Housing and Property Chamber
First-tier Tribunal for Scotland

First-tier Tribunal for Scotland (Housing and Property Chamber) Property Factors (Scotland) Act 2011 ("the Act"), Section 19

The First-tier Tribunal for Scotland, Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017 ("the 2017 Regulations")

Chamber Ref: FTS/HPC/PF/17/0530

Property at Flat 3, 3 Fairyknowe Court, Bothwell, South Lanarkshire, G71 8SZ ("the Property")

The Parties: -
Dr Brian Lynas and Dr Annette Ferri, Flat 3, 3 Fairyknowe Court, Bothwell, South Lanarkshire, G71 8SZ, represented by James Carmichael, solicitor, James M. Carmichael and co, solicitors ("the homeowners")

James Gibb Property Management Ltd, trading as James Gibb Residential Factors, 65 Greendyke Street, Glasgow, G1 5PX ("the factor")

Tribunal Members: -

Simone Sweeney (Legal Member) Carolyn Hirst (Ordinary Member)

Decision of the Tribunal Chamber

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal") unanimously determined that the factor has failed to comply with section 2.5 of the Code of Conduct for Property Factors ("the Code") as required by section 14(5) of the Act but find no breach of section 2.1 of the Code.

Background

1. By application dated 19th December 2017, the homeowners applied to the Tribunal for a determination on whether the factor had failed to comply with sections 2.1 and 2.5 of the Code imposed by section 14 of the Act and to carry out the property factor duties in terms of section 17 of the Act.

2. The homeowners formally intimated their complaint to the factor, in compliance with section 17(3) of the Act by letters dated, 25th July 2017, 4th September 2017, 16th October 2017 and 15th November 2017. Copies of these letters (amongst others) were produced by the homeowners as part of an appendix to their application.

3. By decision dated 8th January 2018, a Convenor referred the application to the Tribunal for a hearing. Notices of referral were sent to the parties on 12th January 2018. A hearing was assigned for 1st March 2018 in Hamilton. Due to adverse weather this hearing was discharged. A fresh hearing was assigned for 4th May 2018 in Glasgow.

4. A hearing took place on 4th May 2018 at 10am within the Glasgow Tribunals centre, 3 Atlantic Quay, Glasgow. In attendance at the hearing were the homeowners and, on behalf of the factor, Ms Debbie Rummens, Operations manager and Ms Paula Murphy, senior property manager. Mr Carmichael, solicitor for the homeowners, was absent from the hearing due to a court commitment. The Tribunal enquired whether the homeowners were content to proceed in the absence of their solicitor or if they preferred to continue the hearing to a date on which their solicitor was present. Dr Ferri advised that although she would have preferred Mr Carmichael to have been in attendance she and her husband wanted to proceed.

Preliminary issue

5. The Tribunal referred to its direction of 21st February 2018 (which is referred to for its whole terms). The Tribunal chair explained that essential to this application is the meaning of ownership and whether Drs. Lynas and Ferri were "homeowners" at the date of the alleged breach by the property factor. It was a matter of agreement that the date of that breach was 3rd September 2015. Written submissions had been received from the homeowners' solicitor on 26th February 2018. No response had been received from the factor. Ms Rummens submitted that the factor had no comment to make in respect of the direction.

6. Dr Lynas submitted that, in his opinion, home ownership was established when missives were concluded on 2nd July 2015. This was not an issue in dispute between the parties. Dr Lynas submitted that the homeowners acquired title to bring a complaint against the factor on that date.

7. The homeowners accepted they did not receive keys, nor transfer funds for the property until 4th September 2015. The homeowners accepted that they were unable to live in the property on 2nd July 2015, neither could they sell the property on 2nd July 2015. The homeowners accepted that each of these things indicated ownership. The homeowners accepted that the contract on 2nd July was an agreement to purchase the property with a date of entry of 4th September 2015.

8. Further, the homeowners accepted that the services provided by the factor transferred from the former owners to themselves on 4th September 2015.

Alleged breach of section 2.1 of the Code

Evidence of the homeowners

9. Section 2.1 of the Code prohibits a factor from providing information which is misleading or false. It was the homeowners' position that the factor had breached this obligation in their letter of 3rd September 2015.

10. Dr Lynas submitted that, in 2015, he and his wife had purchased the property in the knowledge that no significant works were planned. Soon after they had moved into the house they were advised that works were to be carried out to the balconies at a cost of approximately £1,300 per owner. The complaint was that this information was known to the factor but withheld from the homeowners prior to them completing the purchase.

