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

Decision on homeowner's application: Property Factors (Scotland) Act 2011 Section 19(1) (a) incorporating proposed property factor enforcement order

Chamber Ref: FTS/HPC/PF/17/0423 and FTS/HPC/PF/17/0340

6c Glenford Place, Ayr, South Ayrshire, KA7 1LB ("the Property")

The Parties:-
Mr Alan Lush
6c Glenford Place, Ayr, KA7 1LB
("the Homeowner")

James Gibb Property Management Ltd
65 Greendyke Street, Glasgow, G1 5PX
("the Property Factor")

Tribunal Members:
Martin J. McAllister (Legal Member)
Andrew McFarlane (Ordinary Member)

DECISION

The Tribunal proposes to make a property factor enforcement order requiring the Property Factor to pay £225 compensation to the Homeowner within twenty one days of the property factor enforcement order being made.

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; the Carrick Quay Owners Association is referred to as "the Association" and the housing development at Carrick Quay at one time managed by the Property Factor is referred to as "the Development."

Background

By applications dated 31st August 2017 and 29th October 2017 the Homeowner intimated that he considered that the Property Factor had not complied with the Code and had not carried out the Property Factor's duties in terms of the 2011 Act. Such applications were in terms of Section 17 of the 2011 Act.

On 20th December 2017 parties were advised that the matter had been referred to members of the Tribunal for determination and that a Hearing to consider matters would be held on 30th January 2018. That Hearing was adjourned at the request of one of the parties and a further Hearing was adjourned as a result of adverse weather conditions.

The Application FTS/HPC/PF/17/0340 dated 31st August 2017 alleged that the Property Factor had failed to carry out the property factor's duties in relation to a failure to arrange inspections, pressure testing and servicing of dry riser inlets in the building in which the Property is situated. It also alleged that the property factor had breached item 6.4 of the Code in failing to prepare a programme of works. This Application also alleged that the Property Factor had breached items 7.1 and 7.2 of the Code in relation to complaints resolution. On 28th October 2017 the homeowner indicated that he was not pursuing the alleged breaches of Section 7 of the Code.

The Application FTS/HPC/PF/17/0423 dated 29th October 2017 alleged that the Property Factor had failed to carry out the Property Factor's duties in relation to a failure to arrange regular inspections of the emergency communal lighting system and that this is in breach of the Property Factor's written statement of services at item 4.1. It also alleged that the Property Factor had breached item 6.4 of the Code in failing to prepare a programme of works. It also stated the property factor had not complied with Section 1 of the Code in relation to the provision of a written statement of services and in relation to the contents of such a written statement of services.

During the course of the hearing the homeowner accepted that he had received a written statement of services and that he would not be proceeding with this aspect of the application. He said that it was rather that the written statement of services had not been complied with rather than it had not been provided or had not contained the appropriate information.

The Hearing.

The Homeowner was present at the Hearing which was held on 24th April 2018. Ms Debbie Rummins and Mr Nic Mayell of James Gibb Property were present. The homeowner was supported by two individuals who took no part in proceedings.

Preliminary Matters

The Property Factor accepted that, in the period it had been responsible for managing the Development, no inspections had been carried out in respect of the dry riser systems and also the emergency lighting system.

Matters not in Dispute between the parties.

The parties helpfully set out information on which they were agreed. The Property is part of a Development of 81 residential units in a number of blocks which had been constructed between 2007 and 2011 by McTaggart Construction. (the Development). The Homeowner had purchased his flat in 2012 and the Property is situated on the first floor. There are eight flats in the stairwell of Block 6 where the Property is situated.

Grant and Wilson managed the Development on behalf of the owners and James Gibb Property Management Ltd acquired the business of Grant and Wilson on 2nd March 2015. The existing Grant and Wilson staff transferred to James Gibb Property Management Ltd and the management of the Development was taken forward by the Property Factor. The proprietors decided to change the property factor and the decision was taken in December 2016 with Donald Ross, Ayr, the new property factor taking responsibility for management from 1st August 2017.

The blocks in the Development have a system of dry risers which are a means by which the fire fighting services can pump water to outlet points at the various floors of the blocks in the event of fire. These dry risers require to be tested on a regular basis. The blocks in the Development also have emergency lighting systems, to assist in the event of an emergency evacuation, which have batteries which have to be periodically replaced and the lighting system and batteries require to be tested on a regular basis.

Since James Gibb assumed responsibility for management of the Development no testing or certification of the dry riser systems or emergency lighting had been carried out.

On appointment the new property factor carried out an assessment and sought records of inspections of both the dry riser systems and also the emergency lighting systems. No records could be produced.

