

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Decision on Homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)

Chamber Ref: FTS/HPC/PF/19/3547

5/5 72 Lancefield Quay, Glasgow G3 8JF
("the Property")

The Parties:-

Mr Calum Mortimer, 5/5 72 Lancefield Quay, Glasgow G3 8JF
("the Homeowner")

MXM Property Solutions Ltd, Unit 13, 42 Dalsetter Avenue, Glasgow G15 8TE
("the Factor")

Tribunal Members:

Graham Harding (Legal Member)
Ahsan Khan (Ordinary Member)

DECISION

The Factor has failed to carry out its property factor's duties.

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with section 3 of the Code

The decision is unanimous

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"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

The Factor became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By application dated 4 November 2019 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 2.1, 2.5 and 3 of the Code and that the Factor had failed to carry out its Property Factor's duties. Specifically, the Homeowner alleged that the Factor had failed to comply with its Written Statement of Services regarding the rendering of fees; had failed to comply with its complaints procedure and had failed to comply with the requirements of the Constitutive deed of Community Burdens affecting the property.
2. By Notice of Acceptance dated 18 December 2019 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned.
3. The Factor submitted written representations to the Tribunal dated 30 January 2020 and the Homeowner submitted additional written representations dated 3 February 2020.

Hearing

4. A hearing was held at Glasgow Tribunals Centre on 17 February 2020. The Homeowner attended personally. The Factor was represented by its Managing Director, Mr Mark Allan.
5. By way of a preliminary matter it was noted by the Tribunal that two members of the public were observing the hearing and that Mr Allan had objected to one of the observers being present as he was a party in court proceedings involving the Factor. The Tribunal attempted to establish the nature of the proceedings and if they impacted on the proceedings before the Tribunal but Mr Allan declined to comment. The Tribunal explained that the hearing was open to the public and it would only exclude a person under Rule 34 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 if one of the provisions applied. The Tribunal suggested to Mr Allan that if at any time he felt it would be difficult for him to give evidence because of the presence of one of the observers he should make this known to the Tribunal.
6. As a further preliminary matter, the Tribunal referred the Homeowner to that part of his application in which he indicated he wished the Tribunal to award compensation to all the owners in the building of which the property was part. The Tribunal explained that the Homeowner was applying to the Tribunal as an individual and that in the event of the Tribunal deciding to make an order it would be in respect of the Homeowner only and not all of the owners.

Summary of submissions

7. The Homeowner commenced his submissions by saying that he did not think the revised charges introduced by the Factor in December 2019

altered his position with regards to his complaint. The Homeowner referred the Tribunal to his Productions and the invoices dating from 19 January 2018 to August 2019. He pointed out that the invoices were all for the same amount of £100.00 for the monthly contribution to the Common Service Charges and £20.00 contribution to the lift refurbishment. He pointed out that there was no detailed breakdown of the charges and no factors fee shown. He also said there was no running balance showing the amount of an individual owner's debt.

8. The Homeowner went on to say that in August 2019 he had an informal meeting with some co-owners and had been made aware of a situation that had arisen some time before he had moved into the property when the Factor had submitted to owners' surprise substantial invoices for payment. The Homeowner said he had been sceptical and thought that he had for 19 months been paying his factoring fees in full but decided to seek advice from a chartered accountant who had looked at the balance sheet and who had advised him to his horror that the Factor was not billing the full liabilities of the development and that the development was financially distressed.
9. The Homeowner submitted that the financial reports provided by the Factor did not provide transparency. An ordinary person looks at his bill not at monthly reports. The Homeowner referred the Tribunal to the most recent balance sheet dated 31/12/2018. This was available on the Factor's portal and was now 14 months old. The entry for Debtors Control Account was in respect of bills outstanding by owners. The Maintenance Expenditure Accounts were in respect of costs incurred by the Factor but not yet billed. The Homeowner said he accepted there could be a short period of time where this could occur but the Factor had not billed over a prolonged period. Mr Allan had pointed out that it was necessary to look at both sides of the balance sheet and this showed a Creditors Control Account of £23548.73. After taking account of other funds there was a positive balance of £25829.77 but some £48000.00 of that was made up of debt not invoiced to proprietors and therefore the development was potentially insolvent.
10. The Homeowner referred the Tribunal to page 144 of his productions this was the Aged Creditors report for the month ending 31/12/2018. He pointed out that the Factor had not paid themselves for a six-month period and the debt due to them was almost £16000.00. The Homeowner queried why would a factor build up £48000.00 of debt and not pay themselves.
11. The Homeowner then referred the Tribunal to a series of reports being an analysis of Maintenance Expenditure Categories covering the quarters commencing 01/09/2018 to 30/11/2018 and ending with the quarter 01 June 2019 to 31 August 2019. The Homeowner explained that during that time the debit balance had increased from £22405.90 to £34170.90. It was his submission that there had been no reconciliation of charges over a twelve-month period and charges had not been billed to proprietors for two and a half years.