11. The property is a flat positioned within a modern development. All the properties have a balcony. Dr Lynas alleged that the factor had knowledge of significant structural problems with the balconies in the months leading up to conclusion of missives. The factor had undertaken temporary repairs to a number of balconies in the earlier part of 2015. So widespread was the problem that the factor had instructed a survey of all the balconies at the development in June 2015. Reference was made to a report from Mackie and co. dated 3rd June 2015 (appendix 19 of the homeowners' papers). Specifically, Dr Lynas referred the Tribunal to photographs of various balconies at the building. It was his evidence that the photographs showed knowledge on the part of the factor of significant problems with the balconies which would necessitate major structural works in the very near future. Dr Lynas submitted that the survey report was shared with him in October 2015.

12. Dr Lynas then referred the Tribunal to a letter from the factor to the vendors' solicitors, dated, 3rd September 2015. The letter states,

"Our records do not show any, extraordinary repairs anticipated under our instruction."

13. It was the evidence of Dr Lynas that this statement is crucial to the complaint for 2 reasons; Firstly, he and Dr Ferri had purchased the property based on the fact that no significant repairs were anticipated. Purchase of the property was completed on 4th September 2015. Dr Lynas submitted that the homeowners would have not continued with the purchase had they known that the balconies were to be repaired and that this information was withheld by the factor. Had it been shared, the homeowners would not have a bill of £1,300. The homeowners have withheld payment until their complaint is concluded. Secondly, Dr Lynas could not reconcile this statement with the information set out in the survey report of June 2015. It was the evidence of Dr Lynas that the factor knew of the extent of the problems with the balconies and that major works were required and, in fact, on-going already, in June 2015. To then state that no, *"extraordinary works were anticipated"* was a misrepresentation.

14. Reference was made by the Tribunal chair to a letter within the homeowners' bundle of papers dated, 30th August 2017. This was a letter from the factor to the homeowners in response to their complaint. It stated,

> *"On the 7th May, 2015 a letter was issued to Friels solicitors confirming issues with the balconies and that these were currently being investigated, therefore the sellers Solicitors and indeed the owners were well aware of the issues with the balconies at time of sale."*

15. The homeowners confirmed that purchase of the property had been handled between their solicitor and Friels solicitors, acting for the vendors. There was no contract between the homeowners and the factor. The homeowners were invited to comment on the knowledge of the vendors' solicitors of the issues with the balconies prior to their purchase of the property.

16. Dr Ferri explained that the letter of 7th May 2015 had been requested of the factor over many months but was never forthcoming. It was presented

to the Tribunal by Ms Rummens on behalf of the factor with an undertaking that a copy would be produced for the Tribunal thereafter.

17. Dr Ferri explained that Friels had received this information in May 2015 in the course of a separate conveyancing transaction. The purchase had fallen through. The property was re-marketed, at which point, the homeowners made an offer which was accepted.

18. The homeowners accepted that Friels solicitors knew that there were issues with the balconies.

19. The housing member enquired from the homeowners on which date the factor's responsibilities for the building transferred from the previous owners to the homeowners. Dr Lynas argued that the factor assumed a duty of care towards the homeowners by the terms of their letter of 3rd September. Their alleged misrepresentation made them liable to the homeowners in his opinion.

Evidence of the factor

20. In response, Ms Rummens explained that the factor acquired assets of Grant Wilson Property Management in May 2015. This included the property. It had taken about 6 months to get a full understanding of their business. The property manager for the property was Sharon Cosgrove. It was accepted that there had been repairs to some of the balconies. The repairs arose from a variety of reasons. Sharon Cosgrove instructed Mackie and co to survey the development. The report confirms a variety of reasons for the issues including the building structure. The building is over 10 years old and the NHBC certificate has expired.

21. In light of the surveyor's findings, the factor obtained quotes from different contractors over the following months. It was 2016 before this exercise was complete. There is no evidence of there ever having been any issue with the balcony at the homeowners' property.

22. Ms Rummens submitted that in the conduct of any conveyancing transaction, a factor represents the owner. The factor responds to questions posed by the solicitors. In relation to the terms of their letter of 3rd September 2015,Ms Rummens suggested that different wording could have been adopted. The current practice is for the factor to repeat the specific wording adopted by the solicitor requesting information in their response. The request from Friels was,

> *"Please confirm that there are no repairs of a major nature outstanding, instructed, or authorised but not yet paid for."*

23. Ms Rummens evidence was that, as at 3rd September 2015, the possibility of any major works was only the subject of an investigation. They did not become works in contemplation until August 2016. Ms Rummens disputed that the terms of the letter of 3rd September 2015 was misleading or false.

