

Housing and Property Chamber First-tier Tribunal for Scotland



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

STATEMENT OF DECISION: in respect of applications 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 2017 (“the Rules”).

Reference number: FTS/HPC/PF/19/1171, 1136, 1153, 1175 and 1257 (“the Applications”)

Re: Flatted Properties at Flats 1, 5, 6, 3 and 4, 212, Bath Street, Glasgow, G2 4HW (“the Properties”)

The Parties:

Stephen Tyler, Gianluca Raucci, Catherine Sutherland, Darren McDaid and Elijah Nazarzadeh, all residing at the Properties (“the Applicants”), Stephen Tyler and Gianluca Raucci being “the Lead Applicants” and

James Gibb Property Management Limited having a place of business at 65, Greendyke Street, Glasgow, G1 5PX (“the Respondents”)

Tribunal Members

Karen Moore (Legal Member)

Mary Lyden (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Factor had failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Property Factor Code of Conduct (“the Code”) and had breached Section 4 of the Code at Sections 4.6 and 4.7. The Tribunal proposed to make a Property Factor Enforcement Order.

Background

1. By applications received by the First-tier Tribunal for Scotland (Housing and Property Chamber) between 11 April 2019 and 29 May 2019 (“the Applications”) the Applicants each applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Respondents had failed to comply with Section 4 at 4.6 and 4.7 of the Code, save for Elijah Nazarzadeh whose application related only to 4.7 of the Code.

2. The Applications comprised Application forms dated 17 April 2019, copy correspondence (emails and letters) between the Applicants and the Respondents and the Respondents' Written Statement of Services.

3. The Tribunal issued the following Direction on 30 June 2019:-

"The Lead Applicants are required to provide:

1. A copy of the title deeds or a land register print of the Land Certificate for the Properties or any of them showing the common ownership and factoring title conditions;

The Respondent is required to provide:

- 1. A copy of the Respondent's appointment as property factor to the development of which the Properties form part;*
- 2. Details of the outstanding common charges for the development of which the Property forms part, with personal data redacted if appropriate;*
- 3. Two hard copies of its Written Statement of Services relevant to the Property;*
- 4. A copy of its most recent complaints procedure and*
- 5. A copy of its most recent written debt recovery procedure*

The said documentation should be lodged with the Chamber no later than close of business on 12 July 2019. Each party should present their documentation in a single bundle which should be clearly indexed with numbered pages."

The Parties complied with the Direction.

Hearing

4. A hearing took place at 10.00 a.m. on Wednesday 24 July at the Glasgow Tribunal Centre, 20 York Street, Glasgow, G2 8GT. Mr. Raucci of the Lead Applicants was present and accompanied by Mr. Darren McDaid, one of the Applicants. The Respondents were represented by Mr. Nick Mayall, its Managing Director, by Ms. Catherine Flanagan, its Business Improvement Manager and by Mr. John McKenzie, its Income Recovery Manager.

5. The Tribunal first explained its role in the proceedings and advised the Parties that it had had the benefit of reading all of the paperwork lodged with the Applications and in response to the Direction and so was familiar with the substance of the complaints, being the apportionment of common charges debt owed by Johar Mirza, the proprietor of the flatted property at Flat 2, 212 Bath Street, Glasgow.

6. The Tribunal read out the relevant parts of the Code and advised the Parties that it would focus on these parts, being the pre-amble to Section 4: Debt Recovery and Section 4.6 and 4.7 as follows : *"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.

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).

4.7 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."

