First-tier Tribunal for Scotland (Housing and Property Chamber)

Decision and Statement of Reasons in respect of an Application under Section 17 of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/17/0136

4 Market Street, Forfar, Angus, DD8 3EY
("the Property")

The Parties:-

Mr. Paul Kneebone, residing at the Property ("the Homeowner and Applicant")

Angus Housing Association Limited, 93 High Street, Arbroath, Angus, DD11 1DP ("the Factor and Respondent")

Tribunal Members:-

Patricia Anne Pryce	-	**Chairing and Legal Member**
Mike Scott	-	**Ordinary Member (Housing)**

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the tribunal'), having made such enquiries as it saw fit for the purposes of determining whether the Factor has complied with the Code of Conduct for Property Factors as required by Section 14 of the 2011 Act, determines unanimously that, in relation to the Homeowner's Application, the Factor has not complied with the Code of Conduct for Property Factors and has failed to carry out the Property Factor's duties.

The tribunal makes the following findings in fact:

- The Applicant is the owner of the property known as 4 Market Street, Forfar which is located on the ground floor.
- The property known as 2 Market Street, Forfar is located above the Applicant's property and is owned by the Respondent.
- There are twenty-six dwellings houses located in the development in which the property is located.
- The Respondent owns 22 of the 26 properties within the development.

- Four of the 26 properties, including the Applicant's, are privately owned.
- The Respondent is the factor of the common parts of the building within which the property is situated.
- The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 from the date of its registration as a property factor on 7 December 2012.
- The Applicant is registered blind.
- The Respondent knew that the Applicant is registered blind.
- An escape of water from a hot water pipe located in the kitchen sink unit of 2 Market Street, Forfar caused damage to the Applicant's property on or about 18 August 2016.
- The Respondent paid for the contractor to carry out repairs to the hot water pipe at 2 Market Street, Forfar and did not recharge the cost of the repair to its Tenant.
- All the repairs to the Applicant's property were covered by insurance but the Applicant required to pay a policy excess of £250.
- At the date of the tribunal, the policy excess had not been repaid to the applicant by the Respondent.

Following on from the Applicant's application to the First-tier Tribunal (Housing and Property Chamber), which comprised documents received in the period of 10 April 2017 to 25 May 2017, the Convenor with delegated powers under Section 96 of the Housing (Scotland) Act 2014 referred the application to a tribunal on 26 May 2017.

Introduction

In this decision, the tribunal refers 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 Rules of Procedure as "the 2016 Rules".

The tribunal had available to it, and gave consideration to: the Application by the Applicant as referred to above; representations submitted by the Applicant dated 30 June and 20 July, both 2017 together with productions contained therein; representations submitted by the Respondent by way of letters dated 17 July and 10 August, both 2017 together with productions contained therein; and oral submissions made by both parties at the hearing.

The Legal Basis of the Complaints

The Applicant complains under reference to Sections 2.1 and 7.1 of the Code.

The Code

The elements of the Code relied upon in the application are as follows:-

Section 2.1

You must not provide information which is misleading or false.

Section 7.1

You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.

Hearing

A hearing took place in Caledonian House, Greenmarket, Dundee, DD1 4QX on 15 August 2017.

The Applicant attended on his own behalf. The Applicant's supporter, Dr. Lorna McWilliam, attended to support the Applicant to read documents to him when required and, if necessary, to give evidence as a witness.

The Respondent was represented by Mr. Ron McArthur, who is employed as the Asset Manager of the Respondent.

