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/18/2926

Flat 2/3, 8 Dixon Road, Glasgow, G42 8AY
("The Property")

The Parties:-

Mr Andrew Lynn, residing at the Property;
("the Applicant")

Ross & Liddell Ltd
("the Respondent")

Tribunal Members:

Mr G. McWilliams (Legal Member)
Ms A. MacDonald (Ordinary Member)

Decision

The Respondent has not failed to comply with its duties under Section 14(5) of the Property Factors (Scotland) Act 2011 ("the Act") and not failed to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors ("the Code"). The Respondent has not failed to discharge the Property Factor's duties incumbent on them 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 will not make a Property Factor Enforcement Order ("PFEO").

Introduction

1. The Respondent became a registered Property Factor on 7th December 2012 and their duty to comply with the Code, under Section 14(5) of the Act, arises from that date**.** The Applicant submitted an Application to the Tribunal by lodging documents with the Tribunal on 30th and 31st October 2018.

The Hearing

2. A Hearing was held at Glasgow Tribunals Centre, 20 York Street, Glasgow, G2 8GT on 10th January 2019. The Applicant attended with Ms Marion Lennox. The Applicant explained that Ms Lennox had assisted him with his Application and would help him, in particular with reference to papers, throughout the Hearing. The Respondent was represented by their solicitor, Mr Michael Ritchie of Hardy Macphail, Solicitors, Glasgow. Their Director, Mr Brian Fulton, and Property Manager, Ms Jennifer Johnston, attended as witnesses. Mr Gordon Buchanan of Hacking & Paterson Property Managers, Glasgow attended as an observer at the Hearing during its morning session.

3. In his Application, the Applicant complained that the Respondent had breached several sections of the Code and failed to comply with their Property Factor's duties.

Preliminary Matters

4. At the beginning of the Hearing the Applicant raised various preliminary points, as follows:-

   i) The Applicant referred to the Respondent's documents 14 and 41, in the Respondent's First Inventory of Productions, which were both Mandates regarding proposed works to be carried out at the Property. The Applicant stated that as the Respondent had not included Mandates completed by other proprietors at the Property he sought either that all of those additional Mandates be lodged or, alternatively, that his Mandates, being documents 14 and 41, be excluded from the papers under consideration. The Respondent's representative Mr Ritchie stated that he did not consider that the Mandates were materially relevant to the determination of the Application and that the Respondent wished to proceed with the Hearing. In the discussions regarding this point there was consensus between the parties that the Applicant had abstained from consent in respect of the skylight works referred to in the Respondent's document 14, and had refused to consent to the plaster repair works referred to in the Respondent's document 41.

   ii) The Applicant also sought to exclude documents 43 and 44 in the Respondent's First Inventory as they were duplicates of documents 23 and 24 in that Inventory. The Respondent, through Mr Ritchie, accepted that those documents should be excluded.

   iii) The Applicant sought to exclude document 6 in the Respondent's Inventory. He stated that this was not a copy of the document sent to him as it did not give the charge amount, of £34.17, inclusive of VAT, for the works referred to in the letter. The Applicant produced the principal letter which he had received which did include the charge amount. Mr. Ritchie confirmed that the Respondent was content to have the principal letter lodged, as document 6 was a system generated copy and did not show the amount..

iv) The Applicant also referred to the Respondent's document 42. He stated that it was vaguely familiar to him but he did not have the original within his papers. He stated that he simply wished the Tribunal to be aware that this was the case.

v) The Applicant stated that he had sought of the Tribunal that the Respondent's Managing Director, Mrs Irene Devenny, attend the Hearing to speak to her letter sent to him on 28th September 2018, document 23 in the Applicant's papers, in particular point 4 at the end of that letter, which referred to the Respondent's Schedule of Management ("the Schedule"). In discussions regarding this preliminary matter the parties agreed that the Schedule which had previously been sent to the Applicant, by Ms Johnston with her letter to him dated 3rd August 2018, document 17 in his papers, was a copy of the Schedule previously issued to proprietors in 2013, and that this Schedule remained applicable at the date of the Hearing.

