**Decision 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**

**Mhairi McLellan or Campbell, 24E Inchinnan Road, Paisley PA3 2RA ("the Applicant")**

**Apex Property Factor Ltd, 46 Eastside, Kirkintilloch, East Dunbartonshire G66 1QH ("the Respondent")**

**Chamber Ref: FTS/HPC/PF/18/1883**

**Re: 24E Inchinnan Road, Paisley PA3 2RA ("the Property")**

**Tribunal Members:**

John McHugh (Chairman) and Mike Links (Ordinary (Surveyor) Member).

## DECISION

**The Respondent has failed to comply with its duties under section 14 of the 2011 Act.**

The decision is unanimous.

**We make the following findings in fact:**

1 The Applicant is the owner and occupier of a flat at Flat E, 24 Inchinnan Court, Paisley PA3 2RA ("the Property").
2 The Property is located within a block ("the Block") consisting of 45 flats, 15 garages and one storage area.
3 The Respondent has acted as the factor of the Block.
4 On 19 February 2018, a meeting of certain flat owners took place.
5 At the meeting the owners voted in favour of removal of the Respondent as factor and appointment of Indigo Square in its place.
6 The Respondent has resisted its removal and regards itself as continuing as the property factor.
7 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 (1 November 2012).
8 The Applicant has, by her correspondence, including that of 6 August 2018, notified the Respondent of the reasons as to why she considers the Respondent has failed to carry out its obligations to comply with its duties under section 14 of the 2011 Act.
9 The Respondent has failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

## Hearing

A hearing took place at the Glasgow Tribunals Centre on 7 January 2019.

The Applicant was both present at the hearing and assisted by Brian Gilmour of Indigo Square Property Factors.

The Respondent was represented at the hearing by its Neil Cowan and Mrs Bakhshaee.

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 1 November 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 the Respondent's Statement of Services dated 21 September 2017 which we refer to as the "Written Statement of Services". They also included a Deed of Conditions by Countsonic Limited registered 9 May 1990 which we refer to as "the Deed of Conditions".

## Preliminary Matters

The Applicant tendered some late documents being papers concerning a related Sheriff Court case between the parties. The Respondent indicated that it did not object to the documents being considered by the Tribunal although late. The Tribunal considered that the documents would be of assistance in determining the application and, accordingly, allowed the documents to be lodged although late.

At the hearing the Respondent renewed its request, which had been made and refused in correspondence previously, that the current application should not be heard until after the current Simple Procedure action in the Sheriff Court had been resolved. We refused that request on the basis that it appeared to us that there was no immediate prospect of the Sheriff Court action being resolved (we were advised that a Case Management Conference had been fixed for later in the week) and it seemed likely that a decision in that action would take considerably longer to emerge than in this process. Further, although there was some overlap between the two processes, we considered that the subject matter of each procedure appeared not to be identical.

## REASONS FOR DECISION

### The Legal Basis of the Complaints

**Property Factor's Duties**

The Applicant does not complain of failure to carry out the property factor's duties.

**The Code**

The Applicant complains of failure to comply with Sections 2.1; 2.5; 3; 4.1; 4.3; 5.2 and 6.1 of the Code.

The elements of the Code relied upon in the application provide:

**" ...SECTION 2: COMMUNICATION AND CONSULTATION...**

...2.1 You must not provide information which is misleading or false...

...2.5 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 as 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)...

**...SECTION 3: FINANCIAL OBLIGATIONS**

While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.

The overriding objectives of this section are:

Protection of homeowners' funds
Clarity and transparency in all accounting procedures
Ability to make a clear distinction between homeowners' funds and a property factor's funds

3.1 If a homeowner decides to terminate their arrangement with you after following

the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

3.2 Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor.

3.3 You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.

3.4 You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property).

**If you are a private sector property factor:**

3.5a Homeowners' floating funds must be held in a separate account from your own funds. This can either be one account for all your homeowner clients or separate accounts for each homeowner or group of homeowners.

If you are subject to FSA regulation, compliance with their rules will be in addition to the requirement for property factors to comply with the Code.

3.6a In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest-bearing account must be opened in the name of each separate group of homeowners...

...**SECTION 4: DEBT RECOVERY...**

...4.1 You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts...

...4.3 Any charges that you impose relating to late payment must not be unreasonable or excessive...

**...SECTION 5: INSURANCE...**

...5.2 You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this.

***...SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE...***

...6.1 You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.."

## The Matters in Dispute

The factual matters complained of relate to:

**(1)** Providing false or misleading information

**(2)** Failure to respond to Communications

**(3)** Pursuing debt recovery measures inappropriately

**(4)** Failure to have insurance

**(5)** Failure to ensure that repairs were carried out properly

**(6)** Charging on the basis of 1/45 as opposed to 1/61 shares

We deal with these issues below.