7. The Tribunal then clarified the following points with the Respondents and the Applicants, where appropriate: -

- i) The factoring arrangement was terminated by the Respondents giving three months' notice to the Applicants by email of 23 October 2018;
- ii) Previously the Applicants had sought to terminate by giving notice in January 2018, but on learning from the property factor of the common charges debt accrued by Mr. Mirza, the owner of flat 2, which would now be borne by them, the Applicants agreed with the Respondents to continue with the factoring arrangement for the debt to be pursued by the Respondents. The Applicants had signed a letter to the Respondents to this effect and
- iii) The Applicants were first made aware of the common charges debt accrued by Mr. Mirza which amounts to £8,171.65 by letter of 16 January 2018 from Mr. David Smith of the Respondents in response to the Applicants' January 2018 termination notice. Mr Smith's letter advised the Applicants that a notice period of three months would apply to any termination, and that all outstanding debt would become due and payable by the other owners. This letter also advised that, at that time, the debt at the development totalled £8,171.65, which meant that an additional amount would be due by each owner of £1,634.33 on their final account.

8. The Tribunal then heard from the Parties in respect of the matters raised in the Applications.

9. With regard to Section 4.6 of the Code as narrated in paragraph 6 above, the Respondents accepted fairly that it had not kept the Applicants informed of the debt accrued by their co-owner and accepted that, with hindsight, this should have been done. The Respondents explained that it is their practice as outlined in paragraph 2.8 of their Standard Operating Procedure JG/QU/SOP/004 lodged in response to the Direction that common debt is distributed when factor arrangements ceased and that the Respondents, in common with other factors, carried the debt until the factor arrangements ceased. The Respondents explained that had the Applicants requested the Respondents would have advised them of this debt or if there had been an owners meeting Respondents would have advised them of the debt at the meeting. The Respondents explained that there was no fixed rule or threshold as to when they would alert homeowners to debts accrued by co-owners as this

would be dealt with on a case by case basis, however, again accepted fairly that, with hindsight, the Applicants should have been advised.

10. With regard to Section 4.7 of the Code as narrated in paragraph 6 above, Mr. Mayall on behalf of the Respondents advised the Tribunal that it was his view that the obligation placed on factors was “to **be able** to demonstrate” (emphasis added) that the Respondents had 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” and that it was not necessary for the Respondents actually to demonstrate the steps taken prior to distributing common debt. From his experience with a property factors association, he advised the Tribunal that most factors take this view as the Code is ambiguous. The Tribunal’s view on this point is narrated at Paragraph 36 of this Decision. In any event, Mr. Mayall accepted that the steps taken by the Respondents to recover unpaid common charges from Mr. Mirza had not been conveyed to the Applicants.

11. The Tribunal then heard from the Respondents in respect of the steps taken by the Respondents to recover the debt from Mr. Mirza. Mr. McKenzie on behalf of the Respondents and with reference a timeline of debt recovery events, explained to the Tribunal that following two reminder letters for unpaid accounts and the application of a late payment fee of £30.00, the unpaid account was referred to “Adamsons”, sheriff officers and debt recovery agents to pursue. He explained that Adamsons carried out investigations and traces and found out that Mr. Mirza had been imprisoned, that he had been made bankrupt and that attempts to arrest bank accounts had been unsuccessful. The Respondents advised the Tribunal that court action had been taken against Mr. Mirza and that a decree had been obtained but the representatives were not aware if the decree was in the name of the Respondents alone or in trust for the Applicants. They explained that “Adamsons” as sheriff officers had been instructed to carry out diligence and had been actively pursuing the debt until the factoring arrangement between the Parties ceased in March 2019. The Respondents’ representatives advised the Tribunal that a Notice of Potential Liability had been registered against Mr. Mirza’s property on 2 March 2015 by the previous factors, Grant and Wilson, and that the Respondents had renewed this on 16 February 2017. The respondents explained that it had acquired the business of Grant and Wilson. The Respondents agreed that none of this debt recovery action had been conveyed to the Applicants and agreed further that the common debt accrued by Mr. Mirza had not been made known to Mr. McDaid or the agents involved in his purchase of his property in 2016. With regard to the latter, Ms. Flanagan of the Respondents explained that it was the Respondents’ practice to answer only the precise question asked by selling solicitors and not to expand on this or provide further information.

