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

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

The First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017 ("the 2017 Regulations")

Chamber Ref: FTS/HPC/PF/18/0380

Flat 0/1, 12 Prince Albert Road, Glasgow, G12 9NN
("The Property")

The Parties:-

Mr Paul Austin, residing at the Property;
("the Applicant")

Glasgow West Enterprises Limited, 5 Royal Crescent, Glasgow, G3 7SL
("the Respondent")

Tribunal Members:

Mr G. McWilliams (Legal Member)
Mrs E. Dickson (Ordinary Member)

Decision

The Respondent has failed to comply with its duties under Section 14(5) of the Property Factors (Scotland) Act 2011 ("the Act") in that it did not comply with Sections 2.1 and 2.5 of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors ("the Code") and has failed to carry out their Property Factor's duties in terms of Section 17 of the Act..

This decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") is unanimous.

The Tribunal considered matters and have determined that, in relation to the Application before it, the Respondent has not complied with the Code. The Tribunal propose to make a Property Factor Enforcement Order ("PFEO") in the following terms:

The Respondent is to make a compensation payment to the Applicant, in the sum of £500.00, within 14 days of the date of issue of the PFEO.

Introduction

1. The Respondent became a registered Property Factor on 7th December 2012 and their duty under Section 14(5) of the 2011 to comply with the Code arises from that date**.** The Applicant submitted an application to the Tribunal by lodging documents with the Tribunal in the period 21st February 2018 to 20th March 2018.

The Hearing

2. A Hearing was held at Glasgow Tribunals Centre, 20 York Street, Glasgow, G2 8GT on 24th May 2018. The Applicant attended with two supporters Mr Ernesto de Campo and Mr John Walker, and one witness, Mr Walter Shepherd. The Respondent was represented by their Property Services Director, Ms Elaine Travers, and their Projects Officer, Mr Alistair Harkness. Ms Claire Mullen, Solicitor, TC Young Solicitors, Glasgow, attended as solicitor for the Respondent.

3. The Applicant's complaints relate to the installation of emergency door release units at the tenement property at 12 Prince Albert Road on 24th November 2017.

4. Two preliminary matters were dealt with at the beginning of the Hearing. Firstly, the Tribunal confirmed that, as stated in the Minute of Decision dated 19th March 2018, the application comprised documents which the Applicant lodged with the Tribunal in the period 21st February 2018 to 20th March 2018. Secondly the Tribunal allowed the Applicant to lodge as a production copy letter dated 16th May 2018, which had been sent to him by the Respondent around a week earlier. The parties acknowledged that the letter confirmed that the Respondent had established that the emergency door release units that had been installed at the tenement Property were unnecessary and that the Respondent had removed them from the Property on 16th May 2018.

5. The Applicant complained that the Respondent had failed to comply with various sections of the Code, and also had not fulfilled their Property Factors' duties.

6. In the first instance the Applicant complained that the Respondent had provided him with information that was false or misleading.

7. The Applicant stated that the Respondent had misled him by delaying their response to his complaint that they had not carried out a risk assessment in respect of the installation of the emergency door release units. The Applicant stated that he had raised this point in his telephone call to the Respondent on 29th November 2017, his email sent to the Respondent the following day, and also at his meeting with the Respondent's Mr Gilmartin and Mr Harkness, their Property Services Co-ordinator and Projects Officer, on 6th December 2017.

He submitted that the Respondent, in their letter to the Applicant dated 21st December 2017 stated that they were unable to provide a full response in respect of this matter. In their letter to him, dated 23rd February 2018, the Respondent conceded that a risk assessment had not been carried out. The Respondent's representatives acknowledged that the position had not been confirmed until February 2018.

8. The Applicant also stated that when he met the Respondent's Mr Gilmartin and Mr Harkness on 6th December 2017, he was shown a letter to Homeowners at the property, dated 5th October 2017, which he had not previously received. He stated that the letter made reference to the Respondent's consultation with the Scottish Fire and Rescue Service ("SFRS") prior to the installation of the emergency door release units. The Applicant's position was that there had been no consultation with SFRS at that time, in October 2017. The Respondent's Mr Harkness stated that by 23rd February 2018 the Respondent had been in discussions with SFRS. Mr Harkness accepted that the letter to Homeowners, dated 5th October 2017, did make reference to SFRS, when at that stage, the Respondent had not consulted them.