Issues

The homeowner's position was that the dry riser system and emergency lighting system should have been tested, maintained and repaired during the period that the Property Factor had responsibility for management of the Development and that he had incurred additional costs as a result of the Property Factor's failure because works had to be done to both the dry riser system and emergency lighting system in his block to bring them up to the appropriate standard. His position was that such costs would have been less had the systems been properly maintained by the Property Factor.

The Property Factor's position was that, whilst it accepted that they had failed to ensure that proper maintenance and certification of the systems during their period of management, the Homeowner had not incurred additional costs because he would

have been charged for testing and maintenance and repair of the systems between March 2015 and August 2017 and had been spared such costs because the Property Factor had failed to carry out the work in question. Its position was that, if the works had been done, the proprietors would have been charged for the works in their factoring accounts.

Written Representations of the Property Factor

The representations accompanied an email of the Property Factor dated 8th February 2018. The Property Factor submitted Productions on the same date.

The representations state that the members of the Association were closely involved with all decisions made throughout the Property Factor's management of the Development and that the culture was that the Association would raise action points for the Property Factor to respond to. The representations state that, at no time, was there a programme of works to show a planned programme of cyclical maintenance and inspections requested by the Association or provided by the Property Factor.

The representations state that, when it was brought to the attention of the Property Factor that the emergency lighting had not been inspected, it offered to have it inspected but that the new property factor considered it appropriate that they take the matter forward themselves. The same situation pertained to the dry riser inspections.

The representations state that the Property Factor does not accept the Homeowner's contention that they should be responsible for the cost of bulbs requiring to be replaced as this was a communal responsibility to be borne by the proprietors of block 6 who would have been responsible for the cost of contractor inspections and replacement bulbs from 2nd March 2015.

The representations set out the procedures the Property Factor has put in place to ensure that a similar omission in its duties does not occur in future.

Evidence

Ms Rummins and Mr Mayell stated at the outset of their evidence that they were horrified when it was discovered that the dry riser systems and emergency lighting systems had not been inspected and maintained during the Property Factor's responsibility for managing the Development. Ms Rummins said that, from the investigations she had made, the safety certification and maintenance of both the dry risers and emergency lighting had been carried out until 2013 when, for some unknown reason, the Development had " fallen out" of Grant and Wilson's system and, as a consequence, the issue had not been picked up in the due diligence it had carried out at the point James Gibb had acquired Grant and Wilson. Ms Rummins said that the need for inspections and maintenance had not been flagged up because of this. She said that there should also effectively have been a double check because Total Concept, the contractor involved, should have had the inspections on their system. Ms Rummins accepted that the Property Factor's staff should have been aware of the need for inspections and she accepted that the existence of dry riser and emergency lighting systems was known. She said that they

" were blatantly visible" and that members of staff should have been alerted to the need for appropriate inspections of both systems.

Ms Rummins said that there was regular contact between members of her staff and members of the Association and that members of staff attended quarterly meetings with members of the Association. Ms Rummins stated that works to the emergency lighting and dry riser systems were not charged for and did not appear in the invoices sent to proprietors. Mr Mayell said that the cost of testing a dry riser system was in the region of £180/£200 and that there are nine systems in the Development meaning that one inspection cycle would cost £1700/ £1800. The Homeowner said that the responsibility for payment of the costs for this work would be divided amongst seventy five owners because one block did not have a dry riser system. Mr Mayell said that the cost of testing of an emergency lighting system was somewhere between £80 and £100 for each stairwell. He said that the work was not done between 2013 and 2017 and that, had it been done, it would have been carried out annually.

The Property Factor referred to a letter from Mr David Smith, one of its employees dated 18th October 2017 which stated that emergency lighting system batteries require to be changed every five years. The Homeowner commented that, at the time the letter was written, his block was ten years old. Mr Lush said that, when the emergency lighting system was tested, 117 emergency lights failed the test. The Homeowner said that his life and those of the other proprietors had been put at risk. He said that, if there had been a fire, there was no certainty that there would have been the means to fight it.

The Homeowner referred to a letter which he had lodged from Swindon Electrical Contractors which was undated and was addressed to Donald Ross Estate Agents, the current property factors. Mr Lush said that this was a report on the condition of the emergency lighting system and set out the costs involved in bringing up to standard. He accepted that some of the costs related to an element of upgrading to an LED system. The letter states "It is our opinion that none of the emergency lighting systems are functioning at a satisfactory level to allow sufficient illumination in the event of mains power failure." The letter states that the cost of replacement with an LED control gear is £73 per unit and it sets out that the cost of replacing those for Block 6 is £876. Mr Lush said that he would be responsible for paying an eighth of this.
Mr Lush referred the tribunal to the Property Factor's written statement of services at 4.1 where it states "Statutory Inspections of lifts, emergency lighting, fire- fighting equipment etc. will be arranged, where applicable, by James Gibb residential factors in connection with the individual requirements." Ms Rummins said that the written statement of services was generic and that each Development also had a development schedule. She accepted that inspections of the emergency lighting and dry riser systems should have been on the schedule for the Development and that they were not.

