the hearing along with a friend, Nancy Kennedy.

The Respondent was represented at the hearing by its Credit Control Manager, Steven Maxwell and his colleague, Lisa Miller.

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 very similar to two applications already determined by us which had been made by neighbouring proprietors, Mrs Motaleb and Ms McElhinney. (FTS/HPC/PF/17/0087 & 94). The parties acknowledged that the factual background in this case is identical to that in those other cases, with the exception that the Respondent takes issue with whether it has received adequate notification of the Applicant's complaint against the background that the Applicant had failed to complete the Respondent's Complaints Procedure.

REASONS FOR DECISION

Preliminary Matters

As noted above, 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 argued that the Respondent's director who would have dealt with the second stage complaint had been denied the opportunity to respond.

The Applicant's letter of 13 January 2017 had made specific reference to Stage 1 of the Complaints Procedure. It received a substantive response written by Andrew Fisher of the Respondent. That letter made no specific reference to the Respondent's Complaints Process. It did not offer the option of escalation of the complaint to Stage 2. It simply invited the Applicant to make further contact should she wish to discuss matters further.

The Applicant replied to Mr Fisher by letter of 6 February 2017, again headed "Stage 1 Complaint". By that stage, the Applicant's focus had shifted to attempting to terminate the parties' relationship.

The Applicant wrote no further letters alluding to Stage 2 of the Complaints Procedure. However, on 8 February, Mrs Motaleb wrote to the Respondent indicating that she and the other owners were seeking legal advice on the demand that they pay the debt of a third party non-paying owner. Reference was made in that email to communication between Mrs Motaleb and the Applicant. That email was also copied to the Applicant.

On 14 February 2017, Mrs Motaleb wrote to the Respondent again to escalate the matter to a Stage 2 Complaint. She wrote in an email (which was copied to the Applicant) that: "we our [sic] escalating our complaint...to Stage 2" (emphasis added). That terminology was repeated throughout the email. The email requested that the Respondent copy its response to those copied into the email, which the Respondent declined to do.

The Applicant confirmed at the hearing that she had understood that the Stage 2 complaint being pursued by Mrs Motaleb was also on the Applicant's behalf, although she accepted that she had never specifically advised the Respondent of this.

In the circumstances, we consider that the Respondent was put on sufficient notice that it had not resolved the Applicant's complaint at the Stage 1 process and it should have been apparent that the intention of Mrs Motaleb was that the Applicant was included in the Stage 2 complaint being advanced by Mrs Motaleb. It must at least have realised that there was a substantial risk that Mrs Motaleb and the Applicant believed this to be the case and the Respondent could easily have sought to clarify the position but made no attempt to do so.

In any event, had the Applicant's complaint advanced on its own to Stage 2 it almost certainly would have made no practical difference to the outcome. This is because the complaint is nearly identical to that made by Mrs Motaleb and Ms McElhinney in case no.s FTS/HPC/PF/17/0087& 94 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 (Mrs Motaleb having completed the Stage 2 procedure).

We could identify no practical prejudice to the Respondent in our hearing this 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 Applicant's complaint and has not resolved it. We do not find the Applicant to have failed to exhaust the Complaints Procedure. We therefore do not consider the Application to be premature.

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant does not complain of a breach of property factor's duties.

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 facts in this case are identical to the earlier two cases involving the Applicant's neighbours. The parties agreed that it would be unnecessary to rehearse those same facts at the hearing although Mr Maxwell indicated that he wished at least formally to insist upon a defence that there had been no breach of Code section 4.6, although he accepted that our findings in this case were (subject to the prematurity argument discussed above) likely to be the same as in the earlier cases.

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 by 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 period 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.

As noted above, 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 and advanced her complaint with her assistance.

The Applicant feels that the Respondent was inconsiderate in its approach, in particular regarding its failure to offer instalments and in relation to the timing of the letter of 22 December 2016, being so close to the Christmas/New Year holidays. She is disabled and has significant health difficulties. She advises that she always pays her own debts and found it upsetting that she was being asked to pay the debts of third parties, which she would find it difficult to pay.

She had known nothing of the non-payment by the third party owner 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. 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. 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. 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.

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.

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.

It is evident that the Applicant feels that the Respondent has been insensitive in its handling of this matter. We observe, however, that the Respondent did attempt in its letter of 22 December 2016, and at some stages since, to approach the matter in a careful manner and with regard to the fact that payment of third party debts was likely to be a potentially inflammatory and difficult subject for paying owners such as the Applicant.

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 in so far as that has not already happened (we were advised that a late payment charge of £36 had already been credited to the Applicant).

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.

JOHN M MCHUGH

CHAIRMAN

DATE: 6 October 2017