24. The Tribunal chair enquired why the factor had used the word, *"extraordinary"* in their letter. Ms Rummens could provide no explanation other than this may have been the practice of their predecessors, Grant Wilson.

Alleged breach of section 2.5 of the Code

Evidence of the homeowners

25. The homeowners alleged that the factor had not responded to enquiries and complaints within prompt timescales, had failed to deal with enquiries and complaints as quickly and fully as possible and had not kept the homeowners informed of any additional time required to enable them to respond. They referred the Tribunal to the dates and content of various letters produced in support of their application.

26. It was submitted that communication had been poor throughout. The homeowners referred to letters having been sent to the factor but no response or acknowledgement having been received.

27. In July 2017, the homeowners had submitted their complaint about the factor's knowledge of the state of the balconies in advance of the purchase. Reference was made to a letter from the homeowners to the factor on 4th September 2017 (appendix 7). The content of the letter related to the on-going complaint. There being no response the homeowners sent a further letter on 5th October 2017. The letter read,

> *"According to the complaints guidelines also outlined in your brochure, we should have received a response from your operations director within two weeks. It is now four weeks since you received our letter."*

28. The homeowners submitted that they had sent their letter by recorded delivery to ensure that it was received. By way of response, the factor issued an acknowledgement to the homeowners on 6th October 2017. It was not until 11th October 2017 that the homeowners received a full response to their letter of 4th September. It was the evidence of the homeowners that this length of time was unacceptable and was not in keeping with the terms of the factor's own complaints' procedure.

29. The homeowners submitted that they had lost confidence in the factor. Dr Lynas had attended the factor's offices in person to arrange payment of factoring charges as he had little faith in them arranging this over the telephone. Letters were sent to the factor by recorded delivery or hand delivered to their offices. Dr Ferri emphasised that the factor's personnel were always pleasant. However she had become increasingly frustrated by them making promises which they didn't keep. Dr Ferri submitted that the factor would claim to have written to her but no letter would materialise.

30. The homeowners gave an example of having visited the factor's offices in May 2016. At this time the homeowners were in dispute with the factor over their share of the costs of the works to the balconies. The purpose of the visit was for the homeowners to speak to a representative of the factor about this dispute. The homeowners met with managers, Sharon Cosgrove and Graham Stewart. Dr Ferri expressed her dissatisfaction that

neither manager saw fit to conduct the discussions in private. Rather, the discussion was conducted in the public reception of the factors' offices. During the course of the conversation, the homeowners requested various pieces of information from the factor. This information had been requested of the factor many times before but nothing had been forthcoming. The homeowners were due to go on holiday the following week. Sharon Cosgrove gave a commitment to the homeowners that this information would be with the homeowners, on their return. Nothing was received. Dr Ferri submitted that this example was indicative of the general approach of the factor.

31. Dr Lynas cited the factor's letter of 19th October 2017 as a further example of the factor's breach of section 2.5. The letter read,

> *"I write with reference to the above, and more specifically in response to your letter dated 16.10.17. Stage 5 of our Complaints Process is a review of the investigation and response carried out by our Operations Manager. Further to your letter, your original complaint will be re-opened. A final response will be issued within 7 business days."*

32. The homeowners claimed there was no response within seven days. The next contact was email of 13th November 2017 (Appendix 14). The email was from Business Improvement manager, Catherine Flanagan. It read,

> *"I have spoken with Debbie Rummens today who advises that she has reviewed your complaint and responded to you on the 19th of October. I can see that in the letter she advises that she would write again in 7 days, however Ms Rummens advises she had concluded her review and her final responses is contained within that letter. That means our Stage 5 complaints process has been exhausted."*

33. The homeowners submitted that this was not satisfactory. They had believed that further consideration would be given to their complaint. They felt let down by this response. Moreover the failure to respond within 7

days, as promised, was a further example of the factor's failure to communicate effectively.

34. Finally, the homeowners submitted that, at no time throughout the complaint, has the factor suggested a face to face meeting. The homeowners have never spoken with the same person twice to review what has gone wrong. Dr Ferri considered that a meeting, in person, with the relevant manager listening to the homeowners' concerns would have gone a good way to improving relations. Dr Ferri expressed the level of distress she had suffered from this experience. She felt that she had to see things to a conclusion before the Tribunal.

Evidence of the factors

35. In response to the allegation of a breach of section 2.5 of the Code, Ms Rummens submitted that the factor considered the letter of 25th July 2017 (Appendix 4) from the homeowners to be the first intimation of a formal complaint. The factor's written statement of services indicates that they will respond to a formal complaint within 4 weeks. Ms Rummens directed the Tribunal to the factor's letter of 30th August 2017 from Operations manager, David Smith (Appendix 6). This response was within 4 weeks. Ms Rummens was satisfied that this did not show evidence of a breach of section 2.5 by the factors.