12. The Homeowner referred the Tribunal to page 211 of his productions, a spreadsheet he had prepared in which he had calculated from the information available the amount due by each proprietor amounted to £581.01.
13. The Homeowner referred to the earlier issues with the development and to an email he had received from a co-owner Mr Whiteford dated 16 January 2020 referring to surprise invoices received in October 2017 (Page 299 of the Homeowner's productions). The Homeowner suggested that what had happened in 2017 was not dissimilar to the current situation. The Homeowner went on to say that the development may have a debt problem as many proprietors had still not paid and the reason being given was that they believed they had received improper payment requests. If there was a debt problem it was, he said because of the actions of the Factor not in spite of the Factor's actions. The Homeowner submitted that costs should not be accumulated without proprietors' consent.
14. The Homeowner went on to say that it would be difficult to verify if works had been properly done if they were not charged until two and a half years after they had been said to have been done.
15. With regards to Section 3 of the Code the Homeowner submitted that the Factor had demonstrably failed to comply. The Factor ought to have shown him where he could find his running balance comparable to the one he himself had produced.
16. With regards to its failure to comply with its Property Factor's duties the Homeowner referred the Tribunal to Clause 3.9 of the Deed of Community Burdens and submitted that the Factor had failed to reconcile the maintenance account each year or provide each proprietor with a full breakdown of payment for that year.
17. It was the Homeowner's position that he had been in the property since 19 January 2018 and had not paid for repairs to the property during that time. The Homeowner referred the Tribunal to Section 3.1.6 of the Factor's Written Statement of Services that provided that any expenditure out with the common services would be invoiced on a quarterly basis but this had not happened.
18. The Homeowner went on to say that in response to concerns being raised the Factor had now applied a credit in the monthly invoices that will be used to counterbalance the outstanding charges but is still continuing to avoid reconciling the account and it does not prevent the Factor not paying themselves. The steps taken by the Factor had not been agreed with the owners but had been taken by the Factor itself in response to the complaints but avoids doing its job.
19. The Homeowner submitted that the Factor should be obliged to reconcile the accounts immediately and produce a detailed breakdown of all

charges. He also submitted that the Factor and its accounts should be subjected to a full audit and queried how the Factor could survive without being paid and suggested that did not make sense. The Homeowner also submitted that an audit would show whether the contractor's invoices were legitimate.

20. The Homeowner indicated that the Factor's fee was about £9.00 plus VAT per property per month but there were legal and accountancy charges in addition. The monthly charge also included buildings insurance but the Homeowner said he had never received a breakdown of this.
21. With regards to the alleged breaches of Sections 2.1 and 2.5 of the Code the Homeowner referred the Tribunal to his written submissions on these points and said he had nothing further to add.
22. For the Factor Mr Allan submitted that the issues that had arisen around the 2017 invoices had no relevance to the current issues. Mr Allan went on to explain that in 2011 the Factor had approached a firm of Chartered Accountants IDS &Co to provide professional accountancy services for the development. He said he had worked with the owners' group at the time to reach agreement on the production of annual reports and that had been ongoing since that time. Mr Allan said that reports were produced on a quarterly basis and referred the Tribunal to the Factor's productions 3A, 3B, 3C, 3D and 3E. These he submitted showed that the Factor had complied with Section 2.5 of the Code.
23. Mr Allan went on to say that a bank account was set up in the name of the River Heights Owners and was entirely separate from the Factor's bank account. The Chartered Accountants were responsible for reconciling the developments accounts. The Factor did not use the same firm of accountants for its own business. Mr Allan went on to say that the sales ledger side of the business was done by another independent company as was credit control. That firm posted any income on to the sales ledger. The Factor posted contractors payments.
24. Mr Allan said that the Homeowner had questioned the reliability of the reporting and referred the Tribunal to the Homeowner's productions at page 189. He explained that these reports had been introduced as it was accepted that owners were not accountants. Mr Allan went on to explain the breakdown of the entries in the various sections of the report on pages 190 to 193 of the productions. In Mr Allan's submission the report clearly showed the breakdown of common charges. Mr Allan also referred the Tribunal to the Factor's production 3C which was a detailed note that each owner received and each owner had free access to the portal and the reports.
25. Mr Allan referred the Tribunal to page 197 of the Homeowner's productions which showed the expenditure on a quarterly basis and included insurance. The report showed what each flat owner was paying. Therefore, for the quarter ending on 31 August 2019 the amount due by a

