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

Decision issued under s19(2) of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/17/0183

Flat 0/1, 802 Pollokshaws Road, Glasgow, G41 2AY ("The Property")

The Parties:-

Ms Lynn Forsyth, residing at Flat 0/1, 802 Pollokshaws Road, Glasgow, G41 2AY
("the applicant")

Macfie & Co, Management Sevices Ltd, a company incorporated under the Companies Acts and having a place of business at 5 Cathkinview Road, Glasgow G42 9EA
("The property factor")

The Tribunal, having made such enquiries as it saw fit for the purposes of determining whether the property factor has:

(a) complied with the property factor's duties created by Section 17 of the Property Factors (Scotland) Act 2011 ("the 2011 Act"); and

(b) complied with the code of conduct as required by Section 14 of the 2011 Act,

determined that the property factor has breached Sections 2.5 and 5.3 of the code of conduct for property factors, but has not failed to comply with the Property Factors Duties

Committee Members

Paul Doyle	Legal Member
David Hughes Hallet	Ordinary Member

Background

1 By application dated 8 May 2017, the applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination of her complaint that the property factor has breached the code of conduct imposed by Section 14 of the 2011 Act & that the property factor has failed to comply with the property factor's duties.

2 The application stated that the applicant considered that the respondent failed to comply with the Property Factor's Duties and failed to comply with Sections 2.5 and 5.3 of the code of conduct for property factors.

3 By interlocutor dated 29 June 2017, the application was referred to this tribunal. The First -tier Tribunal for Scotland (Housing and Property Chamber) served notice of referral on both parties, directing the parties to make any further written representations.

4 On 25 July 2017, the property factor sent a detailed response to the application and said that they would not attend the hearing, but relied on that written submission. The applicant responded on 27 July 2017.

5. A hearing was held at Wellington House, Glasgow on 13 September 2017. The applicant was present (but not represented). The respondent was neither present nor represented. After explaining the procedure to be followed to the applicant, tribunal members asked the applicant questions to enable her to give the detail of her application.

Findings in Fact

6 The tribunal finds the following facts to be established:

(a) The property is a ground floor flatted dwelling-house entering by a common passage and stair which contains six flatted dwelling-houses. The applicant purchased the property in May 2015. The applicant used solicitors for the purchase of the property. Before buying the property, the applicant was told by the seller of the property that there were outstanding repairs required to an area of damp on the common stair and basement and to the gutters of the larger building of which the applicant's property forms part ("the common repair"). The applicant contacted the property factor to ask for detail of the repairs by telephone. The property factor (correctly) told the applicant that, as she was not yet the owner, they could not disclose details to her. The applicant instructed solicitors to conclude the bargain and proceed with the purchase of the property.

(b) Before the applicant purchased the property, the property factor had obtained quotations from different contractors for the common repair works. The seller of the property paid the property factor funds to cover his share of the common repairs. Agreement was reached that the seller's funds would be held for six months from the date of entry, and then returned to the seller if the works had not commenced within that period. That agreement was written into the missives of sale entered into between the applicant and the seller.

(c) On 11 December 2015 the property factor wrote to the applicant telling the applicant that more than six months had passed since the date of entry, and that the funds provided by the seller had to be returned to him. The property factor reminded the applicant that she would be liable for the cost of the common repairs, and suggested that she contact her solicitor to discuss.

(d) There was a delay in starting the common repair works because not all of the proprietors of the larger property were willing to contribute to the cost of the works. The applicant and one of her neighbours were instrumental in involving Glasgow City Council to carry out the works and recover the costs. The work started in March 2016, and was finished by April 2016.

(e) On 2 September 2016, the property factor sent the applicant a quarterly common charges account for the period to 31st August 2016. That account included the applicant's one sixth share of the total cost of the common repair. The applicant has always paid her invoices promptly, but she did not receive that invoice from the property factor. The property factors contract with the applicant and her co-proprietors terminated on 30 November 2016. The property factor sent the applicant a final quarterly common charges account on 1 December 2016. That account related than the previous invoice, dated 2 September 2016, had not been paid.