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5. Having made their submissions in respect of the preliminary points, the parties agreed that the Tribunal only had to make determinations in respect of preliminary points 1 and 5.

6. Having considered the preliminary matters, the Tribunal determined that the Mandates, documents 14 and 41 in the Respondent's bundle of papers, should be excluded on the basis that there was no prejudice to either of the parties in this being done, given that they had agreed the Applicant's position in respect of the proposed works referred to in those Mandates. The Tribunal also excluded the Respondent's documents 43 and 44 on the basis that they were duplicates of documents 23 and 24. Further they excluded document 6 for the Respondent and substituted a new document 6 being the letter provided by the Applicant which confirmed the charge for the works, which were the subject of the letter, as being in the sum of £34.17 inclusive of VAT. The Tribunal was not required to make any determination in respect of preliminary point 4, having noted the position. In respect of preliminary point 5 the Tribunal determined that it was not necessary that Mrs Devenny attend as a witness given that the parties were agreed that the Schedule sent to the Applicant on in August 2018 was a copy of the Schedule sent several years previous and was the currently applicable Schedule. The Tribunal determined that it was not necessary for Mrs Devenny to attend the Hearing to speak to matters generally given the presence of Mr Fulton and Ms Johnston and given the extent of the papers produced by both parties in respect of the Application.

7. The Tribunal then discussed two other preliminary points with the parties. Firstly, they sought the parties' opinion on the Respondents late lodging of additional documents in a Third Inventory of Productions, containing documents 46 and 47. The Applicant stated that he had no objection to the late lodging of those documents. Secondly, regarding procedure at the Hearing, the Applicant and Mr Ritchie confirmed that they had no difficulty with all those present within the Hearing room remaining throughout the course of the Hearing. The parties agreed that it would be helpful for this to be case.

8. After determination and discussion of preliminary points the Tribunal proceeded to hear the Applicant's specific complaints in his Application. The Applicant wished to proceed with his complaints in the numerical order stated in the Paper Apart to his Application. The Respondent had no objection to this course of action.

Section 1.1.a.C.j. of the Code.

9. In the first instance the Applicant stated, per his complaint 3 in the first sheet of his Paper Apart, that the Respondent should only issue two bills each year, at 6 monthly intervals. He submitted that the Respondent had acted in breach of Section 1.1.a.C.j of the Code. The Applicant referred to paragraph 8 i) of the Service Level Agreement ("SLA") which had been issued to him and the other proprietors by the Respondent. The Applicant also referred to page 2 of the Schedule in this regard. Mr Ritchie stated that the Respondent's obligation in terms of Section 1.1.a.C.j of the Code was to produce a written statement stating how often the Respondent will bill homeowners and by what method the homeowners will receive their bills. Mr Ritchie stated that the Respondent had done so. Mr Ritchie referred to paragraph 2.iii in the SLA Service which states that the Respondent will normally seek advance funding for major repairs and submitted that it was implied that such advance funding is sought by way of invoices being issued, as happened with the plaster repairs which had been carried out around June 2018. The Applicant stated that the Respondent had, on three occasions, issued invoices outwith the 6 month period, in respect of secondary building reinstatement costs, in an invoice dated 1st February 2018 being the Respondent's document 45, in relation to those plaster repairs, in an invoice dated 12th July 2018 being the Respondent's document 46.7, and also in terms of the Applicant's document 6, relating to insurance, being an invoice dated 18th January 2016 in the sum of £34.30. He stated that the Respondent had not complied with the Code in this regard and that he only wished to make payment to the Respondent's every 6 months. Mr Ritchie submitted that the terms of the SLA permitted the Respondent to issue invoices for major repairs outwith the 6 monthly period, when payment had not been made following letter requests for payment. When giving evidence in respect of this complaint the Applicant confirmed that he had made payment of his share of the plaster repairs and the parties agreed that the Applicant's Factor's account had a nil balance.

Sections 2.1 and 1.1.a.C.e. and i. of the Code.