36. With regards to the homeowners' letter of 4th September, the letter was addressed to manager, David Smith. At this date, David Smith was absent due to ill health. In error, the letter had been left on David Smith's desk. This was not identified until receipt of a chaser letter of 5th October from the homeowners (Appendix 8). The factor issued an acknowledgement (letter of 6th October at Appendix 9) and carried out investigations. Their findings and conclusions are set out in their letter of 11th October 2017. Ms Rummens accepted that there had been delay in the factor providing a full response to the homeowners. However, this was an exceptional set of circumstances and any delay was administrative oversight arising from the letter being left unattended.

37. In response to the homeowners' comments about the content of the factor's letter of 19th October 2017 and the failure to respond within 7 days, Ms Rummens acknowledged that she had given a commitment in that letter to, (i) re-open the complaint and (ii) respond within this timescale. Ms Rummens claimed that she had made this commitment with good intentions. Regrettably, at this time, her father was extremely ill. Ms Rummens was present at the office infrequently. In preparation of her email to the homeowners, Catharine Flanagan had called Ms Rummens for comment. Unfortunately Ms Rummens was with her family at a hospice at the time of the call. Ms Rummens told Ms Flanagan that she had no further comment to make about the complaint at that time.

38. In response to the suggestion that no meeting with the homeowners had been suggested, Ms Rummens claimed that no request for a meeting had been made of her. When requested, she is happy to meet with any customer.

Final submissions

39. With regards the allegation of a breach of the property factors' duties, the homeowners confirmed that there was nothing beyond that which they had already submitted to be considered by the Tribunal.

40. Finally, in terms of what could be done to resolve their complaint, the homeowners had made it clear that they did not feel that they should be liable for the share of the costs of the works to repair the balconies, a cost of £1,300. Within their application, the homeowners held the factor liable for their legal costs in relation to this dispute.

Findings in fact

41. That the homeowners are the heritable proprietors of the property having concluded missives to purchase Flat 3, 3 Fairyknowe Court, Bothwell, on 2nd July 2015 with the date of entry agreed as 4th September 2015, on which date the homeowners took possession of the property.

42. That the factor provided property management and factoring services to the development in which the property was located in 2015.

43. That the relationship between the factor and the homeowners commenced on 4th September 2015.

44. That the factor acquired the assets of Grant Wilson property managers in 2015 which included the property and all related information to the property and to the development in which the property was located.

45. That between May and June 2015 the factor was aware of a variety of issues with balconies at a number of properties at Fairyknowe Court, Bothwell.

46. That the factor confirmed their knowledge by letter of 30th August 2017 to the homeowners by stating the following,

"On the 7th May 2015 a letter was issued to Friels Solicitors confirming issues with the balconies and that these were currently being investigated, therefore the sellers Solicitors and indeed the owners were well aware of the issues with the balconies at time of sale."

47. That Ms Rummens gave evidence to the Tribunal that, in 2015, the factor was aware of a number of problems with the balconies at the development arising from a variety of different issues, that, in response, the factor instructed a full survey of the building in June 2015 and that the findings of that survey revealed a wide variety of reasons for the problems, some of which were connected to the original structure of the building.

48. That the vendors' solicitor, received a letter from the factor on 3rd September 2015 in which it was stated,

> *"Our records do not show any, extraordinary repairs anticipated under our instruction."*

49. That this is the statement which the homeowners allege to be a breach of section 2.1 of the Code of conduct.

50. That the homeowners took entry and ownership to the property on 4th September 2015 at which date they became homeowners in terms of the Act.

51. That the homeowners did not acquire title to bring a complaint against the factor until 4th September 2015.

52. That there is no breach of section 2.1 of the Code.

53. That a copy of the written statement of services forms Appendix 21 within the papers attached to the homeowners' application.

54. That sections 6 and 7 of the written statement of services set out the factor's procedures for dealing with communication arrangements and complaints.

55. That section 6.1 of the written statement of services provides,

"Good communications between the factor and homeowner are the key to a successful relationship."

56. That section 6.1 provides that for general enquiries, email is the best form of communication but should email not be suitable or available, homeowners can communicate by phone or letter.

57. That the homeowners gave evidence to the Tribunal that they had communicated with the factor by letter, email, telephone and personal attendance at their offices. That this evidence was not challenged by the factor.

58. That, for general requests, the factor will acknowledge receipt of a communication within 2 working days of receipt and agree timescales for resolution of queries with the homeowner.