12. In response to questions from the Tribunal, the Respondents advised the Tribunal that, at the time of dealing with Mr. Mirza’s debt there was no fixed rule as to when a debt was considered irrecoverable and the Respondents took guidance from the sheriff officers and external solicitors and agreed that this could mean wasted costs in pursuing irrecoverable debt. The Respondents referred again to their Standard Operating Procedure JG/QU/SOP/004 which has since been introduced and explained that joint

and several development debt could now be accessed on line so that co-owners would be aware of any issues.

13. The Respondents advised the Tribunal that the debt accrued by Mr. Mirza had been apportioned equally to the Applicants when the factoring arrangement ceased in January 2019 and added to their final invoices in May 2019. With regard to questions from the Tribunal in respect of the elements of Mr. Mirza's debt, the Respondents advised the Tribunal that they did not know the exact elements but agreed that it would likely be management fees, insurance premiums and the legal costs in recovering the debt.
14. The Parties were asked if there was anything further that they wished to add and were invited to sum -up. Mr. Raucci advised the Tribunal that had the Applicants been aware of that Mr. Mirza's debt could and would be apportioned to them if they terminated the factoring arrangement, they would not have taken those steps. Mr. Raucci asked the Tribunal that if it were to impose an enforcement order on the Respondents that the debt be cleared but if they were to make payment that the detail of Mr. Mirza's debt be made to know them. Mr. Mayall asked the Tribunal to be fair and proportionate in dealing with the Applications and the outcome.
15. The Tribunal adjourned for a short time to consider if it could deal with matters or if it needed further information, particularly in light of Mr. Raucci's request that the detail of Mr. Mirza's debt be made to know the Applicants. The Tribunal took the view that the detail of Mr. Mirza's debt would be necessary to allow it to deal with matters fairly and justly and so reconvened the Hearing and advised the parties that it would adjourn the Hearing to a later date and would direct the Parties in writing on the further information it required.

Further Direction

16. The Tribunal then issued the following further Direction("Direction 2") :

"The Respondent is required to provide:

1. *With reference to the Respondents' Statement referenced client account 301270014 in the name of Johar Mirza and dated 11/07/2019, a copy of which is lodged with the tribunal, a detailed and itemised breakdown of each of the debit entries listed on that Statement, to include a detailed breakdown of the £2,052.18 debited on 29 November 2017;*
2. *A copy of the summons or initial writ raised by the Respondents against Johar Mirza, the proprietor of the flatted property at Flat 2, 212 Bath Street, Glasgow, in respect of the common charges due by him in respect of that flatted property;*
3. *A copy of the extract decree awarded as a consequence of the said summons or initial writ;*

4. *A note of the dates of entry for each of the Applicants to their respective Properties as held by the Respondents;*
5. *A copy of each letter from the respective solicitor or agent acting in the sale of each of the Properties to each of the Applicants requesting details of common charges and factoring information relevant to that sale and a copy of the Respondents' response to that solicitor or agent;*
6. *A copy of the Respondents' debt recovery procedures which were in place from the commencement of Johar Mirza's ownership of the flatted property at Flat 2, 212 Bath Street, Glasgow to date, excepting any such procedure already lodged with the tribunal;*
7. *A copy of the notice of termination of services issued by the Applicants which prompted the written response by Mr. D. Smith of the Respondents dated 16 January 2018, a copy of which last mentioned letter is lodged with the tribunal;*
8. *A copy of the timeline of debt recovery action taken by the Respondents against the said Johar Mirza and referred to by the Respondents' representatives at the Hearing on 24 July 2019;*
9. *With reference to the letter on the Respondents' note paper, headed "212 Bath Street-Factoring Agreement", signed by Mr. Raucci and dated 25/05/18, a copy of which letter forms Production B-2 of Mr. Raucci's application, details of :-*
 - i) *who drew up this letter;*
 - ii) *why it was required and*
 - iii) *the way in which it was given to Mr. Raucci, and, if relevant, to the other the Applicants. If the said letter was issued with a covering letter, the Respondents should provide a copy of that covering letter;*
10. *With further reference to the said letter referred to in paragraph 9 above, copies of the monthly reports referred to therein from 28 May 2018 to 23 March 2019, being the effective date of the Respondents' resignation as factors;*
11. *Copies of all correspondence, if any, not already lodged with tribunal as part of the Applications between the Respondents and the Applicants from 28 May 2018 to 23 March 2019 and*
12. *The Respondents are directed not to take any action in respect of non-payment by the Applicants of the accounts issued by the Respondents in May 2019 until the current proceedings are determined by the tribunal."*
17. *The Respondents complied with Direction 2 and submitted the information requested.*

