Housing and Property Chamber
First-tier Tribunal for Scotland

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

Property Factors (Scotland) Act 2011

Decision under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

Chamber Ref: FTS/HPC/PF/17/0157

23 Dempsey Court, Queens Lane North, Aberdeen, AB15 4DY ("The Property")

The Parties:-

Miss Emily Cheyne residing at 23 Dempsey Court, Queens Lane North, Aberdeen, AB15 4DY (represented by Mr Ritchie McPherson) ("the Applicant")

James Gibb Property Management Limited, 32 Charlotte Square, Edinburgh, EH2 4ET (represented by Ms Morgan Cooper of James Gibb Property Management Limited) ("the Respondent")

Tribunal Members:
Mr E K Miller (Legal Member)
Mr M Scott (Ordinary Member)

The Tribunal determined that the Respondent had breached their property factors duties owed to the Applicant in that they had failed to properly allocate funds belonging to the Applicant within the sinking fund for the larger development of which the Property formed part against the cost of the repairs. The Tribunal noted that as at the date of this decision the funds had now been re-allocated correctly and accordingly the Tribunal determined that no further action was required. There was no breach of Section 2 of the Code of Conduct for Property Factors ("the Code")

The decision was unanimous.

Background

1. By an application 18 April 2017 the Applicant had made an application to the First Tier Tribunal for Scotland (Housing & Property Chamber) ("the Tribunal") alleging a failure on the part of the Respondent to comply with their duties under the Property Factors duties as contained in the Property Factors (Scotland) 2011 ("the Act").

2. On 9 May 2017, the President of the Tribunal referred the application to the Tribunal for determination.

3. On 27 July 2017, a hearing took place before the Tribunal where both parties presented extensive submissions on (a) the question of the apportionment of a sinking fund relating to the Property and the larger Dempsey Court development ("the Development") and (b) the

timing of the instruction of certain works by the Respondents and whether these had been properly authorised.

It transpired at the hearing on 27 July 2017 that it was not possible from the information available to the Tribunal on the day to ascertain whether or not the transfer of the sinking fund, its apportionment to various former and current residents and its subsequent management by the Respondent had been carried out in the correct manner or not.

The hearing was adjourned and a direction subsequently issued to the parties with a note of the information the Tribunal felt it required to reach a determination. A copy of that direction is annexed to this Decision for information.

In due course the information required by the direction was produced and a further hearing date was set of 11 January 2018. The Tribunal reconvened at that date before the same members of the Tribunal. Mr Ritchie McPherson, one of the owners of the Property, represented the Applicant. The Respondents were again represented by Ms Morgan Cooper, the Operations Director of their Aberdeen office.

The Respondents had, as requested, provided a full, financial spreadsheet of all transactions on the relevant sinking fund relating to the Property and the Development from 1 January 2013 to date. This additional information greatly assisted the Tribunal and brought significant clarity to the issues to be determined.

From what had seemed to the Tribunal to originally be a morass of financial information the Tribunal was then able to quickly identify the relevant information, which in turn turned what had initially appeared to be a difficult decision into a relatively simple point to determine. The Tribunal was grateful to the Respondents for complying with the terms of the direction and producing the information in a more understandable format.

4. In essence there were two issues before the Tribunal. Firstly, the question of how the apportionment of the sinking fund monies amongst the current proprietors within the Development had been carried out. Secondly, whether the Respondent had obtained appropriate authorisation from the owners within the Development for repair works to be carried out prior to them instructing them on behalf of the proprietors.

Dealing with each of these two issues in turn:-

Sinking fund apportionment

By way of background, the Development had originally been factored by a company known as Bruce & Partners. Bruce & Partners had run the general factoring account and the sinking fund account for the Development.

In 2014 Bruce & Company had been bought by the Respondent. Upon acquisition of the business of Bruce & Partners the Respondent began to familiarise themselves with the accounts and the developments that they had taken over the management of.

In the Respondents submission, it quickly became apparent that the accounts that they had inherited had not been run particularly well. Various proprietors within the Development were in debit, some were in credit, some had not been correctly allocated and handed over at points when ownership of various properties had changed, and amounts had been transferred between the sinking fund and the general factoring account at various points to juggle funds. In summary the accounts were a bit of a mess.

