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/17/0018

Flat 2/1, 24 Glasgow Street, Hillhead, Glasgow, G12 8JP ("the Property")

The Parties:-

MR DOUGLAS GRAHAM residing at 6 Forsyth Drive, Old Meldrum, Aberdeenshire, AB51 0NW ("the Applicant")

MACPHIE & CO. MANAGEMENT SERVICES LIMITED (Company Number SC84796) having their registered office at 5 Cathkin View Road, Glasgow, G42 9EA ("the Respondent")

Tribunal Members:

Mr E K Miller, Chairman and Legal Member
Mrs A MacDonald, Ordinary Member

DECISION

The Tribunal determined that there had been breaches of Sections 5.2 and 5.6 of the Code however these had been rectified by the date of the Hearing. There had been no breach of Sections 2.2, 2.5, 5.3, 5.7, 5.8, 5.9 and 6.1 of the Code nor had there been a breach of the Property Factors duties as defined in the 2011 Act.

No Property Factor Enforcement Order was required in the circumstances.

The decision was unanimous.

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 Regulations"

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.

Hearing

A Hearing was held at Wellington House, 134-136 Wellington Street, Glasgow, G2 2XL on 25th April 2017. The Applicant was present and represented himself. The Respondent was represented by Mr Graeme Dickson of the Respondents.

Summary of Submissions

The Applicant's submission was that the whole position regarding block insurance was entirely unsatisfactory and had left him out of pocket. He acknowledged that the Respondent had highlighted at the point of his acquisition of the Property that the block was underinsured. Accordingly he had himself, as a responsible owner, put in place insurance for the full value of the Property. Given that he had done this he did not see the benefit of consenting to the additional block insurance being increased. The Applicant highlighted that there had been numerous letters, particularly from January through to March 2016, regarding the insurance position. He contended that matters were unclear and that contradictory instructions regarding the need, or lack of need, for separate insurance. Having ensured that he was properly insured upon the lapse of the block policy, he was unhappy at the Respondent then reinstating the block policy and seeking payment from him. The Applicant was also concerned that the insurance company, in an effort to get the co-owners to sign up, had dropped the price of the insurance premium by 20%. He queried the veracity of this and also the general value that the block policy provided against the cost of his own individual cover. Generally, the Applicant felt there was a lack of transparency in how the insurance was provided and handled by the Respondent. In relation to repairs, the Applicant had highlighted dampness in the close, a damaged downpipe and the poor condition of the communal windows. He felt the Respondent was failing to attend to the works appropriately. He also felt there was insufficient information in the Respondents invoices to allow him to check the billing position where he had made advance payments.

Mr Dickson, for the Respondent, set out their position and gave some background in relation to the matter. His company had factored the larger block of flats for a great many years. Originally there had been four flats in the block but each of these had been sub-divided and there were now eight flats. The Property had been underinsured for a significant number of years under a block policy. The level of insurance, prior to the dispute arising, was £330,000 for the entire block. This was against a backdrop of a recent property valuation of the entire block of in excess of £2.5 million. The Respondent highlighted they had been trying for a number of years to get the co-owners to agree to a valuation with a view to increasing the level of cover. It had taken many years to even get a proper valuation done of the block. A majority of the co-owners had never, until recently, agreed to the insurance being increased to the correct level.

Matters had come to a head during the course of 2016 when the insurers indicated that they were unwilling to carry on with such a significant level of underinsurance. The Respondent highlighted that they had again written to all the proprietors to try and get a majority to agree to insurance being increased to the correct level. By 18

January 2016 only one proprietor had confirmed the position in relation to that. By 29 January 2016, two proprietors had agreed. On 5 February 2016 the Respondent wrote to all the proprietors to advise that the block policy would be cancelled on 4 March 2016 by the insurers unless a majority of proprietors agreed to insurance at the correct level. On 2 March 2016, the Respondent wrote to the co-proprietors to advise that it seemed unlikely that the necessary majority would be obtained. The Respondent therefore encouraged all proprietors to ensure that they carried their own buildings insurance. The Respondent had previously recommended to proprietors that they have their own insurance as well to cover the shortfall under the block insurance policy. On 9 March 2016 the Respondent wrote to all proprietors to advise that four of the eight flats had agreed to the change. However, this still did not represent a majority and accordingly the common policy was cancelled. Several months later a majority was obtained from the proprietors. The Respondent submitted that in terms of the title deeds they were then obliged to reinstate a block insurance policy in accordance with the majority wishes. This was done on 1 July 2016.

