Decision of the of the First-tier Tribunal for Scotland Housing and Property Chamber
In an Application under section 17 of the Property Factors (Scotland) Act 2011

By

David Byfield, 1 Westfarm Wynd, Cambuslang, South Lanarkshire G72 7RP ("the Applicant")

South Lanarkshire Council, Council Offices, Almada Street, Hamilton ML3 0AA ("the Respondent")

Chamber Ref: FTS/HPC/PF/17/0380

Re: 2/2, 1 Richmond Place, Rutherglen, South Lanarkshire G73 3BA ("the Property")

Tribunal Members:

John McHugh (Chairman) and Carol Jones (Ordinary (Surveyor) Member)

DECISION

The Respondent has not failed to comply with its duties under section 14 of the 2011 Act.

The Respondent has failed in its Property Factor's duties.

The decision is unanimous.

We make the following findings in fact:

1 The Applicant is the owner of a flat at 2/2, 1 Richmond Place, Rutherglen, South Lanarkshire G73 3BA ("the Property").

2 The Property is located within a block of six flats in a former local authority block ("the Block").

3 The Property is on the top floor.

4 The Respondent owns two flats in the Block.

5 The Respondent is the factor of the Block.

6 A Deed of Declaration of Conditions by City of Glasgow District Council recorded 3 July 1990 ("the Deed of Conditions") governs the arrangements which apply among the Respondent and homeowners within the Block including the Applicant.

7 The Deed of Conditions provides for the management of the common parts of the Block to be carried out by a factor and for costs to be allocated among the owners of the individual flats.

8 The Applicant received from the Respondent an invoice dated 24 May 2017 in respect of a share of repairs totalling in excess of £2000.

9 The Applicant received a demand for payment from Stirling Park Debt Collection Services dated 25 July 2017

10 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a Property Factor (17 December 2012).

11 The Applicant has, by his correspondence, including that of 18 October 2017, notified the Respondent of the reasons as to why he considers the Respondent has failed to carry out its obligations to comply with its property factors duties and its duties under section 14 of the 2011 Act.

12 The Respondent has failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at Wellington House, Glasgow on 12 February 2018.

The Applicant was present at the hearing.

The Respondent was represented at the hearing by its Factoring Manager, David Keane and its Building Services Co-ordinator, Jerry Fawbert.

Neither party called additional witnesses.

Introduction

In this decision we refer 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 (Procedure) Regulations 2017 as "the 2017 Regulations".

The Respondent became a Registered Property Factor on 17 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Tribunal had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent.

The documents before us included a Deed of Declaration of Conditions by City of Glasgow District Council recorded 3 July 1990 which we refer to as "the Deed of Conditions" and the Respondent's undated Statement of Services which we refer to as the "Written Statement of Services".

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of a breach of property factor's duties by reference to the duties contained in the Deed of Conditions and the Statement of Services.

The Deed of Conditions contains the following wording:

"*The Factor shall have full power and authority to instruct and have executed from time to time such works as he in his judgment shall consider necessary or desirable for the repair, maintenance or renewal of the Common Parts or any part thereof, provided always that in the case of a major work (being a work the cost of which is estimated by the Factor to exceed Two Thousand Pounds or such greater amount as may from time to time be fixed by a meeting of the proprietors of all dwellinghouses in the Property) the Factor shall, before instructing same, report the matter to such proprietors and such work shall be undertaken only if it is authorised by a majority of such proprietors. The decision of a majority of such proprietors on such a matter shall be binding upon all of the proprietors. Notwithstanding the foregoing provisions in relation to major work the Factor shall be entitled forthwith to instruct and have executed such work as he considers necessary for the interim protection or safety of the Property or any part thereof or any person, pending the decision of said proprietors.*"

The Written Statement of Services states that the Respondents will:

"undertake annual common-area inspections"

The Code

The Applicant complains of a failure to comply with Sections 1.1a A.a. and 1.1a A.b; 2.4 and 6.2 of the Code.

They provide:

"1.1a For situations where the land is owned by the group of homeowners
The written statement should set out:
A. Authority to Act
a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group;
b. where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation;...

... 2.4 You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies)...

... 6.2 If emergency arrangements are part of the service provided to homeowners, you must have in place procedures for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for giving contractors access to properties in order to carry out emergency repairs5, wherever possible."

The Matters in Dispute

Background

The factual matters complained of relate to the Respondent having carried out repairs to the common drains and having imposed charges upon the Applicant in respect of these works.

The Applicant received an invoice from the Respondent dated 24 May 2017 for digging up and repairing the common drains. The repair cost was a total sum of £2529.36, with the Applicant's share being £421.56.

The Applicant was immediately concerned that the works exceeded the £2000 authority contained in the Deed of Conditions and that there had been no

consultation with him before carrying out the works. There was no indication of urgency in relation to the works. He wrote to the Respondent on 1 June 2017 to express his concerns.

He also complained regarding the failure of the Written Statement of Services to detail the basis of the Respondent's authority as factor.

He complained that the Written Statement of Services was vague and did not contain clear procedures for emergency works.

He requested a copy of the last maintenance report as per the Written Statement of Services.

On 7 June 2017 Mr Keane wrote a letter of explanation and apology and offered a credit towards the invoice equivalent to bringing the total works cost down to a figure of less than £2000.