## Factual Background

As noted above, the Applicant and the Respondent are presently engaged in a Simple Procedure action at Paisley Sheriff Court. We understand that proceedings were brought by the Respondent against the Applicant in around August 2018. The proceedings are for payment by the Applicant of sums said by the Respondent to be due by the Applicant by way of factoring fees and charges for common repairs. The Applicant defends the action on the basis that no sums are due, the sums claimed being either invoices arising after the time when she says the Respondent's appointment as factor had been terminated or sums not actually due as they are the subject of pro forma invoices for anticipated repairs which have not been carried out.

The Applicant has indicated that she prefers any determination of her liability to pay pro forma invoices and as to the termination of the Respondent's appointment as factor to be made by the court. We have therefore refrained from making any formal findings upon these questions. There is however an overlap in respect of the facts relevant to this Application and those which will be determined by the court and we have included certain observations in this Decision which may be of assistance to the court.

We were advised by the Applicant that termination of the Respondent's appointment as factor took place by a validly constituted meeting and vote of owners in accordance with the terms of the Deed of Conditions. The Respondent's sole objection at the hearing was to the fact that intimation of the meeting had not been made to all who were entitled to receive intimation. This was because intimation had

been made to all flat owners but not to the owners of the garages or the single storage space. The Applicant's position is that the garages and the storage space are in the same ownership as the flats and, accordingly, the intimation given was in fact given to all those entitled to receive it. The Respondent advises that it believes that four of the garages are owned by third parties who are not owners of the flats although it was not in a position to produce any evidence in support of that contention.

The Deed of Conditions provides at Clause EIGHTH the procedure for the calling of a meeting of owners at which decisions, including those regarding the appointment of factors, can be made.

The documentation provided by the Applicant and her oral evidence at the hearing appears to indicate that the formal requirements of Clause EIGHTH have been met and the Respondent's appointment properly terminated.

It certainly appears correct that the owners of the garages and storage area were entitled to receive notice of the meeting (the Applicant's position being that they did, since they are the same persons as the flat owners). While garage or storage area owners would have been entitled to attend the meeting, they would not have been entitled to vote so there may seem little practical relevance attached to the exclusion from the meeting of any persons who were garage/storage area owners only (if such persons exist).

Assuming, however, that such persons do exist and that they did not receive intimation of the meeting in accordance with Clause EIGHTH, the Applicant would be assisted by the terms of Section 4(8) of the Tenements (Scotland) Act 2004 which applies Rule 6 of the Tenement Management Scheme.

Rule 6.1 provides: "Any procedural irregularity in the making of a scheme decision does not affect the validity of the decision". It would therefore appear that the decision to replace the Respondent as factor would be capable of being valid even if it there had been a procedural irregularity in relation to the intimation of the owners' meeting (upon which question we express no view).

**(1) Providing false or misleading information**

The Applicant complains that the Respondent's staff have advised her by telephone that they remain appointed as factors by virtue of the fact that they appear on the Scottish Government's Register of Property Factors. Mr

Cowan confirmed that such representations had been made by the Respondent.

We consider this to constitute a breach of Code Section 2.1. The Register is a register to which the factor submits its own information as to the properties which it factors. The fact that the Respondent's name appears on the Register is not independent evidence or certification by a third party of the Respondent's status as the property factor for a listed property; it simply reflects the fact that the Respondent has submitted an application containing this information to the Register and that those administering the Register have recorded it. We consider that presentation of the fact of registration as evidence in the face of challenge by the Applicant as to the Respondent's continued status as factor is misleading and that the Respondent is in breach of its duties under Section 2.1 of the Code.

**(2) Failure to respond to Communications**

The Applicant complained of specific delays in responses to her communications.

Specifically, there was no response to her email of 22 September 207 until 30 October 2017. There was no response to her email of 23 February 2019 until 24 April 2018. There was no response to her email of 31 May 2018 until 3 July 2018. There was no response to her email of 24 April 2018 nor to her email of 12 July 2018.

The Respondent accepts that these delays occurred and explains them only by saying that pressure of work and limited staff resources could affect response times. The one exception was the email of 24 April 2018 where Mr Cowan thought that he had responded but there was no evidence of that. There was no evidence that the Respondent had sought to mitigate the effect of delays by communicating with the Applicant such as by issuing a holding response or by explaining the reason for the delay. We have in mind in considering this matter that the Written Statement of Services indicates that it is the Respondent's aim that responses will be provided to correspondence within 21 days.

We find the Respondent to be in breach of Code Section 2.5 in respect of its failure to respond promptly to the Applicant's communications.