9. The Applicant stated that the tender process for the installation had commenced in March 2017 and the Respondent therefore had adequate time to notify Homeowners of the project. The Applicant submitted that the Respondent's Mr Gilmartin's letter to him, of 21st December 2017, was misleading, in that it referred to the Respondent's "missed opportunity" to issue letters to the Homeowners before the works commenced, as the contractor had commenced works quickly without reference to the Respondent. The Respondent's representatives stated that they had originally treated the installation as a repair under delegated authority. They reiterated that the contractors had carried out the installation without notifying them and stated that they did not consider that they had to notify the Homeowners in advance of the installation date.

10. The Applicant also complained that the Respondent had not provided Homeowners with substantive information post installation until they issued a letter, dated 16th May 2018, approximately one week before the Hearing. The Respondent's position was that they had been carrying out a review of the installation.

11. The Applicant further complained that the Respondent's comparison of the door release units, which had been installed, with the service access facility at the existing door entry system at the property, was misleading. The Respondent's representatives did not accept that the comparison in this regard was misleading.

12. The Applicant complained that the Respondent's reference to the extent of CCTV coverage at the property was misleading, as was their statement, in their letter to him dated 21st December 2017, that the primary point of security for an individual Homeowner is their own front entrance door, rather than the common entrance door. The Respondent's representatives stated that the

statements were expressions of opinion**.** The Applicant also submitted that the CCTV at the property was not able to provide full monitoring information of all entrance areas at the property. The Respondent's Mr. Harkness accepted that the Respondent had made a generalisation when stating that the CCTV would cover the relevant areas. The Respondent did not accept that this was misleading.

13. The Applicant further complained that the Respondent did not have a procedure in place to consult with Homeowners and seek their written approval before the installation of the units was carried out and that they had not carried out a consultation. The Respondent's position was that there was a procedure in place. The Respondent's representatives accepted, however, that the procedure had not been adhered to.

14. The Applicant also complained that the Respondent had not confirmed their response times for enquiries and complaints in their written Statement of Services. The Respondent's representatives stated that the Statement was currently being reviewed.

15. The Applicant stated that he and other Homeowners had not been given any guidance or instructions in respect of emergencies relating to the door release units. The Respondent's Mr. Harkness stated that the Applicant and his fellow Homeowners were able to use existing emergency contact procedures in relation to any issues with the units as well as in respect of any other matters concerning common areas at the Property. The Applicant agreed that he was aware of the general, emergency contact procedures.

16. Further, the Applicant complained regarding the clarity of the Respondent's Written Complaints Resolution Procedure. The Respondent's Comments and Complaints Guidance Leaflet was produced at the Hearing. The Applicant accepted that he had previously had sight of this and agreed that he did not wish to insist on this part of his application.

17. The Applicant also complained that the Respondent did not confirm to him that their letters issued to him, in December 2017 and February 2018, had been approved by a member of the Respondent's Senior Management Team. The Respondent's position was that all letters issued in connection with complaints were approved by Senior Management. The Respondent directed the Tribunal to page 4 of the said Comments and Complaints Guidance Leaflet, under the section headed "Taking Things Further", wherein it states that at the final stage of an internal complaints process the response to the Homeowner will be approved by the Service Manager or Divisional Director before it is issued. The Respondent's position was that all letters issued had been approved by Senior Management.

18. The Applicant further complained that, in terms of their Property Factor's Duties, the Respondent was under an obligation to comply with the Scottish Housing Quality Standards ("SHQS"). He quoted Section 5 of the SHQS. The Respondent's solicitor submitted that the SHQS applied to Social Landlords.

The Respondent accepted that some Social Landlords are also Property Factors but submitted that in this case this was not the position.

The Tribunal make the following Findings in Fact and Law:

19. The Applicant is the owner of the property at 0/1 12 Prince Albert Road, Glasgow G12 9NN ("the Property"). The Property was transferred to him on 12th September 2005. It is situated on the ground floor of the tenement property at 12 Prince Albert Road.

20. The Respondent performs the role of Property Factor of the tenement block property within which the Property is situated.

21. The Respondent did not confirm to the Applicant whether or not a risk assessment had been carried out in respect of the installation of the emergency door release units at the time of that installation, and the Applicant's complaints, in November 2017. They misled the Applicant by delaying to confirm that an assessment had not been carried out until they issued a further letter to the Applicant dated 23rd February 2018.