59. That the factor's complaints procedure, as set out at section 7 of their written statement of services, takes up to 5 stages and investigation of the complaint should take no longer than 4 weeks.

60. That the factor considered a letter from the homeowners dated, 25th July 2017 to be formal intimation of the homeowners' complaint.

61. That the complaint was acknowledged by letter of 28th July 2017 and a full response was issued on 30th August 2017.

62. That the letter of 28th July 2017 stated that the factor would issue a formal response to the homeowners, *"within four weeks of today's date."*

63. That the formal response of 30th August 2017 exceeded the 4 week period by 5 days.

64. That no evidence was produced to the Tribunal which suggested that the factor had indicated to the homeowners that their response would exceed the timescales set out in their statement of services.

65. That the letter from the homeowners of 4th September 2017 was in response to the factor's letter of 30th August 2017 and the decision not to be uphold the complaint.

66. That this letter was not acknowledged until 6th October 2017 and not within 2 working days of receipt in terms of the factor's statement of services.

67. That the factor's acknowledgement was prompted by receipt of the homeowners' chaser letter of 5th October 2017.

68. That the delay was accepted by Ms Rummens, in evidence. This delay is a breach of section 2.5 of the Code.

69. That, in their letter of 19th October 2017, the factor gave the homeowners undertakings to re-open their original complaint and to issue a final response within 7 business days.

70. That the next communication to the homeowners from the factor was an email from Business Improvement manager, Catherine Flanagan, dated 13th November 2017.

71. That the email stated,

> *"I have spoken to Debbie Rummens today who advises that she has reviewed your complaint and responded to you on 19th of October. I can see that in the letter she advises that she would write again in 7 days, however Ms Rummens advises she had concluded her review and her final response is contained within that letter. That means our Stage 5 complaints process has been exhausted."*

72. That the factor did not respond to the homeowners in 7 days nor did they re-open the original complaint and that this was accepted by Ms Rummens, in evidence.

73. That this failure to respond within their own timescales is a breach of section 2.5 of the Code.

Reasons for decision

74. Having received and acknowledged the homeowners' complaint on 25th July 2017, the factor provided a written undertaking to issue a formal response within 4 weeks. They did not issue a response within this timescale. No evidence was produced to the Tribunal to show that they had advised the homeowners that their response would exceed the timescales in their statement of services. This provides evidence of a failure to keep the homeowners informed. The Tribunal is satisfied that this is a breach of section 2.5 of the Code.

75. The homeowners' letter of 4th September 2017 was not acknowledged until 6th October 2017. The Tribunal accepts Ms Rummens' explanation for this occurring. However, there is no reason why this commercial organisation should not have had a system in place to prevent mail being left, unanswered, for this length of time. The Tribunal is satisfied that this is a breach of section 2.5 of the Code.

76. The factor made a commitment to the homeowners on 19th October to re-open the complaint and to respond with their findings 7 days later. The factor did not meet this commitment. The factor did not contact the homeowners to explain why they were unable to do so. The content of the email of 13th November 2017 suggests that no further consideration was given to the complaint. If that is not the case, then the email is misleading. In any event no evidence was placed before the Tribunal to suggest otherwise. The Tribunal understands that this was a very difficult time for Ms Rummens, personally. The email of 13th November was communicated by another manager. No evidence was put before the Tribunal to suggest why the complaint could not have been passed to another member of

personnel at an earlier stage. This would have spared Ms Rummens from being contacted away from work. Ms Rummens accepted in evidence that this was a failure on the part of the factor. The Tribunal considers this to be evidence of a failure on the part of the factor to respond quickly and fully. It is a breach of section 2.5 of the Code, therefore.

77. The homeowner indicated that the factor should waive their share of costs in light of the alleged misleading information contained in the letter of 3rd September 2015. The homeowners also sought repayment of all legal costs incurred by them. Having found no breach of section 2.1 of the code, the Tribunal makes no requirement of the factor to do so. The Tribunal makes a finding of a breach of section 2.5 of the Code. The Tribunal is satisfied that the homeowners have become quite distressed by this experience. The level of frustration which she felt was obvious by how upset Dr Ferrri became at the hearing. The complaint was made in July 2017. The Tribunal heard the complaint in May 2018. In recognition of the time, inconvenience, distress and the expense of pursuing this matter, the Tribunal order the factor to pay to the homeowners the sum of £500 being £50 per month.

Decision

78. The Tribunal, having found the factor to be in breach of section 2.5 of the Code, propose a Property Factor Enforcement Order ("PFEO") to accompany this decision.

Appeals

79. 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 within 30 days of the date the decision was sent to them.

S Sweeney

Simone Sweeney, Legal member, 17th May 2018