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

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016

Chamber Ref: HOHP/PF/16/0173

Re ; common landscape area at 4, Aqua Avenue, Hamilton, ML3 9BA ("The Property")

The Parties:-

Mr Christopher Bonnington residing at 4, Aqua Avenue, Hamilton, ML3 9BA ("the homeowner") and

First Port Property Services Limited, having a place of business at 183, St Vincent Street, Glasgow G2 5QD ("The factor").

Tribunal Members

Karen Moore (Legal Member)

Elizabeth Dickson (Ordinary Member)

Decision

The tribunal determined that the factor had not failed to comply with the Section 14 duty in terms of the Act in respect of compliance with Part 1.F and Sections 2.1, 2.2, 3.0, 4.0, 4.1, 4.5, 4.7 and 4.8 of the Property Factor Code of Conduct ("the Code").

Background

1. By application dated 16 November 2016 ("the Application") the homeowner applied to the Homeowner Housing Panel (now the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the factor had failed to comply with Part 1.F and Sections 2.1, 2.2, 3.0, 4.0, 4.1, 4.5, 4.7 and 4.8 of the Property Factor Code of Conduct ("the Code") in respect of carrying out landscape maintenance at the Property and in respect of the way in which the factor issued and pursued account.

2. The Application comprised the following documents-

a. Application form dated 16 November 2016;

b. Copy correspondence (email and letter) between the homeowner's neighbours, the residents' association, the homeowner and the factor;

c. Factor's written Statement of Services and

d. Copy of homeowner's title deed.

3. In response to the Application, the factor lodged written representations and productions comprising: -

a. Copy correspondence (email and letter) between the homeowner and the factor;

b. Copy invoices and closing statement of account and

c. Photographs of the landscape area.

Hearing

4. A hearing took place at 10.00 on 3 February 2017 at Wellington House, 134-136 Wellington Street, Glasgow G2 2XL. The homeowner was present. Mr Steven Maxwell and Mr Richard Rogers of the factor were present. In response to the tribunal's enquiry, the parties explained to the tribunal that First Port Property Services Limited were the successor company to Peverel, the company which, as far as they knew, had been appointed by the estate developer.

5. The tribunal then dealt with each of the homeowner's complaints in turn.

6. Part 1.F p which states:

"How to End the Arrangement : clear information on how to change or terminate the service arrangement between you and the homeowner, including signposting to the applicable legislation. This information should state clearly any "cooling off" period, period of notice or penalty charges for early termination."

The homeowner advised the tribunal that he had not received a copy of the factor's written Statement of Services until the meeting with Mr Rogers referred to in the following paragraph. He advised the tribunal that, as far as he was aware, none of his neighbours had received a copy either. Mr Maxwell advised the tribunal that as far as he was aware copies of the Statement of Services were issued to all of the factor's customers prior to the statutory deadline in October 2013 Mr Rogers advised the tribunal that, at the request of the residents' association, he had taken copies of the Statement of Services to the meeting in March 2016. The tribunal could not comment on whether or not the homeowner had received a copy of the factor's written Statement of Services in 2013 but, in any event, the tribunal was satisfied that the homeowner now has a copy.

With specific reference to Part 1.F of the Code the homeowner advised that the Statement of Services did not refer to a "cooling off "period, a notice of termination period and an early termination penalty. Mr Maxwell and Mr. Rogers explained that as it was the owners who had terminated there was no "cooling off "period, nor was there an early termination penalty, but that the Statement of Services referred to the three month notice period.

7. Section 2.1 of the Code which states:-

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

The homeowner advised the tribunal that this related to the statement made by Mr Rogers at a residents meeting in March 2016. The homeowner believed Mr Rogers to have stated that the cost of carrying out works to prune the trees and shrubs and remove and replace trees at the Property would be £1200.00. The residents' association subsequently obtained quote of £500.00 and so believed that Mr Rogers had mislead the residents by providing an inflated figure. Mr Rogers explained that the figure of £1200.00 was an indicative figure to cover the works and to top up the float for the development to cover the cost of ongoing work. In this regard, Mr Rogers explained that the float, being a payment of £50.00 per house to account for works carried out by the factor, was insufficient to cover the cost of the landscaping contract. Mr Rogers explained that the factor had a contract for landscaping works for all of the properties on its portfolio which the factor paid monthly. However, the factor invoiced the residents at Aqua Avenue, annually in arrears. The amount of the float did not cover the annual cost of routine pruning and grass cutting and, as more extensive work was now required, the float would not cover this and so an additional payment was required.