Preliminary Issues:-

1. The tribunal noted that the Respondent had attempted to lodge further representations and productions by way of a letter dated 10 August 2017. The tribunal advised parties of the terms of Rule 19 of the 2016 Rules. Given the requirement to send documents no later than seven days prior to a hearing, the tribunal requested an explanation as to why these documents and representations were so late. The Respondent initially advised that it had taken time to get the documents together but then conceded that it was pressure of work that had caused the documents to be sent so late. The Applicant's view was sought. The Applicant indicated that he had received these documents on the Saturday prior to the hearing (12 August 2017) but that he had managed to read them fully and absorb the contents of them. Given this, the Applicant had no objection to these being lodged though late. The tribunal noted that some of the documents would assist in providing further information about the matters in dispute and decided to allow the documents and the representations deciding that it was fair in all of the circumstances. However, the tribunal noted with displeasure the lateness of receipt of these documents.
2. The tribunal noted that the Applicant sought to use Dr. McWilliam as a potential witness. The tribunal noted that, although the Applicant had advised in advance that he intended to bring Dr. McWilliam along as a supporter, he had not indicated until the hearing that he would like her to be a witness, if necessary, at the hearing. Parties were reminded of the terms of Rule 19 of the 2016 Rules. The Respondent confirmed that he had no objection to Dr. McWilliam giving evidence. In all the circumstances, the tribunal decided that

it was fair to allow the Applicant to call upon Dr. McWilliam as a witness if he felt it necessary.

Breach of Section 2.1

The Applicant submitted that the Respondent had provided false and misleading information to him as a result of the escape of water on 18 August 2016 from 2 Market Street, Forfar, which is a property owned by the Respondent and which is directly above the property. The Applicant explained that he wrote a letter to the Respondent's Director, Mr. Bruce Forbes, on 20 August 2016 to bring to his attention the escape of water. He advised that he received no response from the Respondent until he wrote again to the Respondent on 27 September 2016. The Applicant submitted that he received a letter from Mr. McArthur dated 13 October 2016 which enclosed a copy of a letter dated 2 September 2016 which apparently had been sent by the Respondent to the Applicant. The Applicant confirmed that he had not received the letter of 2 September 2016. In short, the Applicant's issue was that he had come home to find his property flooded with hot and steaming water. However, in the aforementioned correspondence, Mr. McArthur had claimed that the water had emanated from a failed pipe leading to a cold water tap after a section of copper pipe had split. The Applicant submitted that this was false and misleading. The Applicant was of the opinion that the hot water leak had been caused by the recent works instructed by the Respondent to improve 2 Market Street by installing natural gas and installing a boiler in this property.

The Respondent replied that their out of hours contractor confirmed that it was a domestic hot water pipe located at a kitchen sink unit which had leaked. The water supply required to be closed off and the following day a plumber instructed by the Respondent had attended at 2 Market Street and repaired the leak. The Respondent advised that, if the leak had emanated from the newly installed heating system, the Respondent would have referred this matter back to Saltire, the firm which had installed the heating. The Respondent submitted that this demonstrated that the leak was nothing to do with the newly installed gas supply and heating system.

The Applicant submitted that the repairs required to be carried out to his property were paid for by insurance but that he had required to pay £250 excess on his policy and now, a year after the water ingress, he was still out of pocket. He confirmed that he had asked for a response from the Respondent by way of his letters to the Respondent in January and February 2017 but this had remained unanswered.

The Respondent submitted that the normal procedure would be for insurance companies to handle this. However, the Respondent did accept that the Respondent could have replied to the Applicant regarding this and also checked with their own insurer to see what progress had been made.

On being questioned by the tribunal, the Respondent accepted that the wording of the letter of 2 September 2016 was incorrect as it was a hot pipe which had leaked

and not a cold pipe. The Respondent accepted that this was factually inaccurate and apologised to the Applicant for this.

The tribunal noted that, although the terms of the letter could have given rise to a level of confusion and contained an inaccuracy in terms of it being a hot water pipe rather than a cold-water pipe having leaked, the letter itself was not false or misleading.

Given this, the tribunal finds that the Respondent did not breach Section 2.1 of the Code.

Section 7.1

The Applicant submitted that he accepted that the Respondent has a procedure for dealing with complaints. However, his submission was that the Respondent did not follow this procedure as the reply he received dated 16 March 2017 from the Respondent should have been received, at the latest, by 10 March 2017.