The Respondent acknowledged that the situation had been far from ideal in that (a) there had been significant underinsurance for a long period of time; (b) this necessitated proprietors requiring to have additional insurance separately if they wished to be fully insured; (c) that the block policy had lapsed; and (d) that it had then had to be reinstated several months later, when other proprietors might have gone and made their own arrangements, given the advice received by the Respondents. The Respondent's position however, was that they were bound by the terms of the title deeds and were obliged to try and maintain a block policy. If they could not obtain a majority decision then they were bound by the status quo. However having obtained a majority decision they were then bound to implement it. Mr Dickson acknowledged that this situation had produced a surfeit of correspondence but that they had wished to ensure that all proprietors were aware of the situation in order that they could carry the correct insurance and minimise any risk in the event of a major claim arising.

In relation to the Applicant's complaints regarding repairs, the Respondent acknowledged that there were some works needing carried out. In particular the communal windows were in need of work. Again the Respondent highlighted that without a majority decision and the necessary funding being put in place by the co-owners, their hands were tied. The Applicant had queried why that an insurance claim had not been made in relation to repairs downpipes. The Respondent submitted that they were of the view that the downpipes had simply corroded rather than burst due to freezing. Accordingly this was not a defect arising from an insured event and was a lack of repair. The Respondent was satisfied that there was no damp within the common close caused by any fundamental issue but rather this had simply been caused by the broken downpipe.

The tribunal make the following findings in fact:

1 The Applicant is the owner of Flat 2/1, 24 Glasgow Street, Hillhead, Glasgow, G12 8JP("the Property")

2 The Property is a flat within the larger block of eight flats at 24 Glasgow Street, Hillhead, Glasgow, G12 8JP (hereinafter "the Development").

3 The Respondent performed the role of the property factor of the Development.

4 The Respondent had breached Conditions 5.2 and 5.6 of the Code of Conduct, albeit these had been rectified by the date of the Hearing.

5 The Respondent had not breached 2.2, 2.5, 5.3, 5.7, 5.8, 5.9 and 6.1 of the Code of Conduct.

6 The Respondent had not breached their Property Factors Duties as defined in the 2011 Act.

Reasons for Decision

Before assessing the individual complaints under the Code, the Tribunal considered generally the position regarding the underinsurance and whether the Respondent had acted appropriately. On balance, the Tribunal was satisfied that the Respondent had acted in the correct manner.

The Respondent found themselves in a difficult position where they were aware that the Property was significantly underinsured. They had done the correct thing by encouraging co-owners to protect themselves by holding their own insurance for the shortfall. The decision of the insurers to decline to carry on with the level of underinsurance precipitated matters.

The Respondent had highlighted the upcoming prospect of the block policy lapsing. They had advised on several occasions of the shortfall in the number of co-owners. Correctly, they had advised the individual proprietors to ensure that they carried other insurance.

It was unfortunate that the block policy had subsequently lapsed and that, in turn, the required majority of proprietors requiring to consent to the block policy had occurred after the policy had lapsed.

However, the Tribunal noted from the terms of the title deeds, that a block policy was meant to be in place and given that a majority of proprietors had consented to this in June 2016, the Respondent had no choice but to reinstate the block policy.

This did lead to the unfortunate position whereby individual proprietors, such as the Applicant, had now paid for individual insurance that was ultimately rendered redundant by the full block policy at the correct value being put in place. However, this was not the fault of the Respondent. Rather this was a reflection upon the co-owners within the block and their failure to give timeous and consistent instruction to the Respondent.

The situation with the insurance had become prolonged and messy but the Tribunal was satisfied that at all times the Respondent had been seeking to ensure that individual homeowners were aware of the risk and had the appropriate insurance.

Whilst the correspondence could, perhaps, have made the situation clearer, nonetheless the Respondent had acted appropriately.

The Tribunal was pleased to note that during the course of the Hearing the Respondent offered to assist the Applicant with seeking a reclaim of the sums he had paid on his individual policy in an effort to minimise the Applicant's loss from this unfortunate situation.

The Tribunal did note that the Respondent had perhaps not fully complied with all sections of the Code. Some of the correspondence issued by the Applicant was a little brusque, however the Tribunal noted that at the Hearing Mr Dickson had acknowledged his wording could have been better and apologised for this. The Tribunal fully appreciated that factoring a block where the proprietors do not give timeous instruction and do not act generally in the same manner can make a factor's life difficult. However, the strictures of the Code require factors to act in a professional and communicative manner at all times. Whilst the Tribunal was satisfied that generally the Respondent had acted in an appropriate and professional manner the style and method of communication could be improved going forward.