In due course more significant repairs were required to the communal parts of the Development and it became apparent that the sinking fund would require to be utilised to assist in the meeting the cost of these works. It was apparent that the funds in the sinking fund account were insufficient to meet the cost of the upcoming repairs and, therefore, the current proprietors within the Development would require to make further contributions to

ensure sufficient funds were available. It was not disputed by either party that there was a shortfall in the sinking fund compared to the actual cost of the repairs.

The Respondent, in their submission, wished to be fair to all the current residents and took the view that the fairest approach in dealing with the monies in the sinking fund was to take the amount at credit that each current owner had contributed and offset that amount against each current owners share of the repairs costs. In relation to the funds that had been paid by previous proprietors, the Factor decided to credit this for the benefit of all current proprietors rather than looking at it on a property by property basis.

The Applicant's submission was that the process carried out by the Respondents lacked clarity and had not been done correctly. A considerable proportion of the Applicant's dissatisfaction with the Respondent was with the difficulties they had encountered in obtaining information as to how historical funds that they and previous owners of the Property had made and whether they had been fully credited to them. In their submission any funds at credit in the sinking fund account paid by them and the previous owners of their property should be credited to their share of the repairs bill. They objected to the "averaging" method of allocation that the Respondent had employed in relation to the historic funds.

The principal question before the Tribunal was whether the averaging method employed by the Respondents to the historic funds was correct or whether there should have been an individual allocation against each property within the Development of all credits or debits individual properties by current and previous proprietors.

The Tribunal considered the point. The Tribunal accepted that it was clear from the information before it that the previous factors had been relatively careless in their management of the Development and the sinking fund in particular. It was apparent that inconsistencies had arisen within the collection of funds and that various owners had differing balances at credit or debit of the fund.

The Tribunal accepted that the previous factors had run the accounts poorly and that the Respondents had inherited a situation that was not of their own making. The Tribunal accepted that the accounts were "a bit of a guddle" and that the Respondents had, with the best of intentions, attempted to resolve issues in what they perceived to be a fair and balanced manner. However, the Tribunal was of the view that the Respondents had failed to appreciate the basis on which individual funds within a sinking fund account were held. The averaging method of the historic funds held in the fund and the subsequent crediting of these historic funds to all current proprietors (as opposed to the historic funds being allocated from each historic owner through to the current owner on a property by property basis) was incorrect.

In an ideal world a sinking fund will have all contributions paid by all owners and be up to date at all times. It is, however, inevitable that some homeowners in a development will be behind in payment and there will be occasional amounts of bad debt. There will be differing sums due to the sinking fund account at various points.

When ownership of a property within a development that has a sinking fund, changes hands, the funds allocated from the previous owner should transfer to the new owner. If there is a debit for an individual property at a point of transfer it is normal for that debit to be recovered at the point of transfer to bring matters up to date. In essence, therefore, amounts within a sinking fund do not run with the individual owners but rather they run with the individual properties within a development. When works come to be carried out it is the current proprietors that benefit or suffer from the credit or debit that exists in relation to that specific property at that point in time.

The Respondents Written Statement of Services effectively confirms that the correct manner to run a sinking fund is for it to run with the property. 5.4.6 of the Written Statement of Services states "if a homeowner sells the property, the amount paid into that sinking fund is not returned. It should, however, be detailed as an asset in the sale of the property".

Similarly Clause Fourteenth of the Deed of Conditions applicable to the Development acknowledges that the fund is connected to the property rather than the individuals in that it requires any shortfall to be made up every time a property is sold in order that the new owner benefits from the full historical balance. This linking of the funds to the property is reflected in general conveyancing practice as well. Solicitors, when acquiring factored property for clients, only check that the factoring/sinking fund fees are up to date for that specific property as that is what the new owner expects to benefit from. Were the averaging method employed by the Respondent to be a standard practice then solicitors would need to check that the whole fund was up to date.

In the case of the Property, it was apparent from the spreadsheet produced by the Respondents that the previous proprietor had been up to date in their payments to the sinking fund. When the Applicant became the owner she too had also made regular payments. Accordingly the Property (via both current and historic owners) had made a full contribution to the sinking fund. The Respondents, by then averaging the balance of historic funds across all proprietors, effectively created a greater shortfall against the proposed works for the Applicant than would have been the case had the full credit been allocated to her share of the maintenance bills.