10. The Applicant further complained that the Respondent had provided him with information which was misleading or false, and was in breach of Section 2.1 of the Code. He, firstly, referred to his own document 7 and 8, dated 14th and 31st October 2011, and 9, dated 17th February 2012, but acknowledged that these letters pre-dated the Code becoming effective on 1st October 2012.

11. The Applicant further referred to the Respondent's documents 10, 11, 12, 13, 14 16, 17, 18 and 19, all of which concerned the Respondents requests to ingather funds for repairs and which included statements that works would have to be cancelled if the funds were not obtained. The Applicant submitted

that the Respondent had a policy of obtaining additional funds before instructing major repairs and that they departed from this policy when they instructed the execution of the plaster repairs in 2018. Mr Ritchie submitted that the Respondent had, in their Service Level Agreement, set out that additional funds may be sought for major repairs and that they would normally do so, as stated in the SLA. He further submitted, however, that the Respondent did not have a policy of always seeking advance funding for major repairs and that they dealt with such repairs on a case by case basis. He submitted that by proceeding with the plaster works in 2018, without having obtained advance funding from all of the proprietors, including the Applicant, the Respondent had not departed from any policy and had not provided the Applicant with misleading or false information in previous letters. When giving evidence in respect of this complaint, the Applicant stated that he was content that the Respondent had proceeded with the plaster repair works and that he had subsequently paid his share of the repairs cost. In this regard, the parties confirmed that it was a matter of agreement between them that there were no outstanding monies due to be paid by the Applicant to the Respondent.

12. The parties also agreed that the Applicant had, only on around 3 occasions over his 29 years tenure at the property, delayed in payment of Property Factor's bills and that he was not regarded as a homeowner with whom the Respondent had difficulty in respect of the recovery of monies due.

13. The Applicant further complained that there were instances of misleading or false information in the Schedule. He stated that his postcode was incorrect. Mr Ritchie conceded this on behalf of the Respondent. The Applicant also stated that the Float amount was incorrectly stated as being £270 but submitted that he did not wish to insist on a complaint in this regard as he was aware that the Float amount had changed. The Applicant further stated that the half yearly management fee was incorrectly stated as being in the sum of £77.75. The basis of these complaints was the fact that the Schedule had been published in 2013. The Applicant also complained that the Schedule did not refer to the addition of VAT to the Respondent's management fee. He confirmed to the Tribunal that he was aware that VAT was added to the management fee. Mr Ritchie agreed that the sums referred to had changed and submitted that the Applicant was aware of the altered fee and Float details given the terms of the various letters and invoices issued to him since the publication of the Schedule in 2013. The Applicant, in evidence later in the Hearing, agreed with the Tribunal that he had received invoices from the Respondent which included management fees and their amounts.

14. The Applicant also referred to Section 1.1.a.C.e of the Code regarding the Respondent's having an obligation to set out their charging arrangements, and provisions for review of these, in a written Statement of Services. The Applicant stated that the Schedule should have been changed to stipulate fresh fees and charges on each occasion that these had been altered. Mr Fulton for the Respondent stated that the Schedule and the SLA provided for the management fees to be reviewed at the time of issue of common charges accounts.

15. The Applicant further complained that the Schedule referred to the Property Manager Colin Johnstone, who was no longer the Property Manager. Mr Ritchie reiterated that Jennifer Johnston was the current Property Manager and this was clear in correspondence with the Applicant.

16. The Applicant then referred to his documents 16, 18 and 20 and stated that as the Respondent had not levied an Administration Charge of £20 plus VAT and not raised Court action against him, in respect of his then non-payment of his share of the plaster repairs, in support of his complaint under Section 2.1 of the Code. The letters stated that continued non-payment would result in application of the Charge and commencement of Court action. The Applicant agreed that he had paid his share of the plaster repair costs. Mr Ritchie submitted that the Respondent had not applied a Charge or commenced litigation as this Applicant was a regular payer and had made payment in respect of those works. Mr Ritchie submitted that there was no prejudice to the Applicant as a result of the Respondent's non application of a Charge or commencement of Court action.

