**First-tier tribunal for Scotland (Housing and Property Chamber)**

**Decision under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016**

**Chamber Ref: HOHP/PF/16/0170**

**Title no: LAN161399**

**Flat 1/2 41 Eversley Street, The Spinney Estate, Glasgow G32 8HS ("The Property")**

**The Parties:-**

**David Eccles**
**Flat 1/2 41 Eversley Street,**
**The Spinney Estate,**
**Glasgow**
**G32 8HS**
**("The homeowner")**

**FirstPort Property Services Scotland Limited**
**183 St Vincent Street**
**Glasgow**
**G2 5QD**
**("the Property Factor")**

**Decision of The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the tribunal') in an Application under s.17 of the Property Factors (Scotland) Act 2011**

**Tribunal Members:**

Paul Doyle (Legal member)
Kingsley Bruce (Ordinary member)

## DECISION OF THE TRIBUNAL

The Tribunal, having made such enquiries as it saw fit for the purposes of determining whether the Respondent has

(a) Complied with the property factor's duties created by s, 17 of the Property Factors (Scotland) Act 2011 ("The 2011 Act") &

(b) Complied with the Code of Conduct, as required by s. 14 of the 2011 Act

Determined that the Respondent has

(a) Complied with the property factor's duties, and

(b) Complied with the code of conduct.

**Background**

1. By application dated 8 November 2016 the Homeowner applied to the Homeowner Housing Panel, which became the First-tier Tribunal for Scotland (Housing and Property Chamber) on 1st December 2016, for a determination of whether the Respondent had failed to comply with the property factor's duties imposed by Section 17 of the 2011 Act, & failed to comply with the duties to comply with the code of conduct imposed by s.14 of the 2011 Act.

2. The application by the Homeowner stated that the he considered that the Respondent had failed to comply with sections 2.1; 4.6 and 6.9 of the code of conduct, and had failed to comply with the property factor's duties because of the manner in which the Respondent deals with the funds of homeowners, because of the manner in which the Respondent instructs, supervises and accepts maintenance work carried out by contractors; because of the manner in which the Respondent communicates with homeowners, and because the Homeowner says that the Respondent has mismanaged the larger property of which his home forms part.

3. The President of the Housing and Property Chamber of the Tribunal intimated a decision to refer the application this Tribunal. The Tribunal served Notice of Referral on the parties.

4. Following service of the Notice of Referral both parties made further written representations to the Tribunal.

5. A hearing was held at Wellington House, Glasgow, on 23 March 2017. All parties were timeously notified of the time, date & place of the hearing. The Homeowner was present (& unrepresented). The Respondent was represented by Mr S Maxwell. Ms C Renton, one of the respondent's area managers, gave evidence for the Respondent. The Homeowner answered questions from Tribunal members. The Tribunal then reserved its determination.

**Findings of fact**

6. The Tribunal finds the following facts to be established:-

(a) The Homeowner is the heritable proprietor of the property known as & forming Flat 1/2 41 Eversley Street, The Spinney Estate, Glasgow G32 8HS. His title is registered in the Land Register of Scotland under title number in LAN161399. He has owned and occupied the property since 2003. The property forms a first-floor flat in a block of 8 flats. The Homeowner's property forms part of development of 86 flatted dwellinghouses and more than 100 houses (" the estate")

(b) The Respondent is the property factor responsible for repair & maintenance of the common parts of the estate at Eversley Street, The Spinney Estate, Glasgow G32 8HS. Since 2002, the Respondent has been responsible for instructing and supervising common repairs to the common parts of the estate including the larger building of which the Homeowner's flatted dwellinghouse at Eversley Street, The Spinney Estate, Glasgow G32 8HS forms part.

(c) 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 Respondent intimated to the Homeowner and all other homeowners a detailed statement of services and delivery standards. Every six months the Respondent issues invoices to the homeowners, including the applicant Homeowner, for the costs of maintenance of the larger property. The Respondent maintains a float fund to which each homeowner is expected to contribute.