The Applicant did not agree with the terms of the response he received from the Respondent dated 16 March 2017. It did not address the substantive nature of his complaint. The Applicant submitted that he should have been consulted before the natural gas supply was provided to the building causing, in the Applicant's view, an unsightly pipe to be affixed to the common external wall of the building adjacent to the property. The Applicant did not accept that the provision of a gas supply was necessary nor did he accept the alternative legal argument that the pipe being affixed to the wall was de minimis.

In response, the Respondent accepted that the letter of 16 March 2017 was late and that there was no excuse for it. The Respondent helpfully accepted that 7.1 of the Code had been breached. However, when asked to comment on the tone of this letter and on its lack of substantive response, Mr. McArthur submitted that he did not wish to answer this question.

In light of the foregoing, the tribunal finds that there was a breach of Section 7.1 of the Code.

Failure to carry out the property factor's duties

The Applicant submitted that the Respondent had failed to notify, consult and seek agreement with him in relation to the provision of the gas supply to the property. The Applicant submitted that he had received no information from the Respondent regarding the upgrading works to be carried out to the development in which the property is located. The Applicant submitted that the provision of the gas supply was not a necessity as claimed by the Respondent but that it was an improvement and, as such, the Respondent required to consult with him prior to carrying out these kinds of works.

Furthermore, the Applicant submitted that the works for the provision of the gas supply had taken around six weeks to complete. The Applicant confirmed that, as a person who is registered blind, it made it very difficult for him to access and egress from his property safely.

The Applicant further submitted that he accepted that the gas supply pipe would remain in situ and that he did not wish it to be removed. However, this did not mean that he considered it to be de minimis. His view was that this was a mains gas supply pipe and therefore not minor work.

The Applicant considered that the gas pipe adversely affected the "kerb appeal" and sale-ability of his property due to the pipe's poor cosmetic appearance.

When asked by the tribunal about the potential benefits to his property, namely that a prospective buyer may like the idea of an available gas supply, the Applicant conceded that this was a view but not one with which he necessarily agreed.

The Applicant accepted that the Respondent had arranged to have gas supplied to the development as a result of the Scottish Housing Quality Standards ("SHQS") but submitted that there was other available electric heating which could have reached this standard.

The Respondent submitted that the gas pipework was de minimis as it did not impact on the structural nature of the common wall. He advised that legal advice had been obtained by the Respondent before these works had been carried out. The Respondent further stated that running a gas service to a building is not an extraordinary use of the building and therefore unanimous consent from all the owners was not required. The Respondent also submitted that various types of heating had been tried out by the Respondent in the five years before the installation and gas heating was considered to be the best option for the Respondent to ensure that its properties met the SHQS.

The tribunal questioned the Respondent about its submissions, in particular, that the Respondent was not the Applicant's property factor as the Applicant does not pay a management fee and is not part of a factoring agreement. The tribunal referred to Section 2 of the 2011 Act. The Respondent submitted that it could not comment in relation to that Section. The tribunal then referred to the Respondent's own documents, namely, Appendix 1 which is entitled "Factoring Services" and within which the Respondent refers to ".... a statement of the terms and service delivery standards of the factoring arrangement between Angus Housing Association Limited..... and Mr. Paul Kneebone. It is provided in accordance with the Property Factors Code of Conduct". The tribunal also referred to Appendix 2 as produced by the Respondent which was an invoice to the Applicant by the Respondent detailing works carried out to the property including "remove vegetation from chimneys and spray weed killer". The Respondent accepted that it was likely that the Respondent was, in all the circumstances, the Applicant's property factor despite the absence of a management fee.

The Applicant submitted that he only became aware of the gas installation works when another resident in the development told him. He was never notified by the Respondent of the impending works.