Mr Mayell and Ms Rummins accepted that inspections had not been done but Ms Rummins said that the Association was so active in management issues that she would have hoped that it would have noticed that the works in question were not being done. Ms Rummins said that at no time did the Association ask the Property

Factor to set out a programme of maintenance for the Development. She re stated that the culture was that the owners took an active interest in management of the Development and raised matters with the Property Factor who then prepared a Report for consideration by the Association. She referred to Minutes of the Association's Committee which had been lodged by the Property Factor.

Submissions

The Homeowner's position was that the Property Factor failed in its duties to ensure that the fire fighting and emergency lighting systems were properly inspected and maintained and that it should have included such works in a programme of maintenance in terms of the Code. Mr Lush said that his life and others had been at risk and that the property factor's failure had also made him liable for costs which he would not otherwise have had.

The Property Factor was clear in stating that it had failed in the period from 2nd March 2015 to 1st August 2017 to carry out inspections and works in respect of the dry riser and emergency lighting systems. Its position was that the Homeowner had not incurred additional costs because during that period he had not required to pay for inspections or works to the dry riser and emergency lighting systems.

Discussion and Reasons

The issues for consideration by the tribunal were focused. The Property Factor accepted that it had not carried out the inspections of both emergency systems and this was not a matter which required to be determined by the tribunal. The Homeowner considered that he had been financially disadvantaged as a result of the Property Factor's failures. The tribunal had no issues of credibility to determine.

Section 6.4 of the Code states that "If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works." The Homeowner had led no evidence with regard to the Property Factor failing to prepare a programme of works but in the written statement of services the Property Factor states that it will carry out "Statutory Inspections" and, whilst Ms Rummins' evidence was that the Property Factor had not been asked to prepare a programme of works, the Code is clear that, if periodic property inspections are to be carried out, a programme of works should be prepared. Such a programme may have alerted the Property Factor to the fact that the inspections were not being carried out.

The tribunal determined that the Property Factor had failed to comply with Section 6.4 of the Code.

It was accepted by parties that the Property Factor had not carried out inspections and work to the dry riser and emergency lighting systems and the tribunal determined that this was a breach of the property factor's duties.

The tribunal considered whether or not it was appropriate to make a property factor enforcement order.

The Homeowner was clear in his position that he had sustained financial costs as a result of the failures of the Property Factor and that these are costs which he would not otherwise have had to bear. The tribunal noted the Property Factor's position that any costs the Homeowner was required to pay were offset by the savings in not having to pay for inspections of the dry riser and emergency lighting systems during the period they were managing Development. No clear evidence had been led in this regard but the tribunal considered that it was entitled to assume that the costs of dry riser inspections and emergency lighting systems which were not charged would be in the region of £700/£800 or so based on annual dry riser inspection costs of £180/£200 and annual emergency lighting inspection costs of £240/£300 taken over two/three years. The saving to the Homeowner may have been in the region of £100 or so. The tribunal also noted that the work to the emergency lighting system involved an element of upgrading. The tribunal determined that there may have been additional costs to be borne by the Homeowner but that these would be minor.

The tribunal accepted without hesitation the feeling with which the Homeowner stated that his life had been at risk and this was clearly a genuine and reasonable concern. The tribunal also disregarded completely the Property Factor's reference to its hope that the Association could have alerted it to the need to carry out the inspections. In fairness, the Property Factor did not press this point and the tribunal considered that such inspections in a development like Carrick Court were basic and ones which any competent Property Factor would realise required to be done.

The Homeowner had been put to worry and concern as a result of the Property Factor's failings. He may also have had additional costs but these were difficult to determine and minor. In all the circumstances the tribunal considered that it would be appropriate for it to propose that it make a property factor enforcement order requiring the Property Factor to pay compensation of £225 to the Homeowner.

Section 19 of the 2011 Act provides as follows:

"... (2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it 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 First-tier Tribunal is satisfied, after taking account of any representations make 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..."

Intimation of the tribunal's Decision and this notice of proposal to make a PFEO to the parties should be taken as notice for the purposes of section 19(2) (a) of the 2011 Act and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2) (b) of the Act reach the tribunal's office by no later than twenty one days after the date that the Decision and this notice 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 ("PFEO") 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.

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.

Martin J. McAllister, legal member

4th May 2018