(d) On 8th August 2016, the Homeowner contacted the Respondent and complained that the locks to the stair leading to his front door was defective. The Respondent instructed repairs but by 6 September 2016 the door had not been repaired. The Homeowner contacted the Respondent complaining that the door had not been repaired and the delay in repair was inhibiting access to his own property. The Respondent contacted the contractor and the works were completed on 9 September 2016. Neither party is happy about the delay. On 3 March 2017, the Respondent refunded £13:52 to the Homeowner as a credit for the cost of the repairs to the front door lock.

(e) On 15 May 2012, the Homeowner wrote to the Respondent complaining about the factors' invoice received by him at the start of May 2012. That invoice sought payment of an increased £150 for the reserve (or float) fund. The Respondent intended to seek for payments totalling £500 over a two-year period to increase the reserve fund. In his letter of 15 May 2012, the Homeowner complained about his perception of comparatively uneven treatment of homeowners who did not pay their invoices. The Homeowner refused to pay the additional charge of £150, and has not made any other enhanced payments to increase the reserve fund.

(f) On 25 May 2012, the Respondent replied to the Homeowner explaining the purpose of the reserve (or float) account and explaining that an increase in the individual contributions to the float is necessary because expenditure had increased and because a number of homeowners have not paid their invoices, and that bad debts in the region of £39,000 existed across the estate.

(g) The title conditions affecting the property are set out in the burdens section of the Homeowner's land certificate. One of the burdens writs is a deed of declaration of conditions by Barratt Homes Ltd, registered in the Land Register for Scotland on 3 December 2001. One of the conditions imposed in that deed of conditions enables the factor to recover the proportion of payments for maintenance, factoring charges, insurance premia, remuneration and other factoring expenses - which cannot be recovered from proprietors who refuse to pay - from the remaining proprietors in the same block or from the other proprietors of all the flats erected on the estate.

(h) On 27 May 2015, the Respondent wrote to the Homeowner setting out a plan of maintenance, cleaning and internal decoration. Under the heading "*Internal redecoration*" the Respondent said

> *"this is a project we are working on, but the problems with debt and nonpayers at the Spinney have a negative effect on the funds held and the fluidity of the available funds in the development bank account."*

Under the heading "*Debt*" the Respondent said

> *"we are currently working on the debt problem at the development and will update you in due course."*

(i) In August 2015, the Respondent balloted all members of the housing association of which the Homeowner's property forms part to seek a mandate to redecorate the common parts of the larger property. The combined homeowners instructed the Respondent to carry out the work. The works were completed by May 2016 and on 2 May 2016 the Respondent sent each homeowner an invoice for the redecoration works. The invoice for the redecoration works explained that the reserve funds maintained as a float by the Respondent had been diminished by the refusal of some homeowners to meet the cost of common expenditure for which they were liable.

(j) On 29 April 2016, the Respondent wrote to the Homeowner explaining that irrecoverable debt is now a problem and that the reserve fund balance to the credit of the Homeowners is only £256. The balance had been reduced to that level by the cost of redecoration and carpeting. The Respondent explained that there was irrecoverable debt £19,482.84. The Respondent went on to explain each proprietor of the flatted dwellinghouses in the estate would be asked to contribute an additional £226.54. The Homeowner refuses to pay that sum.

(k) Correspondence followed between the Homeowner and the Respondent. In the appendix to a letter dated 2 August 2016 from the Respondent to the Homeowner, the Respondent set out details of the irrecoverable debts, the account history and outstanding service charges. The Respondent continues to pursue unpaid invoices. On 2 November 2016, the Respondent wrote to the Homeowner setting out revised figures based on sums recovered and details of savings made on rearranging the block insurance policy.

(l) In a letter from the Homeowner to the Respondent dated 14 May 2016, the Homeowner concedes that since 2012 he had been aware that the Respondent had been trying to recover unpaid invoices and identifying some unpaid invoices as bad debt.