(f) As part of the services offered, the property factor arranged block buildings insurance for the larger building of which the applicant's property forms part. In a sequence of emails throughout 2015 the applicant complained that premium paid for buildings insurance was far too high. The applicant believes the premium was four times the level of comparative insurance packages available. In 2016 the property factor arranged buildings insurance at a reduced rate.

(g) The property factor is regulated by the FSA as an insurance intermediary. They arranged insurance through an independent firm of brokers. The property factors received insurance commission in return for the insurance placed through their brokers.

(h) The property factors gave the applicant a written statement of services when she moved into the property. The final sentence in the section headed "*communal buildings insurance*" reads

> The level of insurance commission earned by Macfie & Co Management services can be confirmed upon request.

(i) In December 2015, there was an exchange of emails between the applicant and the property factor discussing the level of insurance premium and the liability for the cost of common repairs. The exchange of emails ended on 11 December 2015 when the applicant emailed the property factor complaining about their services. The email finished with the sentence

> I would be grateful for a response as soon as possible.

(j) The property factor has still not replied to that email. There was no further email correspondence between the applicant and the property factor until the start of 2017.

Reasons for decision

7 (a) Section 2.5 of the code of conduct says

> You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (section 1 refers).

(b) In the written statement of services, the property factor says that emails and letters will be responded to within seven days.

(c) The applicant produces a sequence of emails. Those emails fall into two parts. The first is a sequence of emails between September and December 2015. The second is a sequence of emails throughout 2017. The first section of emails ends with an email from the applicant to the property factor dated 11 December 2015. That email concludes with a request for a response. The applicant's unchallenged evidence is that she has still not received a response to the email 11 December 2015. The applicant's unchallenged evidence is that there was no email correspondence between the applicant and the property factor between 11 December 2015 and the start of 2017.

(d) The property factor, in the submission made on 25th of July 2017, disagrees and says

> Our responses are well documented within the submissions made by the applicant. It is quite a different matter that the responses were evidently not to the applicant's liking.

The property factor's position is that responses were made timeously but that the applicant was not told what she wanted to hear

(e) The property factor relies on the sequence of emails produced by the applicant. That sequence of emails grinds to a halt on 11 December 2015. The final email dated 11 December 2015 from the applicant to the property factor clearly expresses dissatisfaction and asks for a response. The applicant's unchallenged evidence is that she is still waiting for a response to that email.

(f) We found the applicant to be an impressive witness. She answered questions from tribunal members in a clear and straightforward manner. She conceded that her memory of every detail cannot be perfect. She gave balanced answers to questions from tribunal members. Both parties rely on exactly the same sequence of emails. There is no email replying to the applicant's email of 11 December 2015. The weight of reliable evidence indicates that the property factor did not respond to an email which specifically asks for a reply. The property factors written statement of services undertakes to respond within seven days. Section 2.5 of the code of conduct places an obligation on the property factor to respond to enquiries and complaints received by email within prompt times.

(g) The only conclusion that we can reach is that the property factor has breached section 2.5 of the code of conduct because the property factor did not respond to the email dated 11 December 2015.

(h) Section 5.3 of the code of conduct says

> You must disclose to homeowners, in writing, any commission, Administration fee, rebate or other payment or benefit received from the company providing insurance cover and any financial or other interesting you have with the insurance provider. You must also disclose any other charge you make for providing the insurance.

(i) The applicant says that the property factor has never disclosed the commission or other monetary payment received for providing insurance cover. We have copies of various quarterly common charge accounts sent to the applicant. Those accounts do not contain any details of monies received by the property factor. In the submission dated 25 July 2017 the property factor effectively relies on the written statement of services and says that the applicant did not ask about the level of insurance commission, or other payment, received by the property factor.

(j) The written statement of services says

> The level of insurance commission..... can be confirmed upon request.

(k) There is a conflict between what is said in the written statement of services and the requirements of section 5.3 of the code of conduct. Section 5.3 of the code of conduct is written in mandatory terms. It starts with the words

> You must disclose to homeowners....

Section 5.3 is not qualified. It does not say that only if asked the property factor must disclose. It says the property factor must disclose. The mandatory language used in section 5.3 indicates that the property factor cannot wait to be asked for information about insurance commission, but is obliged to freely disclose that information.