22. The Respondent prepared a letter to the Applicant dated 5th October 2017, and showed it to him at a meeting on 6th December 2017, which contained terms which are misleading or false as they make reference to consultation with Scottish Fire and Rescue Service ("SFRS"). In their letter to the Applicant dated 16th May 2018, the Respondent acknowledged that there had been no consultation with SFRS.

23. The Respondent issued a letter to the Applicant dated 21st December 2017, which contained terms which are misleading or false. The tender process for the installation works had commenced in March 2017 and there had been adequate time for the Respondent to notify Homeowners. It was misleading or false for the Respondent to state to the Applicant that they had "missed the opportunity" to issue letters to Homeowners before the works commenced,

24. The Respondent's delay in communicating in detail with the Applicant and his fellow Homeowners regarding the installation, between November 2017, when the Applicant raised concerns, and May 2018, when the Respondent removed the emergency door release units, was unhelpful but not misleading.

25. The terms of the Respondent's letter to the Applicant dated 21st December 2017, comparing the emergency door release units with the service access facility, indicated the Respondent's lack of understanding of the operation of the different devices, but was not misleading.

26. In their communications the Respondent's statements regarding the availability of CCTV at the Property and the primary point of security for Homeowners being their front entrance door, rather than the common entrance door, indicated a lack of understanding of the Applicant's concerns and were unhelpful but were not misleading.

27. The Respondent has a procedure in place for consulting with Homeowners in respect of works, and this is stated in their Guide to Fabric Repairs.

28. The Respondent has not specified response times in respect of Homeowners complaints in their Written Statement of Services.

29. The Applicant is aware of the general emergency contact procedures in respect of the Property. These procedures could have been followed in the event of an emergency arising in respect of the door release units

30. The Applicant has had sight of the Respondent's leaflet headed What You Can Provide Feedback About which refers to issues involving contractors. The Applicant did not wish to insist on this part of his application.

31. In the Respondent's Comments and Complaints Guidance leaflet, under the section headed "Taking Things Further", it states that at the final stage of an internal complaints process the response to a Homeowner will be approved by the Service Manager or Divisional Director before it is issued. The Applicant has had sight of this leaflet.

32. The Respondent has breached Sections 2.1 and 2.5 of the Code.

33. The Respondent has not breached Sections 2.4, 6.2, 7.1, and 7.2 of the Code.

34. Section 5 of the SHQS imposes an obligation on Social Landlords to instruct Factors to carry out works to maintain the necessary standards. It does not impose an obligation on the Factors to do so. Accordingly the Respondent's Property Factor's duties do not include an obligation to comply with the SHQS.

35. The Respondent did not consult with the Applicant and fellow Homeowners regarding instruction of the installation works and failed to carry out their Property Factor's duties in this respect in terms of Section 17 of the Act.

Reasons for Decision

36. Firstly, dealing with the Sections of the Code complained of:

a) Section 2.1 states that a Property Factor must not provide information to a Homeowner which is misleading or false. The Tribunal, having had sight of all the papers and heard the evidence and submissions of the parties, is satisfied that, in the following instances, the Respondent provided information to the Applicant Homeowner which was misleading or false, as follows;

   i) The Applicant asked the Respondent to clarify whether or not they had carried out a risk assessment in respect of the installation of the emergency door release units in his telephone call to the Respondent

on 29th November 2017, his email sent to the Respondent the following day, and also at his meeting with the Respondent's Mr Gilmartin and Mr Harkness, their Property Services Co-ordinators, on 6th December 2017. The Respondent, in their letter to the Applicant dated 21st December 2017 stated that they were unable to provide a full response in respect of this matter. In their letter to him, dated 23rd February 2018, the Respondent conceded that a risk assessment had not been carried out. Having considered matters and on a balance of probabilities, the Tribunal find that it was reasonable to expect that the Respondent was aware of whether or not a risk assessment had been carried out by the time of the installation of the units, and the Applicant's complaints, in November 2017. The Tribunal find that in delaying to confirm the position until February 2018 the Respondent misled the Applicant in this regard.

ii) The Applicant had sight of the Respondent's letter to home owners regarding the installation of the over-ride devices, dated 5th October 2017, at his meeting with Mr B. Gilmartin and Mr A. Harkness on 6th December 2017. The Respondent has accepted that the letter did make reference to the consultation with Scottish Fire and Rescue Service ("SFRS"). In their letter to the Applicant dated 16th May 2018, the Respondent acknowledged that there had been no consultation with SFRS. Accordingly, the Tribunal is satisfied that the letter dated 5th October 2017, which the Applicant was given sight of at the meeting on 6th December 2017, contained misleading information.

