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/17/0156

1239/1241 Cathcart Road, Glasgow, G42 9HA ("The Property")

The Parties:-

Mr Beinan Liu

("the Applicant")

Macfie & Co. Management Services Ltd.

("the Respondent")

Tribunal Members:
G. McWilliams (Legal Member)
S. Hesp (Ordinary Member)

DECISION

The Respondent has failed to comply with its duties under Section 14(5) of the Property Factors (Scotland) Act 2011 ("the 2011 Act") in that it did not comply with Sections 2.2 and 3 of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors ("the Code").

This decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") is unanimous.

The Tribunal considered matters and have determined that, in relation to the Application before it, the Respondent has not complied with the Code. The Tribunal propose to make a Property Factor Enforcement Order ("PFEO") in the following terms.

The Respondent is to send a letter to the Applicant apologising in respect of the intimidating language used in previous communications and providing the Applicant with an undertaking that there will be no further communications sent to him which contain intimidating terms. The letter is to be sent by the Respondent to the Applicant within 14 days of the issue of the PFEO.

Introduction

1. The Respondent became a Registered Property Factor on 7th December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date. The Applicant submitted an Application to the Tribunal by lodging documents with the Tribunal in the period 24th April 2017 to 4th May 2017.

The Hearings

2. A Hearing was held at Wellington House, 134-136 Wellington Street, Glasgow, G2 2XL on 6th July 2017. A preliminary matter was discussed at that Hearing and the Tribunal issued a Direction, with regard to that matter, on 21st July 2017. Following the issue of the Direction the Applicant intimated that he wishes to proceed with his Application. A Further Hearing was held on 24th October and continued on 28th November 2017. The Applicant and his interpreter Ms J. Smitheram were present at all Hearings. The Respondent was represented by their Director Mr J. Walker at all Hearings. Mr Walker had become the a Director of the Respondent company in Spring 2017 The Applicant's friend Mr Lee attended with the Applicant to assist him with his visual presentation of photographs, and to observe, at the continued Hearing on 28th November 2017.

3. The Applicant referred to his Skeleton Argument, lodged in advance of the first Hearing, on 6th July 2017, and, firstly, stated that he was not clear as to what authority the Respondent had to set the financial threshold for instructing works without further consultation. The Respondent's Mr Walker stated that the previous threshold of £200.00 in relation to such works had been set in the early to mid 1990's and was increased in late 2012 when the Respondent's Written Statement of Services was issued. Mr Walker confirmed that the Statement of Services was issued to all owners in February 2013. Mr Walker confirmed that there had been a meeting of homeowners on 23rd November 2017 and a vote not to change the apportionment of liability for common charges had taken place. He stated that at the meeting the threshold for common repairs was increased to £600.00 from £500.00 and the homeowners had also agreed to a revaluation of the building so that the possibility of arranging a Common Buildings Insurance Policy could then be discussed. Mr Walker also stated that the Respondent was currently redrafting the Statement of Services but did not envisage a dramatic increase in the threshold. Mr Walker stated that it was open to the owners at the property to convene a meeting and seek to alter the threshold if they so wished. Mr Walker stated that the Statement of Services had been available on the Respondent's website since 2015.

4. The Applicant next referred to communications which he considered to be intimidating. Mr Walker acknowledged that the Respondent's letters to the

Applicant dated 23rd January and 2nd February 2017 were written in a manner which was not helpful.

5. The Applicant further referred to several invoices of the Respondent which he believed did not contain sufficient clarity and transparency. He referred to the Respondent's invoice dated 4th September 2015 and stated that he had no knowledge of door entry repairs having been required. Mr Walker stated that he was content that WSS Group Limited had been instructed to repair the door release system following vandalism. The Applicant referred to the Respondent's invoice dated 4th December 2014 and, in particular, the J.H. Horn & Son charge detailed on that invoice. Mr Walker acknowledged that there was confusion in the terms of that invoice given the use of the phrase "Do Not Use" where it appears alongside the J.H. Horn & Son charge.

6. The Applicant also referred to the J.H Horn & Son invoice dated 31st January 2015 in respect of checking a leaking downpipe, which was not invoiced by the Respondent until 2016 1st December 2015. The Applicant stated that he himself had arranged for the leaking downpipe to be repaired by an independent tradesperson at a cost of £25.00. Mr Walker stated that the Respondent would not be able to have a repair carried out so cheaply given that they have to instruct tradespersons who comply with all relevant Regulations, including the Working at Height Regulations.

7. The Tribunal noted again that the principal concern of the Applicant, referred to at the original Hearing in respect of his Application, on 6th July 2017, being his share of liability for common charges, was also referred to on several occasions by the Applicant and Respondent during the discussions about the latter's invoices. The Tribunal made observations in this regard in their Decision dated 21st July 2017 and have made a further observation below.