Overall, the breaches of the Code were relatively minor and had been rectified ahead of the Hearing. Accordingly the Tribunal saw no benefit in any further procedure beyond the issue of this decision.

Dealing with the individual parts of the Code complained of:-

Section 2.1 – you must not communicate with homeowners in any way which is abusive or intimidating or which threatens them (apart from reasonable indication that you may take legal action) – the Tribunal was satisfied that whilst one or two letters had been a trifle brusque, no correspondence had been threatening or abusive.

Section 2.5 – you must respond to enquiries and complaints received by letter or email within prompt timescales – the Tribunal was satisfied that the Respondent had acted appropriately here. They had responded within a reasonable timescale to the Applicant's complaints and had set out their position generally. They had signposted the Applicant to the Tribunal when it became apparent that a resolution was not to be achieved. Accordingly there had been no breach of the Code in this regard.

Section 5.2 – you must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy – the Tribunal was of the view that the Respondent had not fully complied with this section of the Code at the earliest opportunity. The Applicant had sought information regarding rental cover and details of how the policy premium had been calculated. Whilst this information was forthcoming it had not been provided as timeously as it ought to have been and the question in relation to rental cover had been answered simply by directing the Applicant to the broker.

Section 5.3 – you must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment of benefit you receive from the company providing insurance cover and any financial or other interests that you have with the insurance provider – the Tribunal noted that there did not appear to be any suggestion during the course of the Hearing that this section had been breached. The Applicant's written submissions around this section had focussed on what level of cover was in place. This, however, was not relevant to this section of the Code. Accordingly the Tribunal was satisfied there had been no breach.

Section 5.6 – on request, you must be able to show how and why you appointed the insurance provider, including any cases where you decided not to obtain multiple quotes – the Tribunal was of the view that whilst the Respondent had, in due course, provided details of the brokers selections and methodology, it had taken a couple of requests from the Applicant for this information to be provided. This matter had been rectified and accordingly the Tribunal was satisfied that whilst there had been a breach of the Code in this regard it was now of limited significance.

Section 5.7 – if applicable, documentation relating to any tendering or selection process should be available for inspection, free of charge, by homeowners on request – it did not appear to the Tribunal that there had been any relevant tendering or selection process and accordingly there had been no breach by the Respondent in this regard. The Applicant had been concerned that the ability of the broker to reduce insurer/broker to reduce the premium by 20% led the Applicant to query whether value for money was being obtained. The Respondents had confirmed at the Hearing, however, that the brokers had persuaded the insurers to review their rating of the block and also that the insurer had made a commercial decision to reduce the premium to retain the business. The Tribunal was satisfied with this information.

Section 5.8 – you must inform homeowners of the frequency with which property revaluations will be undertaken for the purposes of building insurance and adjust this frequency if instructed by the appropriate majority of homeowners in the group – the Tribunal did not take the view that there had been any breach here. The Respondent's terms of business indicated that revaluation should be carried out every 5 years. Given the co-proprietors failure to give instructions to the Respondent to carry out valuations generally, the Tribunal was of the view that the Respondent could not have breached this clause.

Section 5.9 – public liability insurance. Although specified by the Applicant, this section only applies in land management situations. This case does not relate to a land management situation and therefore is inapplicable.

Section 6.1 – you must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention – this issue arose relatively informally at the end of the Hearing. The Tribunal was satisfied that the Respondent was aware of the condition of the building and was seeking to carry out appropriate repairs as and when they could obtain the necessary consents from the co-owners and the funding to carry out the works. The Applicant had stated during the Hearing that he was simply looking for more information on the repairs

works required. The Respondent had indicated during the Hearing that they were happy to meet the Applicant and to have a residents meeting. There had been an issue around invoicing, which the Respondent had apologised for. More clarity was now being given on invoices and on advance payments for work and the parties agreed to work more collaboratively together going forward. It appeared to the Tribunal that matters were in hand and that no finding was required in this regard.

Property Factors Duties – the Tribunal was satisfied that there had been no breach of the Property Factors Duties. As set out above, the Respondent had faced a difficult situation in relation to the underinsurance and had done their best to ensure that all parties were aware of the situation and that any risks were minimised. Accordingly the Tribunal was satisfied in this regard with the conduct of the Respondent.

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.

E Miller

Legal Member

8/6/2017

Date