flat owner would be the total of the Flat Common Charges per unit plus the Block Common Charges per unit plus the Car Park Common Charges per unit. These were shown at the bottom of the right-hand columns.

26. Mr Allan then referred the Tribunal to page 204 of the productions. That he said showed a difference of £138.07 for the period this being the additional expenditure payable by each unit for the period ending on 31 August 2019.
27. Mr Allan confirmed that there had been a realignment exercise carried out in 2016/2017 when additional invoices had been issued. He said this had been done in conjunction with two owners who were accountants and who were members of the owners' group.
28. Mr Allan confirmed that the Factor did not produce a cumulative report for each owner but that it would be possible for an owner to add up the running balance for each quarter.
29. Mr Allan said that although the Homeowner had suggested he had been unaware of the position until August 2019 that was in fact not the case and referred the Tribunal to the Factor's document 2C a minute of a meeting of owners on 29 November 2018 and to item 2301. Mr Allan said this explained why accumulated expenditure in respect of maintenance work was shown as an asset on the balance sheet.
30. Mr Allan then referred the Tribunal to the balance sheet on page 142 of the Homeowner's productions and explained that the balances at items 2301, 2303 and 2305 represented funds spent by the Factor on the building that can be invoiced out to the owners.
31. Mr Allan went on to say that when the Factor took over management of the development it started to collect £10.00 per month on floats and had so far collected floats of £200.00 from 44 owners. He said that up to 25% of owners were not contributing to their share of the costs and this had a knock-on effect if owners were being invoiced all the time. It had therefore been the Factor's decision to get the debt down to a manageable level because if chasing money more people then don't pay.
32. The Tribunal referred Mr Allan to the Factor's Written Statement of Services and the meaning of the last paragraph on page 19. Mr Allan said that it was meant to mean that all common charges would be invoiced out as required and referred the Tribunal to paragraph 4 of section 3.1.6 and suggested that this paragraph included maintenance costs.
33. Mr Allan again said that the Factor had not wanted to invoice owners as that would have an adverse impact on reducing the debt. Mr Allan went on to say that following the owners' meeting in September 2019 owners had been invoiced £150.00 in December and January instead of the previous £120.00. Mr Allan referred the Tribunal to the Factor's document 3E an email attached to the invoice of October 2019 which he said explained the position to owners. Mr Allan confirmed the floats do not cover the quarterly

expenditure. Mr Allan said he was confident that owners would have a VAT refund due from utility charges as owners should not have been charged at the commercial rate of 20% but he could not say exactly when owners accounts would be credited with a refund. It was the Factor's intention to address ad hoc items in the 5 and 10-year maintenance plans and these would be invoiced accordingly.