8. Further, the Applicant made reference to the carrying out of repairs and maintenance and, in particular, referred to an issue regarding leaking which he understood was coming from the top floor flat no. 3/2 above the Property. Mr Walker stated that the gutter cleaning common charge, which appeared in the Respondent's invoice dated 1st March 2017, was fair given that it was reasonable to investigate whether or not the leak was coming from the gutter, and that it was reasonable that such investigation incurred a common charge.

9. The Applicant concluded his points for consideration by the Tribunal by stating that he should also have been advised of the existence of the Tribunal by the Respondent. Mr Walker stated that the predecessor of the Housing and Property Chamber Tribunal, the Home Owner Housing Panel, was referred to in Section 77.2 of the Respondent's Written Statement of Services which was sent out to all homeowners in 2013, and which had been available on the Respondent's website since 2015.

10. Regarding Factor's duties, the Applicant intimated that he was concerned about removal of refuse at the property. The Applicant stated that refuse had lain in the back garden at the tenement property for some months. The Respondent stated that they had an ongoing problem with occupiers of the

flats within the property, and similar properties within their portfolio, "dumping" refuse and then with other persons adding to the "dumped" collections. The Respondent's Mr Walker stated that ordinarily they allowed 28 days for the Local Authority to uplift the refuse, and then act if the refuse has not been uplifted. Mr Walker stated that recurring littering was, regrettably, "part of tenement life". In relation to garden maintenance, the Applicant stated that he was unhappy with the annual charge of £260.00 per year being levied by a gardening maintenance contractor. He felt that this was too high. He felt that the garden was not being maintained properly. The Respondent's Mr Walker stated that he considered the charge to be reasonable as it was shared between the owners of the 13 properties at the relevant tenement property.

Summary of submissions

11. The Applicant's primary concern is the apportionment of liability for common charges. As he stated in the Application papers, and orally at the Hearing, he further considered that the Respondent had not made their position clear regarding the threshold for instruction of works without consultation. He also considered that some of the Respondent's communications with him were intimidating and, further that there was a lack of transparency and clarity in some of their invoices. He was also concerned regarding garden maintenance.

12. The Respondent's position, as stated by Mr Walker in the case papers and also orally at the Hearing, was that the Respondent had tried as best as possible to sort things out with the Applicant. There had been two different Court cases which had now been settled and he was hopeful that things could move forward. He had acknowledged that the apportionment of liability for common charges was something which the Applicant was unhappy about. He reiterated that a meeting of owners called on 23rd November and a vote not to change the share allocation for common charges had taken place He acknowledged that some of the communications sent by the Respondent, per his predecessors, were unhelpful in their terms. He also acknowledged that some invoices were lacking clarity.

The Tribunal make the following findings in fact:

13. The Applicant is the owner of the property at 1239-1241 Cathcart Road, Glasgow, G42 9HA ("the Property"). He purchased the property on 18th February 2011. It is situated on the ground floor of a tenement property which contains four shops and nine flats.

14. The Respondent performs the role of Property Factor of the tenement block property within which the Applicant's property is situated on the ground floor.

15. The Respondent issued letters to the Applicant dated 23rd January and 2nd February 2017 which contain terms which are intimidating. The Respondent's invoices dated 4th December 2014, 3rd March and 1st December 2015 are lacking in clarity. The Respondent has, accordingly, breached Sections 2.2

and 3 of the Code. They have not breached Sections 1, 6 and 7 of the Code nor failed to carry out Property Factor's duties.

Reasons for Decision

16. Dealing firstly with the individual parts of the Code complained of:-Section 1 states that each homeowner should be provided with a Written Statement of Services. The Tribunal, having had sight of all the papers and heard the evidence and submissions of the parties, is satisfied that a Written Statement of Services was sent to the homeowners in 2013, and that this has been made available on the Respondent's website since 2015. There is no evidence before the Tribunal to establish, on a balance of probabilities, that the Applicant did not have the Respondent's Statement of Services. The Applicant has owned the Property since 2011 and would ordinarily have received a copy of the Statement of Services in 2013. In the event that he did not receive the Statement it is clear that the Applicant has been in communication with the Respondents over a number of issues and over several years. The Tribunal find it to be reasonable that the Applicant could have requested a copy of the Statement of Services from the Respondent, or accessed a copy online. Accordingly the Tribunal is satisfied that there has been no breach of the Code in this regard.

17. Section 2.2 provides that a Property Factor must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them. The Terms of the Respondent's letters dated 23rd January and 2nd February 2017 are acknowledged by the Respondent to be unhelpful in their terms. Those communications include the Respondent's statements that the Applicant's comments are "verging on the bizarre" and state that he is "verging on dangerous ground". The Tribunal is satisfied that some of the terms of those communications, bearing their ordinary construction, are intimidating for the Applicant, and accordingly the Tribunal find that there has been a breach of Section 2.2 of the Code.