iii) The Respondent stated that they had treated the installation as a repair under delegated authority, and accordingly did not consider that they had to notify the Homeowners in advance of the installation date. They further stated that in any event the contractors have carried out the installation without confirming the position to the Respondent. The Applicant submitted that Mr Gilmartin's letter to him of 21st December 2017 was misleading. The issue for the Tribunal to determine, in this regard, was whether or not the information given to the Applicant, in Mr Gilmartin's letter of 21st December, regarding the Respondent's statement that they had "missed the opportunity" to issue letters to Homeowners before the works commenced, was misleading or false. The Applicant's position was that the tender process for the works had commenced in March 2017 and there had been adequate time for the Respondent to notify Homeowners. Having considered matters and on a balance of probabilities, the Tribunal accepted the Applicant's assertion that there had been no missed opportunity on the part of the Respondent and find that it was therefore misleading or false of them to say so.

iv) The Respondent stated, in their letter to the Applicant of 21st December 2017, that they would communicate regarding the works, and they subsequently stated, in their letter of 23rd February 2018, that they would write to all users. The Applicant submitted that no substantive information was given to the Homeowners until they were issued with

the letter dated 16th May 2018. In this regard the Tribunal find that the delay in completing a review of the installation, between the time of the Applicant's raising of points in November 2017 and the Respondent's removal of the devices in May 2018, was unhelpful to the Applicant and his fellow homeowners but that the Respondent had not misled the Applicant in their communications given that they had indicated that they were reviewing the position in respect of the installation. The Respondent stated, in their letter to the Applicant dated 21st December 2017, that they would likely write again in February 2018, and they did so. They then presumably completed their review in March 2018 and removed the devices. The Tribunal bear in mind that the devices were disconnected on 15th December 2017 and the previous position regarding the entry to the property was reinstated at that point. The delay in informing the Applicant and Homeowners of the position regarding the installation was not helpful but, on a balance of probabilities, the Tribunal find that this was not misleading.

v) In respect of the Applicant's complaint that the Respondent's comparison of the emergency door release units with the service access facility was misleading, the Tribunal find that the terms of the correspondence dated 21st December 2017 from the Respondent to the Applicant in this regard indicated a lack of understanding of the operation of the different devices, but was not misleading. The Tribunal find, on a balance of probabilities, that the Respondent's statement of comparison was not intended to be false or misleading.

vi) Regarding the Applicant's complaint in connection with the CCTV facility at the property, the Tribunal again find that there was no intention on the part of the Respondent to mislead the Applicant in this regard. The Tribunal find, on a balance of probabilities, that the Respondent attempted to reassure the Applicant but lacked understanding of the Applicant's concerns.

vii) Further, regarding the Applicant's complaint that the Respondent's statement, in their letter of 21st December 2017, that Homeowners primary point of security is their front entrance door, rather than the common entrance door, was misleading or false, the Tribunal find, on a balance of probabilities, that this was not the case. The Tribunal find that it was an unhelpful statement but that there was no attempt to mislead the Applicant by the Respondent in this connection.

b) Section 2.4 of the Code states that a Property Factor 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. The Respondent's position was that there was a procedure in place, stated in their Guide to Fabric Repairs, which had been lodged in the case papers, but they accepted that this was not adhered to. The Tribunal, having considered matters, find, on a balance of probabilities, that there was a procedure in place but this was not complied

with. As there was a procedure in place, the Tribunal find that there has been no breach of this Section of the Code. However as the procedure was not adhered to the Tribunal find that the Respondent did not carry out their Property Factor's duties as they did not consult with the Applicant and fellow Homeowners as described below.

c) Section 2.5 of the Code states that the Property Factor must respond to enquiries and complaints by letter or e-mail within prompt timescales and that response times should be confirmed in their Written Statement of Services. The Respondent accepted that their Statement was currently being reviewed. Having considered the terms of the Statement the Tribunal find that the Respondent has not specified prompt timescales and response times in their Written Statement of Services.