To set out the relevant numbers, the previous owners of the Property had created a credit of £1,120.95 in the sinking fund. This had been added to by the Applicant since taking ownership by an additional credit of £274.47. This gave a total credit of £1,395.42 attributable to the Property which should have been offset against the proposed works which had an estimated expense of £1,780.08. This should have left the Applicant requiring to contribute £384.66 to the repairs. However, the Applicant had suffered by the averaging methodology employed by the Respondent to the sum of £257.66. The Applicant had been invoiced £642.32 instead of £384.66. The £257.66 had effectively been taken from their account and applied to shortfalls in relation to other properties.

The Respondents had, at the reconvened hearing, indicated that if the Tribunal took the view that their averaging methodology was wrong and that the individual account should have been fully credited then they would rectify matters to the extent of the sum of £257.66 (being the amount of variance created by the two differing methodologies).

The Tribunal had adjourned the reconvened hearing briefly to discuss between the members the methodology that had been used and had indicated to the parties during the course of the hearing that they viewed the factor's methodology of averaging as incorrect. Following the hearing the Respondents confirmed to the Tribunal that they had carried out an adjustment to the Applicant's account and had applied the full historical credit rather than applying their averaging methodology. As a result the shortfall between their credit in the sinking fund and the proposed cost of the works had reduced from £642.32 to £384.66 as set out above.

The Tribunal considered matters. As highlighted above, the Tribunal had some sympathy for the Respondents. It was clear that they had inherited a mess and it was a difficult situation to try and resolve. The Tribunal accepted that the Respondents had applied what they thought was a fair methodology. However the Tribunal was satisfied that individual accounts had been incorrectly applied and that the averaging methodology used was not correct. The Tribunal accepted that this may cause some difficulty for other residents, some of whom may find they are entitled to a greater credit and some may find they have a higher debit towards the overall shortfall. However, the Tribunal was satisfied that it was appropriate to allocate the historical balances relating to each individual property to the current owners of that individual property. In this particular case the necessary adjustments had already been made by the date of this decision and the Applicant's account now correctly reflected the historical credit relating to the Property. The Tribunal considered what the breach here was (in terms of a classification between the Code of Conduct and property factor's general duties). Although the overarching obligation of Part 3 of the Code was financial transparency and fairness, none of the individual sections of the Code were applicable to the situation at hand. Rather, the Tribunal felt what had occurred was a breach of property factors duties as contained in s17 of the Act, in that the Respondent had not complied with the terms of their Written Statement of Services and the underlying burdens in the titles regarding the sinking fund.

Authorisation for works

At the initial hearing the Applicant had submitted that the proper authorisation process had not been gone through for works carried out by the Respondent. They alleged that at the 2016 AGM for the Development the minutes that were subsequently issued did not properly reflect the discussion that had taken place. It was also alleged that works authorised at that AGM had already been instructed prior to the appropriate authorisations being obtained at the AGM.

At the hearing it proved difficult for the Tribunal to ascertain whose version of events was correct in relation to the AGM. In order to assist in resolving the position, the Tribunal had issued an additional direction requiring the Factor to produce work instructions to the contractor in order that it could be ascertained when these had been instructed. This was duly done by the Respondents and copies of two work instructions to A&G Roofing and MN Hamilton & Sons by J&E Shepherd (the chartered surveyors acting for the Respondents) were produced. These were dated 23 September 2016 and clearly postdated the AGM.

Mr McPherson, at the reconvened hearing, confirmed that the question of the authorisations was a secondary point and the Applicants main concern had been around the allocation of the sinking fund monies. Given the dates provided on the works orders provided by the Respondents, the Tribunal was of the view that this matter had now been clarified and no breach of Section 2 of the Code had occurred. It appeared that the contractors had not been instructed until the appropriate authorisations had been obtained. The Tribunal was unable to determine whether the minutes of the 2016 AGM were accurate but in any event neither party seemed to be particularly concerned with this aspect of the complaint any longer and accordingly the Tribunal was satisfied to determine that there had been no breach by the Respondents.

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 and Chair

13/3/18 Date