

Housing and Property Chamber First-tier Tribunal for Scotland



Proposal regarding the Making of a Property Factor Enforcement Order

**Following Upon a
Decision of the the First-tier Tribunal for Scotland Housing and Property
Chamber**

In an Application under section 17 of the Property Factors (Scotland) Act 2011

by

Fharjana Motaleb, Flat 1/2 , 9 Celtic Street, Glasgow G20 0BU (“the Applicant”)

**FirstPort Property Services Scotland Ltd, 183 St Vincent Street, Glasgow G2
5QD (“the Respondent”)**

Chamber Ref: FTS/HPC/PF/17/0087

**Re: 1/2 , 9 Celtic Street, Glasgow G20 0BU
 (“the Property”)**

Tribunal Members:

John McHugh (Chairman) and Helen Barclay (Ordinary (Housing) Member).

**This document should be read in conjunction with the Tribunal’s Decision of
the same date.**

The Tribunal proposes to make the following Property Factor Enforcement Order
 (“PFEO”):

*“Within 31 days of the date of the communication to the Respondent of this property
factor enforcement order, the Respondent must:*

- 1 Pay to the Applicant the sum of £100.*

- 2 *Refund to the Applicant all administration or other charges relating to late payment which have been imposed relating to the Applicant's delayed or non-payment of common charges since January 2017.*
- 3 *Confirm in writing to the office of the Tribunal that steps 1 and 2 above have been carried out."*

Section 19 of the 2011 Act provides as follows:

“(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a) give notice of the proposal to the property factor, and

(b) allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order...”

The intimation of the Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the Tribunal office by no later than 14 days after the date that the Decision and this proposed PFEO is intimated to them. If no representations are received within that timescale, then the Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a property factor enforcement order may have serious consequences and may constitute an offence.

J McHugh

JOHN M MCHUGH

CHAIRMAN

Date: 20 July 2017

Housing and Property Chamber First-tier Tribunal for Scotland



**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

Fharjana Motaleb, Flat 1/2 , 9 Celtic Street, Glasgow G20 0BU (“the Applicant”)

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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 of a flat at 1/2, 9 Celtic Street, Glasgow G20 0BU ("the Property").
- 2 The Property is located within a development known as Lennox Gardens ("the Development").
- 3 The Development includes six separate buildings and associated parking and common areas.
- 4 Each building consists of six flats.
- 5 There are a total of 36 individual dwellings within the Development.
- 6 The Applicant purchased the Property in December 2015, having previously occupied it as a tenant.
- 7 The Respondent is the factor of the Development.
- 8 The owners of flats within No.9 have attempted to dismiss the Respondent as factor of their block and there remains disagreement between the parties as to the extent to which that attempt has been successful.
- 9 A Deed of Conditions by Barratt West Scotland Limited recorded 26 June 1995 ("the Deed of Conditions") governs the arrangements which apply among the Respondent and homeowners within the Development including the Applicant.
- 10 The Deed of Conditions provides for the Development's management costs to be allocated among the owners of the individual flats.
- 11 The Deed of Conditions makes no provision for the reallocation of non-paying owners' shares.
- 12 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).
- 13 The Applicant has, by her correspondence, including that of 13 January, 1 and 8 February, 6 April and 12 May 2017 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.
- 14 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 18 July 2017.

The Applicant was present at the hearing and was accompanied by a neighbour, Evelyn Boyle.

The Respondent was represented at the hearing by its Credit Control Manager, Steven Maxwell and its Area Manager, Andrew Fisher. Another employee of the factor, Roger Bodden, was present as an observer.

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 2016 as “the 2016 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 a Deed of Conditions by Barratt West Scotland Limited recorded 26 June 1995 which we refer to as “the Deed of Conditions” and the Respondent’s undated Statement of Services & Delivery Standards which we refer to as the “Written Statement of Services”.

Incidental Matters

The current application is similar to a second application by a neighbouring proprietor (FTS/HPC/PF/17/0094). Accordingly we directed that the two cases be heard together.

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant made no complaint in relation to any breach of property factor's duties.

The Code

The Applicant complains of a failure to comply with Section 4.6 of the Code.

It provides:

"4.6 You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation)."

The Matters in Dispute

The factual matter complained of relates to the Respondent having allowed arrears to have built up because of the non-payment of common charges by another owner within the Development without intimation to the other owners including the Applicant.