Adjourned Hearing

18. The adjourned Hearing took place at 10.00 a.m. on 10 October 2019 at the said Glasgow Tribunal Centre. Mr. Raucci of the Lead Applicants was present. The Respondents were represented by Ms. Catherine Flanagan, its Business Improvement Manager and by Mr. John McKenzie, its Income Recovery Manager.
19. The Tribunal took the Parties and the Respondents, in particular, through the information lodged by the Respondents in response to Direction 2.
20. With reference to paragraph 1 of Direction 2 being the breakdown of the entries debited on 29 November 2017, the Tribunal noted that these related to common works, services and management fees arising from 2010 and that there did not appear to be excessive debt recovery costs or penalty charges.
21. With reference to paragraphs 2 and 3 of Direction 2 being the court action against Mr. Mirza, the Tribunal noted that this was in the name of the Respondents alone for a debt due to the Respondents for services and that a decree in the sum of £5,634.40 with interest at 8% per annum and cost of £560.00 had been granted in October 2017. The Respondents confirmed that interest had not been added to the principal sum and that the court costs had not been included in the sum sought from the Applicants.
22. With reference to paragraphs 4 and 5 of Direction 2 being the dates of entry for each of the Applicants and the information sought and provided as part of their respective conveyancing processes, the Respondents explained that they had provided the information which they held. The Tribunal noted that although most of the Applicants had purchased their properties during the period of Mr. Mirza's debt, the agents for only two had been advised of the extent of the debt. The Respondents explained again that its procedure is to take a narrow view of the request for information. Ms. Flanagan advised the Tribunal that the Respondents are being sued by an owner whose sale fell through because the Respondent had disclosed common debt to a potential purchaser.
23. With reference to paragraphs 4 and 5 of Direction 2 being the copy of the Respondents' debt recovery procedures which were in place from the commencement of Johar Mirza's ownership of the flat property at Flat 2, 212 Bath Street, Glasgow to date, the Tribunal noted that the procedures had not changed significantly but that the distribution of common debt is now mentioned and that it will normally occur in the event of a 'Cease to Factor'. Ms. Flanagan advised the Tribunal that, in addition, each owner is now able to view the level of common debt for his/her development on-line.
24. With reference to paragraphs 8, 11 and 12 of Direction 2 being the debt recovery action taken by the Respondents against Mr. Mirza and the costs incurred, the Tribunal noted that no excessive or unnecessary costs had been incurred and passed on to the Applicants. Ms. Flanagan advised the Tribunal that the difference in the sum sought from the Applicants and the sum obtained by decree is the common charges which fell due from

the date of the decree to the end of the factoring arrangement and no additional sums were incurred by the Respondent in attempting to recover these additional sums. Mr. Raucci confirmed that these charges are in line with the common charges for his property.

25. With reference to paragraph 9 of Direction 2 being the mandate or letter headed. "212 Bath Street- Factoring Agreement", signed by Mr. Raucci and dated 25/05/18, the Tribunal noted that this had been adjusted between the Parties.
26. With further reference to the remaining items, the Tribunal noted that the Parties had attempted to resolve matters and had attempted to make arrangements with the occupant of Mr. Mirza's property to reduce the debt.
27. In closing, Mr. Raucci submitted that the Respondents' processes were inadequate. Ms. Flanagan submitted that the Respondents were actively working towards improving all of its process and communications.