When questioned by the tribunal, the Respondent accepted that the Applicant should have been notified. The Respondent accepted that the Applicant should have been contacted by the Respondent in advance of the works being carried out. The Respondent accepted that, although the Respondent was subject to the SHQS in terms of its properties, the Applicant was not and what the Respondent considered to be a necessity in terms of the SHQS, the Applicant would not. The Respondent submitted that it was under pressure to achieve the standards in terms of the SHQS but accepted that these were not relevant to the Applicant.

The Respondent accepted that it should have notified the Applicant in advance of the works and should have consulted with him. The Respondent also accepted that it had not carried out a risk assessment in relation to the works and the impact they would have on the Applicant as a person of additional needs. The Respondent submitted that it thought that its contractor would carry out a risk assessment and that the Respondent would probably have told the contractor that the Applicant was registered blind in order for the contractor to carry out a risk assessment.

When questioned by the tribunal, the Respondent confirmed that it had a written procedure to follow to advise contractors of residents with additional needs.

The Applicant confirmed that the works impacted on his maneuverability.

The Applicant submitted that he felt that the Respondent had acted unreasonably in not notifying him and consulting with him regarding the works.

The Respondent confirmed that it was well aware that the Applicant was registered blind and that it was not there to upset people. Mr. McArthur apologised on behalf of the Respondent if it had failed in its duty as a property factor.

The Applicant also submitted that the Respondent had failed in its duty as a property factor as its letter of 16 March 2017 was sent late. However, the Applicant accepted that this had been considered and fully rehearsed in terms of the accepted breach of Section 7.1 of the Code as noted above.

The tribunal noted that in terms of Appendix 1 produced by the Respondent, under heading "Specific Projects/ Maintenance", the Respondent states that it ".....will contact all affected owners in advance with details of the work .....". The tribunal notes that the Respondent fully accepts that it did not contact the Applicant regarding these works in advance of the works being carried out.

In light of the foregoing, the tribunal finds that there was a failure by the Respondent to carry out the property factor's duties as the Respondent failed to notify the Applicant of the impending gas installation.

Observations

The tribunal noted that the Applicant sought to include the issue of the insurance policy excess, however, this was not a matter which the Applicant had properly included within the present application. The Applicant had not made reference to any section of the Code in relation to an alleged breach nor did he include this within the failure of the Respondent to carry out the property factors duties.
The tribunal was concerned about the conduct of the Respondent in this matter. Throughout the correspondence with the Applicant, the tone of the correspondence written by the Respondent was wholly unhelpful and did not properly address the issues raised by the Applicant. Furthermore, while the tribunal notes that the Respondent considered that it was under pressure to achieve the SHQS as regards its properties, the tribunal was extremely concerned that the Respondent knew that the Applicant was registered blind but did not contact him in advance of the gas installation nor did it carry out a risk assessment in relation to this. The Respondent appeared to the tribunal to run roughshod over the Applicant in order to achieve the SHQS at this development.

The tribunal is firmly of the opinion that, in all the circumstances of this case, the Respondent is the Applicant's property factor.

Finally, the tribunal notes that it is with regret that the Respondent at no time appears to have considered offering to meet with the Applicant to clarify matters.

Property Factor Enforcement Order

The tribunal proposes to make the following property factor enforcement order:-

Within 28 days of the date of communication to the Respondent of the property factor enforcement order, the Respondent must:-

1. Pay to the Applicant the sum of £300.
2. Provide documentary evidence to the tribunal of the Respondent's compliance with the above Property Factor Enforcement Order by sending such evidence to the office of the First-tier Tribunal (Housing and Property Chamber) by recorded delivery post.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the tribunal proposes to make a property factor enforcement order, they 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 them.

(3) If the 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 tribunal must make a property factor enforcement order."

The intimation of this decision to the parties should be taken as notice for the purposes of section 19(2) 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 First-tier Tribunal's office by no later than 14 days after the date that this decision 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.

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.

P Pryce

Legal Member and Chair

15 August 2017

..... Date