17. The Applicant also complained that the Respondent had breached Section 1.1.a.C.i. of the Code as they had proceeded with the plaster repairs without obtaining full funding. The parties had already given evidence regarding the carrying out of and the payment for these works, referred to in paragraph 11 above. The Respondent stated that of the 11 homeowners at the Property, 7 had consented to the works, 3 had not replied to their letters and the Applicant had refused to consent. They had gone ahead as they had a majority and sufficient funds.

Sections 4.1 and 2.2 of the Code

18. The Applicant stated that the Respondent had not complied with the SLA and 6 month billing and therefore no debt recovery action should have been taken. He stated that if his complaint under Section 1.1.a.C.j. of the Code, regarding the issue of bills every 6 months, was upheld, this complaint should also be upheld. He stated that all of the Respondent's actions in seeking payment from him in 2018, in respect of the plaster repairs cost, were invalid. Mr Ritchie submitted again that the terms of the SLA permitted the Respondent to issue invoices for major repairs outwith the 6 monthly period, when payment had not been made following letter requests for payment for major works and the Respondents were not in breach of the Code

19. The Applicant further stated that the Respondent's letters intimating that they would levy an Administration Charge of £20 plus VAT and raise Court action against him, in respect of his non-payment of his share of the plaster repairs, were intimidating. He said that as the correspondence was sent in respect of a bill which had been issued outwith the 6 month period, referred to above, it was intimidating. Mr Ritchie submitted that the bill was due and payable, the Applicant settled it and the Respondent did not levy a Charge or raise Court action. The Applicant stated that the Respondent should have taken him to Court.

Section1.1.a.C of the Code.

20. The Applicant then referred to the Title Deed for the Property, document 2 in his papers, and stated that the terms of page 7 in the Deed provided that the Respondent Property Factor should pay for all works in advance of billing homeowners. Mr Ritchie reiterated that the SLA provides that the Respondent can request advance funding. The Applicant's complaint in this regard was not directed to a specific Section of the Code but appeared to relate to Section1.1.a.C of the Code.

21. In this connection the Applicant also stated that Float monies should be returned to homeowners as the Title Deed does not mention the Float. Mr Ritchie stated that the Float had been in place for some 20 years and that the Applicant had acquiesced in this arrangement. The Applicant stated that he had only recently looked at the Title Deed.

Sections 7.1 and 7.2 of the Code

22. The Applicant also complained that the Respondent was in breach of the above Sections of the Code as their published timescales for dealing with complaints are unreasonably long and as two senior management officers of the Respondent, rather than one, dealt with his complaints, originally set out in his letter sent to the Respondent on 16th July 2018. He stated that he wished to focus on Section 7.2 in this regard.

Submissions

23. The Applicant was not clear as to whether or not he considered that there had been any breach by the Respondent of their Property Factor's duties. He confirmed that he had completed his evidence in respect of his complaints. Mr Ritchie submitted that the Tribunal would have to carefully identify duties and how they had arisen if the Tribunal were going to consider making a determination in this connection. He stated that, when making their determination in respect of the Application, the Tribunal should place considerable weight on the Applicant's comments that the purpose of his Application was "to be a nuisance" to the Respondent. He stated that if there had been any technical breaches of the Code the Tribunal should place such weight on the Applicant's stated objective, referred to in more detail in the paragraph below.

General

24. On several occasions throughout the Hearing the Applicant stated that his goal was to have the Respondent removed as Property Factor for the Property. He stated that the purpose of his Application to the Tribunal, having previously submitted an Application to the Homeowner Housing Panel, the