d) Section 6.2 of the Code states that a Property Factor must have in place procedures for dealing with emergencies. The Applicant's argument was that he and other Homeowners had not been given any guidance or instruction in respect of emergencies relating to the installed units. Mr Harkness for the Respondent stated that the Applicant and his fellow Homeowners were able to use the existing emergency contact procedures in relation to any issues with these devices as well as in respect of any other matters concerning common areas at the property. The Applicant agreed that he was aware of the general emergency contact procedures. In the circumstances the Tribunal do not find that there has been any breach of the Code in this regard. These procedures could have been followed in the event of an emergency arising in respect of the door release units.

e) Section 7.1 of the Code states that a Property Factor must have a clear Written Complaints Resolution Procedure which includes how they handle complaints against contractors. The Respondent's Comments and Complaint's Guidance leaflet was produced at the Hearing. The Applicant accepted that he had previously had sight of this. The leaflet, at page 3, at the Section headed "What You Can Provide Feedback About" refers to issues involving contractors. The Applicant agreed that he did not wish to insist on this element of his application. The Tribunal accordingly do not find that there has been a breach of this Section of the Code.

f) Section 7.2 of the Code provides that in an in-house complaints procedure that has been exhausted the final decision should be confirmed with senior management of a Property Factor before the Homeowner is notified in writing. In this regard the Applicant's argument was that the Homeowner's Property Services Co-Ordinator, Mr Gilmartin, had written to him in December 2017 and February 2018, and there had been no confirmation given to the Applicant that the letters issued to him had been approved by a member of the Respondent's senior Management. The Respondent's position was that all letters issued in connection with complaints were approved by senior management. The Respondent had directed the Tribunal to page 4 of the said Comments and Complaints Guidance leaflet, under the section headed "Taking Things Further" wherein it states that at the final stage of an internal complaints process the response to the Homeowner will be approved by the

Service Manager or Divisional Director before it is issued. The Tribunal noted that, on one interpretation, the letters issued to the Applicant by the Respondent in December 2017 and February 2018 were not final decision letters. In any event and having considered the evidence before it the Tribunal found that given the clear terms of the leaflet, which had been produced by the Respondent, and which the Applicant accepted that he had previously had sight of, there had been no breach of the Code in this regard.

37. In respect of Property Factor's duties, the Applicant's complaint was that the Respondent was under an obligation to comply with the SHQS. He quoted Section 5 of the Standards. The Respondent's position was that the Standards apply to Social Landlords. They accepted that some Social Landlords are also Property Factors but in the instant case this was not the position. Section 5 of the Code of the Standards explicitly refers to Social Landlords. The Applicant also made reference to page 4 of the Code, under the heading "How Do The Requirements of Professional Bodies and other Legislation relate to the Code?" and in particular referred to the paragraphs stated there. The Tribunal considered Section 5 of the Standards and the Code. Section 5, as read at the Hearing by the Applicant, makes explicit reference to Social Landlords. It imposes an obligation on Social Landlords to instruct Factors to carry out works to maintain the necessary standards. It does not impose an obligation on the Factors to do so and therefore the Tribunal find that the Respondent's Property Factor's duties do not include an obligation to comply with the SHQS.

38. The Tribunal acknowledge that the Applicant complained in respect of the Respondent's failure to comply with their consultation procedure under section 2.4 of the Code and did not formally complain that the Respondent had failed to carry out their Property Factor's duties in this regard. Nonetheless it is clear to the Tribunal that a principal element of the Applicant's complaint was that the Respondent did not consult Homeowners in respect of the installation, that is that the Respondent did not comply with their procedure, rather than that the Respondent had no procedure for consultation. Having had regard to the terms of section 17 of the Act the Tribunal are satisfied that the Respondent was given appropriate notice of the Applicant's complaint in this connection and that it is fair and just to consider his complaint in terms of the Respondent's Property Factor's duties. Further, the Tribunal find that the installation works related to common parts of the land owned by the Applicant and he therefore should have been consulted with. As stated at paragraph 36 b) above, the Tribunal find that the Respondent's failure to comply with their procedure for consulting with Homeowners regarding works, stated in their Guide to Fabric Repairs, was in breach of the Property Factors duties incumbent on them in terms of Section 17 of the Act.

Proposed Property Factor Enforcement Order

39. The Tribunal proposes to make a PFEO. The terms of the proposed PFEO are set out in the attached Section 19(2)(a) Notice.

Appeals

40. 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 within 30 days of the date the decision was sent to them.

G McWilliams
Legal Member

6th July 2018