34. In response to the Factor's submissions the Homeowner submitted that the additional invoices issued by the Factor related to common charges not maintenance. This was still not being addressed by the Factor. He also submitted that there was a failure on the part of the Factor to provide a reconciliation of the accounts on an annual basis as required by Section 3.9 of the Deed of Conditions. This was disputed by Mr Allan who submitted that there would always be debtors and creditors and the charges were reconciled and the Factor would issue invoices when it was sensible to do so. To do otherwise would add to litigation costs. The additional £30.00 per month currently being charged to owners would be reviewed after a year.
35. The Homeowner disputed that he would be able to calculate the amount he was due from adding up the quarterly reports provided by the Factor. He thought if he took the previous eight quarters reports he might be able to obtain an approximate figure but it would only be an approximation.
36. With regards to the alleged breach of 2.5 of the Code Mr Allan referred the Tribunal to the Factor's written representations and went on to say that he had met with the Homeowner at his home and corresponded with him. The Homeowner had not followed the Factor's complaints procedures as detailed in the Written statement of Services at Section 5. According to Mr Allan the Factor had addressed the Homeowner's concerns. He accepted that following the Homeowner's email of 11 December 2019 the Factor had not responded as it appeared the Housing and Property Chamber was involved.
37. Finally there was some discussion around the Factor's Production 4A and its relevance to the current proceedings.

The Tribunal make the following findings in fact:

38. The Homeowner is the co-owner of the property.
39. The Property is a flat within the River Heights Development, Lancefield Quay, Glasgow (hereinafter "the Development").
40. The Factor performed the role of the property factor of the Development.
41. The Factor provided detailed quarterly reports that were available to the Homeowner on the Factor's portal.

42. These reports provide an analysis of common services expenditure and maintenance expenditure broken down into a charge per unit.
43. The reports do not provide the Homeowner with a cumulative total of the amount owed by him.
44. There was a shortfall in the amount invoiced to the Homeowner for common service charges and the actual cost incurred between January 2018 and August 2019.
45. The shortfall for the period from 1 June 2019 to 31 August 2019 amounted to £138.07.
46. The Factor has increased the monthly common service charge from £120.00 to £150.00 per month with effect from December 2019.
47. The Factor did not invoice the Homeowner on a quarterly basis for expenditure out with the common services as provided for in the Factors Written Statement of Services for the period from January 2018 to 31 August 2019.
48. The Homeowner cannot easily calculate the amount owed by him to the Factor at any time.
49. The information provided by the Factor to the Homeowner on a quarterly and annual basis is not presented in a clear and transparent way.
50. The Constitutive Deed of Community Burdens by FM River Height Limited dated 21 January 2005 burdens the development.
51. The Factor responded to the Homeowner's enquiries and complaints within a reasonable period of time.

Reasons for Decision

Section 2.1 of the Code

52. The Homeowner's argument with regards to the alleged breach of this section of the Code was based on the Factor suggesting that it had for a number of years tried to suggest to owners that they were not paying enough towards the running costs of the development. According to the Homeowner prior to raising his complaint the Factor had never made him aware of this and if they had his response would have been to tell them to invoice him for a greater share of the liabilities. In its defence the Factor argued that it had, both prior to the Homeowner's purchase of the property and subsequently in November 2018, attempted to engage with owners to progress a five-year plan on maintenance of the development. Whilst there are undoubtedly issues with regards to the clarity and transparency of the accounts which are dealt with below the Tribunal was of the view that in

terms of providing false or misleading information the Factor was not in breach of this section of the Code. The information provided at owners' meetings and on the portal was accurate.

Section 2.5 of the Code

53. The original complaint from the Homeowner was made on 28 August 2019 and briefly responded to by the Factor the same day. Following a further query by the Homeowner on 4 September a detailed response was provided by the Factor on 13 September 2019. As part of that response the Factor arranged a meeting with the Homeowner to take place on 19 September 2019. The Factor also arranged a meeting with all owners on 24 September 2019. A further email from the Homeowner on 27 September 2019 was briefly acknowledged but not responded to by the Factor on the basis that the matter was being considered at further owners' group meetings that took place on 22 October and 19 November 2019 and which were attended by the Homeowner. The Factor then did not respond to an email from the Homeowner on 11 December 2019 as it concluded that the Homeowner intended making an application to the Housing and Property Chamber. Looking at the Factor's responses as a whole the Tribunal was persuaded that in general the Factor responded within prompt timescales and in line with its Written Statement of Services. With the benefit of hindsight, it would have been preferable if the Factor had responded to the Homeowner's email of 11 December but the Tribunal did not consider that this in itself constituted a breach of this section of the Code.