The Applicant remained unhappy. His complaint was escalated with a response from the Respondent's Head of Property Services being issued on 31 July 2017.

While the complaint was in the course of being investigated and addressed by the Respondent, the Applicant received a demand for payment from Stirling Park Debt Collection Services dated 25 July 2017.

The Applicant complains in relation to five matters: the absence of consultation regarding major works; the absence of evidence of annual inspections having been carried out; the absence of emergency procedures; and the issuing of the demand by Stirling Park and the failure of the Written Statement of Services to contain necessary information.

The Absence of Consultation regarding Major Works

The Respondent explains that there had been a history of complaints from one of the ground floor occupants in the block of blocked drains. A number of attendances had been made but the problem had quickly recurred. The matter was not at that time being treated as an urgent repair.

The Respondent identified that there was a more serious problem. A CCTV survey was carried out on 23 January 2017 and that revealed that a section of drain had collapsed. The Respondent arranged for the pipe to be dug up. It expected that

only a short section would require to be excavated. When work began it transpired that there had been a collapse of a significant length of the drain. The Respondent was of the view that, having commenced the works, it was appropriate that they be finished as soon as possible. There was sewage spilling into the ground flat. The situation had become more pressing. The collapsed drain would have to be fixed and no consultation of owners was possible at the time. There could, in any event, have been little argument from owners as to whether the works were necessary.

The Respondent acknowledged that there had been a failing on its part when compared to its normal procedures. These are to send out a notification letter when works of less than the specified value are intended and to send a consultation letter when (non-urgent) works in excess of the specified value are considered necessary.

In this case the repair had been expected to be of less than £2000 so a notification letter should have been sent. Because of a systems failure, no letter had been sent. The expectation had been that the repair would involve a sum of less than £2000. It was only when work had commenced that the true magnitude of the problem, and the cost to fix it, transpired.

The Deed of Conditions appears to allow works in excess of the £2000 limit in the current circumstances. However, the Deed of Conditions still envisages some consultation process (although it would probably have made no practical difference in this case). The Respondent accepts that it did not follow the consultation procedures but advises it has made changes to its working practices to avoid repetition of the situation which arose.

We find there to have been a breach of property factor's duties. We find no breach of the Code.

The Absence of Evidence of Annual Inspections

The Respondent explained at the hearing that its inspection regime falls into three categories. The first is the reactive report. This is where a need for repair comes to its attention (either because of a report by its staff or by a third party) and is dealt with. The second is the five yearly property condition survey carried out by a surveyor and designed to identify issues requiring current and future planned maintenance. The third is the inspection which is carried out at least twice a year by the local Housing Officer. That inspection is designed to identify any health and safety issues.

At the hearing the Respondent presented a copy of the most recent report of an inspection of the Block. This was in the form of a table which detailed a number of

other properties as well as the Block. The only problem noted in relation to the Block was dog fouling.

The Respondent explained that there had been reluctance to share this report before now for fear that it might reveal the details of other unrelated persons or properties. We consider that that concern could however have been dealt with in other ways such as by redaction of irrelevant details.

The Applicant had expected from the wording of the Written Statement of Services that the Respondent had a more detailed annual report carried out by someone qualified in assessing building condition such as a surveyor. That expectation was, perhaps, understandable although the inspection carried out appears to be adequate to meet the obligation specified in the Written Statement of Services.

In the circumstances, we consider that the Respondent has demonstrated that it does carry out an annual inspection of the Block and we identify no breach of property factor's duties or the Code. However we observe that the Written Statement of Services is not clear in relation to the nature and extent of these inspections and would recommend this aspect should be improved at the next opportunity for revision.

The Absence of Emergency Procedures

At the hearing the Applicant confirmed that he is not insisting upon this head of complaint.

The Demand by Stirling Park

There is no dispute that the Applicant received a demand for payment from Stirling Park Debt Collection Services dated 25 July 2017 at a time when his complaint was still being dealt with by the Respondent.

The Applicant advised that the demand letter had caused him distress.

The Respondent acknowledged at the hearing that there had been an error in its internal processes. Debts pass automatically to Stirling Park for collection unless they are put on hold by the Respondent. The Respondent had, in error, failed to put this particular matter on hold. The Respondent's representatives tendered their apologies to the Applicant for any distress caused.

Although the Respondent has clearly made a mistake in this instance and apologised for that mistake, we do not consider there to have been any identified breach of property factor's duties nor of the sections of the Code relied upon by the Applicant.

The failure of the Written Statement of Services to contain necessary information.

At the hearing the Applicant confirmed that he is not insisting upon this head of complaint.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

Having regard to the failures of the Respondent which we have identified and the distress caused to the Applicant, we have decided that the Respondent should be ordered to pay to the Applicant the sum of £150. In setting that amount, we have had regard to the early reduction in the relevant invoice by the Respondents and to their apology.

Section 20 of the 2011 Act provides the Tribunal with a wide discretion as to the terms of any PFEO. In particular, section 20(2) allows us to award such sum as we consider to be reasonable. In all the circumstances of this case, we consider payment of these sums to be reasonable.

APPEALS

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.

JOHN M MCHUGH

CHAIRMAN

DATE: 20 February 2018