**(3) Pursuing debt recovery measures inappropriately**

The parties agree that the Respondent has a practice of issuing "pro forma" invoices to owners for certain repairs. This is done when an item of

expenditure is identified. Each flat owner is invoiced for their share by way of a pro forma invoice. The Respondent collects payments from owners and, once it has funds from all, it will begin the repairs. At the time of issuing the pro forma invoices the Respondent has not carried out any repairs. The pro forma invoice is simply a device which it employs to obtain the advance payments of shares from owners. That practice itself seems unobjectionable but a practical difficulty has arisen because certain owners have made certain payments in respect of pro forma invoices for intended repairs while others have not. The Respondent's practice is to treat pro forma invoice payments as "ring fenced" for their specific intended purpose and not to release any such funds back to the paying owners nor to allow such sums to be treated as credits towards other invoices rendered to such owners. The Respondent will hold onto such funds for years in the hope and expectation that eventually all owners will pay.

The parties agree that the Applicant has made payments in respect of pro forma invoices in respect of works which have not been carried out because the Respondent has not received payment from other owners of their shares.

The Respondent has imposed a debt recovery charge in respect of non - payment of invoices by the Applicant. The Applicant has carried out an analysis of all invoices received and all invoices paid and calculates an overpayment by her of c.£200. The Respondent did not produce any competing statement outlining a different position. The Respondent does however accept that the balance which is said to be outstanding is only outstanding if late payment charges on pro forma invoices are included.

We find the imposition of late payment charges upon pro forma invoices to be inappropriate in circumstances where the Respondent appears to have no debt recovery policy providing a basis for such action. The Respondent asserts no legal justification for the imposition of such charges. Further, the Respondent has pursued debt recovery action in respect of invoices said to relate to the time after which the Applicant maintains that the Respondent has been dismissed as factor. Those are disputed debts and the Respondent is obliged to have a policy to deal with those. There is no evidence that it has such a policy. We accordingly find there to have been a breach of Code Section 4.1.

Separately, the Applicant has complained, and the Respondent accepted at the hearing, that she had twice requested a copy of the Respondent's debt recovery policy and that it had not been provided. We therefore find there to have been a breach of Code Section 4.1 in this respect also.

**(4) Failure to have insurance**

The Applicant complained that the Respondent did not maintain insurance. The Respondent produced a Certificate of Insurance. The Applicant acknowledged that she had received this previously.

The factual history appears to be agreed that insurance was maintained up until April 2018. As notice of termination had been given to the Respondent by that date and that termination was intended to have effect from May 2018, the Applicant had requested that the insurance cover be provided only until then. The complaint had been that there was no insurance but insurance cover does seem to have been in place and we are unable to identify any breach of the Code in this respect.

**(5) Failure to ensure that repairs were carried out properly**

The Applicant has lodged photographs showing poor quality roof repairs carried out using tape and wood. She alleges that these were carried out by the Respondent's contractors and charged as temporary repairs in invoice no 23512 dated 24 May 2016. At the hearing, the Respondent advised that it considered that the repairs shown in the photograph were not those carried out by its contractors; it suspected that these repairs had been carried out by an unauthorised third party. The Respondent advised that it retains reports from its contractors for all roof works including photographic evidence of the works carried out but that it did not have those at the hearing. It asked to be allowed to produce these.

We decided to allow the Respondent to do so and issued an oral Direction that the Respondent should produce any contractor's reports or photographs relating to the temporary roof repairs described in the invoice as soon as possible and not later than within 14 days which failing we would proceed to make a decision on the available information.

No information was produced by the Respondent within the 14 day timescale and accordingly we have proceeded on the information available to us.

We think it likely that the repairs were in fact carried out by the Respondent's contractors. However, we have been unable to identify a breach of the Code in this respect.

**(6) Charging on the basis of 1/45 as opposed to 1/61**

The Applicant complains that the Respondent is using the wrong apportionment basis for common repairs charges.

The Respondent's response is that it inherited from the previous factors the basis of charge which it uses (1/45 shares). The Respondent uses that approach because it does not factor the garages or the storage area. The Written Statement of Services under the heading "Apportionment of Costs" states that costs will be charged on the basis of the Title Deeds. It then goes on to specify that this is a 1/45 share. Clause FIFTH of the Deed of Conditions, in fact, provides for 1/61 shares to be paid by the owner of every flat, garage and storage area. The Respondent acknowledged that this was so.

We consider the Respondent's conduct in demanding shares of 1/45 on the basis that this was required by the titles, when, in fact, that was not true, to constitute a breach of Code Section 2.1.

## 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.

We have a wide discretion as to the terms of the PFEO we may make. In this case we consider it appropriate to order the Respondent to make a payment to the Applicant of £800. This reflects that the Applicant has been caused significant distress and inconvenience by the persistent and repeated failures of the Respondent. For the avoidance of doubt, the question of what balance, if any, is due by the Applicant to the Respondent is a matter to be determined by the court and our Order (and the obligations which it imposes upon the Respondent) exists entirely independently of whatever determination may be made in the court proceedings.

## 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: 8 February 2019**