Findings of the Tribunal.

28. The Tribunal found that there had been a factoring arrangement between the Parties which had eventually terminated as result of the Applicants becoming aware of a significant common debt owed by their co-owner, Mr. Johar Mirza, and for which they could be held liable in terms of the title conditions for the Properties.
29. The Tribunal found that the Applicants became aware of the extent of this debt and their liability for in January 2018.
30. The Tribunal found that the Respondents had pursued Mr. Mirza's debt, albeit without success, but had not made the Applicants aware of the debt or of the action taken until January 2018 by which time the debt had accrued to over £8,171.65 and that the Respondents sought payment of a further £453.11 from January 2018 until the factoring arrangement terminated.

Issue for the Tribunal

31. The issue for the Tribunal is, having heard the Parties and having regard to all of the information before it, have the Respondents failed to comply with the Code at Section 4 and Sections 4.6 and 4.7 in particular as claimed by the Applicants?

Decision of the tribunal and reasons for the decision.

32. The Tribunal's decision is based on all of the information before it, whether or not specifically referenced herein.

33. The Tribunal had regard to the preamble of Section 4 of the Code, the wording of which is set out in Paragraph 6 above. The Tribunal is of the opinion that the purpose of Section 4 is to prevent the very situation in which the Applicants find themselves. The Tribunal notes that the Respondents' Standard Operating Procedure JG/QU/SOP/004 states that common debt is distributed when factor arrangements ceased and notes that this is set out in the Respondents' Written Statement of Services. However, the view of the Tribunal is that this practice and procedure does not comply with the Code as it does not have regard to the purpose and intention of Section 4. Therefore, the Tribunal finds the Respondents' overarching policy in this regard in breach of the Code. The Tribunal notes that an on-line facility is now available, but this was not in place in January 2018 and is of no benefit to the Applicants in respect of the Applications.
34. The Tribunal had regard to the Section 4.6 of the Code, the wording of which is set out in Paragraph 6 above. This is a specific duty on factors to apprise owners of common debts for which they will be liable and, by the Respondents' own admission and own Standard Operating Procedure, was not complied with.
35. The Tribunal had regard to the Section 4.7 of the Code, the wording of which, again, is also set out in Paragraph 6 above. The Tribunal does not agree with Mr Mayall's interpretation of this duty simply being limited "to be able to demonstrate" the reasonable steps taken and there being no obligation actually to demonstrate the steps taken. A key principle of the Code is transparency, particularly in dealing with financial matters. In the view of the Tribunal, the only way in which a factor is able to demonstrate is to demonstrate and so the Tribunal considers that Mr. Mayall's interpretation falls short of the purpose of this part of the Code. In any event, the Tribunal notes that the Respondents did not take any steps to recover the debt accrued by Mr. Mirza following the granting of the decree and so the Respondents have not, in fact, taken reasonable steps to recover unpaid charges of £2,990.46 from Mr. Mirza prior to charging the Applicants. Therefore, the Tribunal finds the Respondents in breach of Section 4.7 of the Code.
36. The Tribunal having so determined, then considered whether to make a PFEO in terms of Section 19 of the Act. The Tribunal considered that the effect of the respondents' failings on the Applicants is such that it has caused the Applicants unnecessary stress, inconvenience and cost and so the Tribunal propose to make a PFEO which will follow separately to conform with Section 19 (2) of the Act which states:- *"In any case where the First-tier Tribunal proposes to make a property Respondents enforcement order, it must before doing so (a)give notice of the proposal to the property Respondents, and (b)allow the parties an opportunity to make representations to it."*
37. The decision is unanimous.

Appeal

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

Karen Moore

Chairperson

23 October 2019