(l) It is common ground that detail of insurance commission has not been disclosed. The property factor therefore breaches section 5.3. The property factor will have to revisit the written statement of services to correct the conflict between the written statement of services and the code of conduct.

(m) The applicant argues that the same facts and circumstances which lead the property factor to a breach of the code of conduct indicate that the property factor breaches the property factors duties. The real thrust of the applicant's suggestion that the property factor's duties are breached focuses on the manner in which the common repairs were organised, the length of time the repairs took, and the applicant's belief that the property factor

concealed the invoice for the common repairs and only sought payment when the property factor's contract with the homeowners was terminated.

(n) The question of liability for the cost of the common repairs does not fall within the property factors duties. The question of liability for the cost of common repairs is a matter of contract. In this case, liability is governed by the missives of the sale of the property. On the applicant's own evidence, the missives provided that the seller's liability for the cost would end if the works had not commenced within six months of the date of entry. The weight of reliable evidence indicates that the seller's liability had ended by December 2015. Since that date, the liability for the costs of the common repairs has been the applicant's alone. The applicant's dissatisfaction with the property factor does not create a liability on the property factor for the cost of the common repairs.

(o) There is also an element of misunderstanding which has crept into this case. The property factor emailed the applicant on 11 December 2015 saying

> .... The previous owner's solicitors have been in contact requesting the pre-funding of the works be returned. We have been advised that the 6 month timescale which was given has now expired and as such the sum of £1160 is now payable by you...

The applicant knew about the common repairs when she purchased the property. The applicant was reminded by the property factor on 11 December 2015 that liability for the costs of the common repair was now hers.

(p) The applicant thinks that the property factor has acted in a devious way and only asked for a share of the common repair in the final invoice sent in December 2016. The evidence placed before us indicates that the work started at the start of March 2016 and was finished by April 2016. On 2 September 2016, the property factor sent a quarterly common charge account which included a 1/6 share of the common repair costs, dated 18 April 2016.

(q) The weight of reliable evidence indicates that the property factor promptly accounted for the cost of common repairs and, in the next quarterly common charges account, sought payment from the applicant. We accept the applicant's evidence that she did not receive the quarterly common charges account, but the weight of evidence indicates that the account was sent to the applicant. The fact that the applicant did not receive it is neither the fault of the property factor nor the applicant. The property factor realistically addressed the outstanding payment by including it in the next quarterly common charge, which was the last account to be raised. The final account refers to a previous balance and indicates that the quarterly common charge account, dated 2 September 2016, had not been. It had not been paid only because it had not been received

(r) On the facts as we find them to be the respondent has not breached the property factors duties, but has breached sections 2.5 and section 5.3 of the code of conduct.

Decision

8. The tribunal therefore intend to make the following property factor enforcement order (PFEO)

> *"Within 28 days of the date of service on the respondent of this property factor enforcement order the respondent must*
>
> > *"1. Amend their statement of services in relation to comply with section 5.3 of the code of conduct by indicating that written disclosure of any commission, administration fee, rebate or other payment or benefit received for providing insurance cover will promptly be disclosed to home owners in writing.*
> >
> > *"2. Intimate a copy of the amended written statement of services to the applicant.*
> >
> > *"3. Provide the applicant with details of all commissions, fees, rebates, payments and benefits received for providing buildings insurance cover between May 2015 and December 2016."*

9. Section 19 of the 2011 Act contains the following:

> (2) In any case where the committee 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 committee are 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 committee must make a property factor enforcement order.
>
> (4) Subject to section 22, no matter adjudicated on by the homeowner housing committee may be adjudicated on by another court or tribunal.

10. The intimation of the tribunal's decision and this proposed PFEO to the parties should be taken as notice for the purposes of s. 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 s.19 (2)(b) of the 2011 Act reach the First-Tier Tribunal for Scotland (Housing and Property Chamber) office not later than 14 days after the date that the Decision and this proposed PFEO is intimated to them. If no representations are received within that 14 day period, then the tribunal is likely to proceed to make a

property factor enforcement order without seeking further representations form the parties.

Appeals

11. 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 Doyle

Signed 15 September 2017
Legal Member