8. Section 2.2 of the Code which states:-

"You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action)."

The homeowner advised the tribunal that this related to the tone of the letters received from the factor regarding the account which he disputed. The homeowner considered that the factor had escalated the threat of court action with undue haste given that the homeowner disputed that the account was properly due by him. With reference to the various debt recovery letters lodged by the factor, Mr Maxwell demonstrated that the factor's letters had been in accordance with its Statement of Service and its Debt Recovery procedure.

9. Section 3 of the Code which states:-

"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 homeowner advised the tribunal that this related to the fact that the routine maintenance of the landscape areas should cover all of the works and that if the factor had been carrying out its function properly, the shrubs and trees would not have become so overgrown that further work was required. Mr Rogers explained that he had only recently taken over the development and so could not comment on why the specification was restricted to pruning, grass cutting and general tidy up. He explained that the work that was now required, being the removal and replacement of trees, was not be included in routine ground maintenance. However, it was clear that the specification and accordingly cost was inadequate to maintain the landscaping. The homeowner agreed that some of the trees, in particular, required to be removed and replaced and advised the tribunal that the residents had since arranged for this to be done. The homeowner stated that this had incurred an additional cost of £17.19 to him and considered that the factor should meet this cost.

10. Section 4 of the Code which states:-

"Non-payment by some homeowners can sometimes affect provision of services to the others, or can result in the other homeowners being liable to meet the non-paying homeowner's debts (if they are jointly liable for the debts of others in the group). For this reason it is important that homeowners are aware of the implications of late payment and property factors have clear procedures to deal with this situation and take action as early as possible to prevent non-payment from developing into a problem."

The homeowner advised the tribunal that this related to the expression "irrecoverable debt" and a share of "irrecoverable debt" invoiced by the factor. The homeowner referred to the dictionary definition of irrecoverable, stating that the debt was recoverable and the factor is still recovering the debt and it should not have been apportioned to the other owners. Mr Rogers and Mr Maxwell explained that one of the residents had accrued a debt in excess of £1700.00 which the factor had been pursuing by court action and by registering a Notice of Potential Liability. At the time when the residents at Aqua Avenue had terminated their contract with the factors, this sum was outstanding. Mr Maxwell explained that as they would no longer be factor for the development their legal ability to recover the debt was reduced and for that reason the debt was classed by the factor as irrecoverable. As the residents were jointly and severally liable for the debt, the debt was apportioned and a share of the debt was shown on the final invoice. Mr Maxwell explained that since the issue of the final invoice, the defaulting resident had begun to pay the debt and stated that, when paid, the amount recovered from the defaulting owner would be refunded to the residents.

11. Sections 4.1 and 4.2 of the Code which state:-

"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.

If a case relating to a disputed debt is accepted for investigation by the homeowner housing panel and referred to a homeowner housing committee, you must not apply any interest or late payment charges in respect of the disputed items during the period that the committee is considering the case."

The homeowner advised the tribunal that this complaint relates to the matter also raised under Section 2.1 of the Code and that the factor had been too hasty to pursue a debt which he was in dispute. The factor's position was that it had fully explained the homeowner's liability and was satisfied that the debt was due by the homeowner.

12. Section 4.3 of the Code which states:-

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

The homeowner advised the tribunal that the factor had not made it clear that a fee would be payable for closing the account nor that a late payment fee would applied. Mr Maxwell advised the tribunal that the Statement of Services and the Debt Recovery Procedure both made reference to these fees. Mr Maxwell advised the tribunal that a copy of the Debt Recovery Procedure was issued along with reminders for overdue accounts. It was noted by the tribunal that in his letter of 10 November 2016 to the homeowner, Mr Maxwell had offered to waive the late payment fee if the homeowner settled the account.

13. Sections 4.4, 4.5, 4.6 and 4.7 of the Code which state:-

"You must provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations.

You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding.

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).

You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs."

The homeowner advised the tribunal that this related to the "irrecoverable debt" due by a fellow resident. The homeowner accepted that the residents had been aware of the debt and accepted that steps were being taken to recover this debt, although this had not been fully appreciated by him until the Hearing.

14. Section 4.8 of the Code which states:-

"You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention".