The Applicant first became aware of the matter upon receipt of the Respondent's letter of 22 December 2016. This letter was sent to all owners of flats within the Development. It advised, firstly, that the float of £200 per property was becoming inadequate and, secondly, that there was a level of irrecoverable debt relating to the Development of £8600. The letter suggested dealing with the former issue by either increasing the float level or moving from six monthly to quarterly billing. It advised that the second issue would be dealt with by allocating the non-paying owners' liability among the remaining owners. This would be done by demanding the first half ie £4300 of owners in the six monthly bill to be issued in January 2017 and the remainder in July 2017.

The Applicant took immediate exception to this and complained to the Respondent that she was being asked to pay debts of a third party which related to a long period prior to her purchase of the Property. She thought this unfair and complained that she had been given no notification of this in terms of Code Section 4.6.

The Respondent followed the Respondent's two stage Complaints Procedure but no resolution acceptable to her resulted.

The Applicant feels that the Respondent was inconsiderate in its approach.

She knew nothing of any non-payment by third party owners. This was not something brought to her attention by her solicitors when she had purchased the Property. She was unaware whether any enquiries had been made of the Respondent as factor of the Development as to the arrears position in the context of her purchase. She had remained unaware of any issue until receipt of the letter of 22 December 2016. She was left with an unexpected bill to pay and there had been no offer to allow payment by instalments.

Mr Maxwell advised that no enquiries had been made by solicitors in the context of the Applicant's purchase of the Property. If enquiries had been made he advised that the Respondent would have advised the arrears position. It had become increasingly common in recent times for such enquiries to be made in these circumstances.

The debts related to a single owner who had not made a payment on his account since 2006. Mr Maxwell explained that it procedures had been followed, court action raised a charge for Payment served, and a petition for sequestration raised, although in the event another creditor had presented a petition just ahead of the Respondent. The non-paying owner was now sequestrated and a Notice of Potential Liability had been served. The sequestration had been granted in 2014.

The decision that the non-paying owner's debt should be reallocated among the other owners had been taken at the point when the non-paying owner's mortgage lender had taken possession of the flat and had agreed to pay a portion of the future common charges. At that point, the Respondent considered that (subject to any possibility of payment coming eventually by way of the Notice of Potential Liability) recovery from the non-paying owner was now doubtful and that reallocation was necessary. Mr Maxwell explained that although steps towards recovery had been made, the Respondent had been anxious to avoid bringing the matter to the attention of other owners because of the upset it would cause them and so this was why intimation had not been given sooner. He accepted that the Respondent had "not

covered itself in glory" in this respect and that it would have been possible to inform owners of the matter sooner, albeit the delay in providing information had been with the best of intentions. If owners receiving the unexpected bill had expressed difficulties in paying, they would have been offered the option of payment by instalment.

Mr Maxwell advised that the Deed of Conditions made no provision for reallocation of the unpaid charges and so reallocation had been made in accordance with the Tenements (Scotland) Act 2004.

Mr Maxwell advised that the delay in notification had caused the Applicant no financial loss.

We consider that the terms of Code Section 4.6 require the issue of non-payment and potential re-allocation to be brought to the attention of owners relatively early (the Section requires only that the non-payment *could* have an effect upon those owners). While a sensible construction may not require immediate intimation to owners of minor delays in payment by other owners, there were a number of stages at which events had obviously taken a concerning turn including the time at which it was decided to raise court action; the obtaining of decree; the service of a Charge for Payment; the expiry of the Charge without payment, the lodging of the Notice of Potential Liability; the decision to petition for sequestration and the granting of the sequestration of the non-paying owner. At all and any of those points, the Respondent had had to give serious consideration to the matter and it would have been obvious that the non-payment was significant and could result in a reallocation to the detriment of the other owners such that intimation to them in terms of Section 4.6 was appropriate.

We consider the Respondent's failure to provide this information to constitute a breach of Code Section 4.6.

The duty under the Code arises only from the date of the Respondent's registration. In relation to the Applicant, the failure relates only to the period from her ownership commencing ie from December 2015 to December 2016.

Observations

A number of other issues remain contentious between the parties including the circumstances surrounding the attempt by the Applicant and other owners to end their factoring relationship with the Respondent. These issues are mentioned in some of the papers available to us. These, however, are not the subject of the Application and, accordingly, we have not heard any evidence or made any findings in respect of them.

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 £100 and to refund any charges imposed in respect of late payment.

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.

J McHugh

JOHN M MCHUGH

CHAIRMAN

DATE: 20 July 2017