predecessor of the Tribunal, was “to be a nuisance” to the Respondent in order that they would decide to resign as Factors. The Applicant, in his evidence, acknowledged that he was unlikely to achieve his aim. It was agreed by the parties, in their evidence, that the Respondent had issued two letters to other proprietors at the beginning of 2018 asking them to contact the Applicant if they wished to discuss with him his concern regarding the Respondent’s appointment as Property Factor. The Applicant stated that only one proprietor had contacted him and they had then failed to carry on dialogue with him in this regard. The Applicant repeated that he wished to continue “to be a nuisance” to the Respondent as this was all he could do to try to achieve his aim. He repeated that this was why he was bringing proceedings, including the previous Homeowner Housing Panel Application. The Tribunal stated, on several occasions throughout the Hearing, that, in the circumstances, it may be helpful if the parties were to enter into dialogue with a view to developing a positive relationship. The Respondent, through Mr Fulton and Ms Johnston, indicated that they would be willing to enter into discussions in this regard. The Applicant stated that he did not wish to do so at this time. He said that he wanted his Application to be determined. He indicated that he would be willing to hold discussions thereafter.

The Tribunal make the following Findings in Fact and Law:

25. The Applicant is the owner of the property at Flat 2/3, 8 Dixon Road, Glasgow, G42 8AY

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

27. The terms of the Respondent’s SLA permit them to request funding from homeowners, and issue invoices in this regard, for major repairs outwith the six monthly period referred to in their Schedule, when payment has not been made following letter requests for payment.

28. The Respondent did not have a policy of always seeking advance funding for major repairs. The terms of their SLA permit them to do so. In proceeding with the plaster works in 2018, without having obtained advance funding from all of the proprietors, including the Applicant, the Respondent had not departed from any policy and had not provided the Applicant with misleading or false information in previous letters in this regard.

29. The Applicant had been content that the Respondent had proceeded with the plaster repair works, without having obtained full advance funding from all the proprietors, including himself, and paid his share of the repairs cost.

30. The Applicant was made aware of altered fee and Float details given the terms of various letters and invoices issued to him by the Respondent’s since the publication of their Schedule in 2013. The Applicant also received invoices/accounts from the Respondent which included updated management fees and their amounts.

31. The Respondent's Schedule and SLA provided for the management fees to be reviewed at the time of issue of common charges accounts/invoices.

32. The Applicant's postcode is as detailed above, There was a typing error in his postcode stated in the Respondent's Schedule.

33. The Applicant is aware that his Property Manager is Jennifer Johnston.

34. The Respondent issued letters to the Applicant in 2018 stating that continued non-payment of his share of plaster repair costs would result in application of an Administration Charge and commencement of Court action. The Respondent was entitled to issue letters as monies were due to be paid to them by the Applicant. The letters were not intimidating. The Applicant is aware of the Respondent's procedures for debt recovery. The Applicant paid his share of the plaster repair costs and the Respondent did not apply a Charge or begin litigation.

35. The Applicant has acquiesced in the Respondent's Float arrangements for the Property.

36. Two members of the Respondent's senior management, Mr B Fulton, a Director of the Respondent, and Mrs I Devenny, the Respondent's Managing Director, dealt with the Applicant's complaint, originally detailed in his letter to the Respondent dated 16th July 2018. The Applicant wrote to Mr Fulton and Mrs Devenny in letters dated 18th August and 5th September 2018, in accordance with the Respondent's complaint procedure. Mrs Devenny, in her letter to the Applicant dated 28th September 2018, confirmed the Respondent's final decision in respect of his complaint.

37. The Respondent has not breached Sections 1.1.a.C.e.,i.and j., or Sections 2.2, 4.1, 7.2, or any other Sections of the Code.

38. The Respondent has not failed to carry out their Property Factor's duties incumbent upon them in terms of Section 17 of the Act.

Reasons for Decision

39. Section 1.1.a.C of the Code provides that a Property Factor, in their written Statement of Services, has to set out Financial and Charging Arrangements. In their SLA and Schedule the Respondent did so. In particular, the terms of the Respondent's SLA permit them to request funding from homeowners, and issue invoices in this regard, for major repairs outwith the 6 month period referred to in their Schedule, when payment has not been made following letter requests for payment. The Applicant is aware that the Respondent has on three occasions issued invoices outwith the 6 month period. In 2018 the Respondent had proceeded with plaster repairs works without obtaining full funding as it had a majority agreement and sufficient funds in the Property account. The Respondent's Schedule and SLA also provide for the

management fees to be reviewed at the time of issue of common charges invoices.