18. Section 3 of the Code provides that there should be clarity and transparency in all of the Respondent's accounting procedures. The Tribunal examined the invoices referred to at the Hearing, and considered the parties' evidence and submissions in this regard. Having done so, the Tribunal is satisfied that there is a lack of clarity in the invoices dated 4th December 2014 and 3rd March 2015. The inclusion of the phrase "Do Not Use" in those invoices is confusing to the Applicant. The Respondent's Mr Walker stated in the Respondent's written submission to the Tribunal that the use of this phrase was a quirk of the Respondent's accounting soft-ware system. At the continued Hearing on 28th November 2017 he acknowledged that confusion could arise from the use of that phrase. The Tribunal also find that the Respondent's invoice dated 1st December 2015, within which a charge for work carried out in respect of a leaking downpipe some ten months previous was included, was also confusing for the Applicant, given the time lapse between the work being carried out and the charging for same. Overall the Tribunal find that there has been a lack of clarity in certain of the Respondent's invoices, referred to

above, and accordingly that there has been a breach of Section 3 of the Code in those instances. However, given that the invoices referred to are now of some age and there was an acknowledgement by the Respondent that the terms of those invoices are confusing and, further, as the recent Respondent's invoices within the Application case papers are clear in their terms, the Tribunal do not find it necessary to make any specific PFEO in connection with the Respondent's obligation to adhere to the Code in respect of financial obligations.

19. Section 6 of the Code makes various provisions regarding the procedures for instructing repairs, including appointing contractors, and communicating details of the repairs to homeowners. Having considered all of the Application papers and heard the evidence and submissions of the parties, the Tribunal is satisfied that there has not been a breach of this Section of the Code. In particular, the Tribunal finds that the Respondent's explanation regarding inspection of the downpipe leak was reasonable. The Tribunal finds that the Respondent acted reasonably in arranging for an inspection and providing a quotation. It was for the Applicant and other homeowners at the tenement property to decide whether or not to proceed with the works based on that quotation. The Applicant then dealt with the matter directly. This was his choice, the Respondent having acted reasonably in dealing with the matter. The Tribunal accordingly do not find there to be any breach of the Code in this regard.

20. In relation to the leaking and staining to the front of the property the Respondent again had arranged for gutters to be inspected to check whether or not the staining emanated from leaking gutters. The Applicant maintained that the staining had come from a tank or boiler within a third floor flat. During the Hearing he stated that he could not say for certain that this was the case and that he had not accessed the flat. In the circumstances the Tribunal find that it was reasonable that the Respondent carried out investigations and arranged for the gutters to be cleared. The Tribunal do not find there to be any breach of the Code by the Respondent in this regard.

21. Section 7 of the Code makes provisions regarding complaints resolution. The Applicant's contention was that he had not been told about the existence of the Housing and Property Chamber by the Respondent. The Tribunal find that there is reference to the predecessor of the Housing and Property Chamber, the Home Owner Housing Panel, in the Respondent's Written Statement of Services. As stated above, with reference to Section 1 of the Code, the Tribunal find that it was reasonable that the Applicant could have requested a copy of the Statement of Services, or accessed this online, in the event that he had not received his copy which the Respondent's stated they had sent out to him and all proprietors in 2013. Accordingly the Tribunal do not find there to be any breach of the Code in this regard.

22. Regarding Property Factors' duties, the reasons for the Tribunal's decision are as follows. The Applicant raised issues regarding rubbish clearance and garden maintenance. The Respondent stated that ordinarily they allow 28 days for the Local Authority to uplift refuse, and then act if the refuse has not

been uplifted. The Tribunal find that the Respondent's approach to this issue is reasonable, and there has been no breach of their duties. In relation to garden maintenance, the Applicant was unhappy with the annual charge of £260.00 per year being levied by a gardening maintenance contractor. He felt this was too high and that the garden was not being maintained properly. The Tribunal find that the annual garden maintenance cost is not unreasonable as it is shared between the 13 homeowners at the tenement property. The Tribunal further find that, in arranging for regular instruction of garden maintenance, the Respondent is fulfilling their Property Factor's duties.

Observation

23. The Tribunal observe from the evidence and submissions of the Applicant that his principal concern remains the apportionment of liability for common charges at the tenement property, which places a greater burden on him than other proprietors. As stated in the Tribunal's Direction dated 21st July 2017, it is for the Applicant to consider obtaining legal advice regarding a possible application to the Lands Tribunal for Scotland to seek to alter the apportionment, in particular given that a meeting of the proprietors of homeowners took place on 23rd November 2017 and they voted not to alter that apportionment.

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a PFEO. The terms of the proposed PFEO are set out in the attached Section 19(2)(a) Notice.

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 McWilliams
Legal Member

29th January 2018