The homeowner advised that this related to elements of the final invoice which he disputed and which had been referred to lawyers for legal action. In particular, the homeowner continued to dispute the factor's entitlement to the management fee and was of the view that this should have ended in March 2016 when, at the meeting of the residents, Mr Roger had been instructed not to take any further action in respect of the landscape maintenance. The factor's position is that the residents did not give notice to terminate until May 2016 and that as a three-month notice is required, the factor was entitled to a fee until the end of August 2016. The factor also pointed out that the factor had been arranging insurance cover and pursuing the common debt during this time and so was carrying out work on behalf of the residents. The homeowner accepted this position.

15. In the interests of reaching an amicable solution with the homeowner, Mr. Maxwell offered to waive the £36.00 late payment fee and also offered to meet the cost of £17.19 referred to in paragraph 8 above. Mr Maxwell made it clear that this offer to reduce the sum due by the homeowner was made as a goodwill gesture and without admitting any fault or liability on the part of the factor. Mr. Maxwell also undertook that the referral of the homeowner's debt to the factor's lawyers would remain on hold until a new invoice is issued to the homeowner talking account of the final sum recovered from the defaulting neighbour and offset against the amount due by the homeowner and the sum of £53.19 waived by Mr. Maxwell.

Findings of the tribunal

16. The tribunal took into account the application and accompanying papers, the productions lodged by the parties and the submissions made at the Hearing.

17. The tribunal found the following facts to be proved:-

a) The property is the landscaped area at the development at Aqua Avenue, Hamilton;

b) The property had been managed by the factor until August 2016;

c) All of the owners in the development have a joint responsibility for common debt due in respect of landscaping costs;

d) The float of £50.00 per house in the development is unlikely to cover the full annual costs and, as the factor invoices annually in arrears, the factor bears the deficit in cost until the accounts are paid by the owners;

e) The factor's written statement of services makes it clear that the factor is entitled to charge a late payment fee for unpaid accounts and a fee for terminating the contract;

f) Those parts of the factor's written Statement of Services which were considered by the tribunal complies with the Code and the factor follows the processes set out in its written statement of services and

g) The factor is pursuing a debt due by a defaulting owner on behalf of the residents.

Decision of the tribunal

18. The tribunal found that the parties gave evidence fairly and honestly and that the dispute between them was rooted in communication.

19. With regard to Part 1.F of the Code, the tribunal agreed with the factor that the Statement of Services made reference to the notice of termination period and so found that the factor had not breached the Code in this respect.

20. With regard to Section 2.1 of the Code, the tribunal accepted Mr Rogers' explanation that the sum of £1, 200.00 mentioned by him was an indicative amount representing the current works and the potential future deficit and that he had not misled the residents. The tribunal found that the factor had not breached the Code in this respect.

21. With regard to Section 2.2 of the Code, the tribunal found that the factor had followed its debt recovery procedure and that the content of the letters was no different to standard letters issued by any commercial organisation. The tribunal found that the factor had not breached the Code in this respect.

22. With regard to Section 3 of the Code, the tribunal found that the factor had been clear in respect of the services it provided to the residents and so found that the factor had not breached the Code in this respect.

23. With regard to Section 4 of the Code, the tribunal found that, whilst there was some confusion around the use of the word "irrecoverable", the factor does have a clear process in place to deal with common debt and so found that the factor had not breached the Code in this respect.

24. With regard to Section 4.1 and 4.2 of the Code, the tribunal accepted that it was the factor's position that the debt was due by the homeowner. In any event, the Code's requirement that debt recovery is put in abeyance applies only when the debt

is disputed before a tribunal. Accordingly, the tribunal found that the factor had not breached the Code in this respect.

25. With regard to Section 4.3 of the Code, the tribunal was of the view that the late payment fee of £36.00 was not excessive and was in line with charges made by similar commercial organisations. Accordingly, the tribunal found that the factor had not breached the Code in this respect.

26. With regard to Section 4.4, 4.5, 4.6, 4.7 and 4.8 of the Code, the tribunal noted that the homeowner accepted the factor's position in this respect and, accordingly found that the factor had not breached the Code in this respect.

27. The tribunal found that whilst the factor had not breached any part of the Code, the factor could have communicated better with the homeowner and his fellow residents to explain that the specification for the routine landscaping work had become inadequate and could have outlined more explicitly the steps being taken to recover the debt due by the defaulting resident. The tribunal appreciated the gesture by the factor to waive part of the homeowner's costs.

28. The decision is unanimous.

Review of tribunal's decision

Any 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 the party must seek leave to appeal from the First-tier tribunal. The appeal must be made within thirty days of the date when the decision was sent to them.

K Moore

Karen Moore

Chairperson

14 February 2017