Section 3 of the Code

54. This section of the Code acknowledges just how important it is for homeowners to be aware of what they are paying for, how charges are calculated and that no improper payment requests are involved. It is absolutely fundamental that there is complete transparency and clarity in the accounting procedures involved. In the Tribunal's opinion that must mean that an owner is kept apprised of not only how much is being spent by the Factor on his behalf each month or quarter but also that these costs are being clearly invoiced and collected. The Factor cannot be faulted for failing to provide regular reports. These were uploaded to the portal quarterly and the Tribunal has no reason to doubt their accuracy. They have been prepared by a firm of Chartered Accountants. The problem as the Homeowner clearly submitted is the lack of invoicing of maintenance costs over a prolonged period and an undercharging of common service charges also. The Tribunal acknowledged that the Factor's failure to invoice properly and in accordance with its own Written Statement of Services may have been done with the intention of not exacerbating an existing debt problem within the development but in so doing it appeared to the Tribunal it was just building up a further problem and not addressing the issue. The Tribunal was in no doubt that the procedures employed by the Factor lacked clarity and transparency. By not invoicing additional maintenance charges quarterly it would be much more difficult for the

Homeowner to keep abreast of his expenditure. It would be more difficult for him to challenge the validity of an item of work purportedly carried out 18 months or two years previously. Overall the Tribunal felt it was an example of poor management of the development on the part of the Factor and a clear breach of this section of the Code.

Failure to carry out the Property Factor's Duties

55. In terms of Clause 3.9 of the Constitutive Deed of Community Burdens affecting the property the Factor shall reconcile the Maintenance Account each year and within three months of any calendar year will send each proprietor a full breakdown of payment for that year. It was the Factor's position that it had complied with its duty under that clause by providing the information set out in the annual accounts. That was a reconciliation of the charges incurred and was reflected in the balance sheet. The difficulty for the parties and the Tribunal is that the burdens deed envisages a situation where each owner has paid a deposit into a maintenance account in terms of Clause 5.5.2 prior to any maintenance work being carried out as well as paying on purchasing the property a deposit of £250.00. The Tribunal was advised that when the Factor assumed responsibility for the development there were no deposits and as at the date of the hearing only 44 owners had paid a deposit on the purchase of their property. It was also apparent that Clause 5.2.2 was not being implemented. The Tribunal was not advised by the Factor that there had been any amendment to the Constitutive Deed of Community Burdens and therefore the Tribunal has to conclude that the Factor with or without the acquiescence of the owners is not complying with its duties under the deed. The Tribunal was not addressed by the Factor as to why it thought that Clause 5.5 need not be applied but in the absence of the application of Clause 5.5 there cannot be a Maintenance Account as so defined in that Clause that can be reconciled in terms of Clause 3.9 therefore it is inevitable that the Tribunal has to conclude that the Factor has failed to carry out its Property Factor's duties as constituted under the Constitutive Deed of Community burdens.
56. The Homeowner sought an order from the Tribunal that the Factor pay for an independent audit of the development's finances. However the Tribunal was satisfied that the reports prepared by the accountants instructed by the Factor were sufficiently detailed to obviate the need for such an audit and the Tribunal was not directed by the Homeowner to any specific charges that were said to be suspicious or required further scrutiny.
57. The Tribunal was of the opinion that the Factor should provide the Homeowner with a detailed invoice for all maintenance charges incurred to date and it would of course be sensible that all other owners were provided with similar invoices to avoid a build-up of debt and that in future all such maintenance charges should be invoiced on a quarterly basis. Given the circumstances it would of course be open to the Factor to agree with owners for any accrued debt to be paid over a number of months but that would be a matter for the Factor.

58. Given the mandatory terms of the Constitutive Deed of Community Burdens affecting the development it will be for the Factor and the owners to determine how its terms are to be implemented in the future if the Factor is to avoid further findings of failing to carry out its Property Factor's Duties. Either Clause 5.5 will require to be properly followed or a Deed of Variation would be necessary.

59. It was apparent to the Tribunal that the Homeowner has been put to a degree of worry and inconvenience as a result of the breach of the Code and the failure on the part of the Factor to carry out its Property Factor's duties and in the circumstances determined that a financial award was appropriate.

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

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.

Legal Member and Chair

8 March 2020

Date