40. The Applicant was made aware of altered fee and Float details given the terms of various letters and invoices issued to him by the Respondent's since the publication of their Schedule in 2013. The Applicant also received invoices from the Respondent which included updated management fees and their amounts.

41. Section 2.1 states that a Property Factor must not provide information to a Homeowner which is misleading or false. The SLA provides that the Respondent "may" seek advance funding. It does not prescribe that they will do so and, accordingly, there is no policy of the Respondent to always seek advance funding. The information given in the SLA is therefore not misleading or false.

42. The Applicant's postcode is known to him. There was a typing error in his postcode stated in the Respondent's Schedule. This was an inconsequential error.

43. The Applicant is aware that his Property Manager is Jennifer Johnston. The Respondent's Schedule has not been updated since 2013 as there have been no significant changes in respect of the management of the Property. The Applicant continues to receive communications from the Respondent with relevant, updated information when details and values are changed.

44. Section 2.2 provides that a Property Factor must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that they may take legal action). The Respondent, and their agents, issued letters to the Applicant in 2018 stating that continued non-payment of his share of plaster repair costs would result in application of an Administration Charge and commencement of Court action. The Respondent was entitled to issue letters as monies were due to be paid to them by the Applicant. The letters were not intimidating, abusive or threatening. They reasonably indicated that the Respondent may take legal action.

45. Section 4.1 provides that a Property Factor must set out a debt recovery procedure which is clearly, consistently and reasonably applied. The Applicant is aware of the Respondent's procedure for debt recovery. The Applicant received letters from the Respondent, and their agents, in respect of unpaid plaster repair costs, and is aware of the Respondent's debt recovery procedure. The Applicant paid his share of those repair costs and the Respondent did not apply an Administration Charge or commence Court action. The Applicant's submission that the Respondent should have acted consistently and raised a Court action was unhelpful. If he had sought that proceedings be raised he would not have settled his account in this regard,

46. Section 7.2 provides that when an in-house complaints procedure has been exhausted the final decision should be confirmed with senior management of

a Property Factor before the Homeowner is notified in writing. The Applicant wrote to Mr Fulton and Mrs Devenny, in letters dated 18th August and 5th September 2018, in accordance with the Respondent's complaint procedure. Mrs Devenny, the Respondent's Managing Director, in her letter to the Applicant dated 28th September 2018, confirmed the Respondent's final decision in respect of his complaint.

47. The Applicant, in his closing evidence and submission, was not clear as to whether or not he considered that there had been any breach by the Respondent of their Property Factor's duties. He did not identify any duties that may have been breached and how they had arisen. His complaints in this Application were in relation to alleged breaches of the Code.

Outcome

48. The Tribunal, having had sight of all the papers and considered all of the evidence and submissions of the parties, accordingly finds, on a balance of probabilities, that the Respondent has not failed to comply with its duties under Section 14(5) of the Act and not failed to comply with the Code. Further the Tribunal finds, on a balance of probabilities, that the Respondent has not failed to discharge the Property Factor's duties incumbent on them in terms of Section 17 of the Act.

Observation

49. The Applicant stated on several occasions throughout the Hearing that he wished to continue "to be a nuisance" to the Respondent as this was all he could do to try to achieve his aim of removing them as Property Factor for the Property. He stated that this was why he had submitted this Application, and his previous Homeowner Housing Panel Application. He stated that he would continue to bring proceedings. The Tribunal stated, also on several occasions throughout the Hearing, that, in the circumstances, it may be helpful if the parties were to enter into dialogue with a view to developing a positive relationship. The Respondent did not cite unreasonable behaviour by the Applicant in the conduct of this case and did not seek an award of expenses in respect of this Application. The Respondent, through their Mr Fulton and Ms Johnston, indicated that they would be willing to enter into discussions with the Applicant. The Applicant indicated that he would be willing to enter into such discussions once his Application was determined. The Applicant and Respondent are encouraged to consider having discussions to try to foster a more positive relationship.

Appeals

50. 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

G McWilliams
Legal Member

18th February 2019