(m) The Respondent has invoiced the Homeowner for further payment towards the float of maintenance funds because the Respondent believes the contributions which have not been paid by other homeowners of the larger property are an irrecoverable debt. Some debts are not recoverable because some homeowners have been sequestrated and another homeowner has signed a trust deed for creditors.

(n) The Respondent insists that the development has not been mismanaged. The Respondent has redecorated and carpeted all blocks of flats within the larger property and has secured a lower premium for the block buildings insurance. Since May 2016 the Respondent has ensured that each homeowner is given a detailed statement of account showing the current bank balance, the level of resident debt, the current level of reserves and the invoicing for floats.

(o) The Respondent has instructed debt recovery agents to pursue outstanding accounts from recalcitrant homeowners. The Respondent has lodged notices of potential liability against the homeowners with the largest debt, so that they can recover outstanding sums when properties are sold. It is the Respondent's practice to wait until the individual level of debt reaches £300 before instructing recovery.

(p) There are three homeowners who have not made payments to the Respondent. One has amassed a debt of £5752.84. The property factor obtained a decree against that proprietor and then instructed sequestration. By the time the Respondent took steps to sequestrate that homeowner, the homeowner had already entered a debt arrangement scheme (in March 2014).

(q) The second homeowner amassed a debt of £6327.26. The Respondent obtained decree against that homeowner in August 2014, and sequestrated that homeowner in December 2014.

(r) The third homeowner amassed a debt of £7402.74. The Respondent obtained decree against that homeowner in May 2014, and sequestrated that homeowner in March 2015. Those three homeowners are responsible for a total debt of £19,482.84. It is principally because of those three homeowners that this Homeowner is asked to increase his contribution to the reserve fund. The Respondent asked the Homeowner to pay £113.27 in addition to his bi-annual property factor charge. The Homeowner refuses to make that payment.

(s) When the Respondent increased the contributions to the reserve fund, the Respondent explained to all homeowners that the float had to be increased to take account of irrecoverable debts incurred by homeowners who would not pay. On 27 May 2015, the Respondent wrote to the homeowners reminding homeowners that there was an historic problem with unpaid accounts. The Respondent wrote to all homeowners, including this Homeowner, in similar terms in April 2016.

(t)The Homeowner was first asked for additional payments to address the shortfall caused by other proprietors in May 2012. He has consistently refused to make additional payments. The Homeowner raised his concerns with the Respondent in August 2016, and complained that the Respondent had breached the code of conduct and the property factors duties. The Respondent suggested a meeting to discuss the Homeowner's grievance. The Homeowner rejected the offer of a meeting. Parties then tried to resolve their differences by correspondence.

(u) Every six months the Respondent sends a statement of account to the Homeowner. That statement details the debits and credits on the Homeowner's account from March 2004. It does not include a statement of the capital account, nor does it is specify that there are unpaid invoices from other homeowners. The

statement of account does not detail sums due by other homeowners to the Respondent. The statement of account says nothing about bad debts.

**Reasons for the decision**

7. (a) The Applicant complains that the Respondent has failed in the duties imposed by both sections 14 and 17 of the 2011 Act. The Applicant gave evidence in clear and credible terms, answering questions from tribunal members fluently & without hesitation. The oral evidence given by the Applicant is entirely consistent with the documentary evidence placed before us.

(b) Section 2.1 of the code of conduct says

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

The Applicant told the tribunal that he did not think the Respondent provided false information, just that the Respondent had provided misleading information. The misleading information he complains of relates to the necessary repair to the block of the main entrance door to the larger property of which the Homeowner's flat forms part.

(c) Parties agree that on 8 August 2016 the Homeowner reported a fault in the lock the front door of block of flats to the Respondent. On the same day, the Respondent emailed the Homeowner confirming that a contractor had been instructed to carry out the necessary repair. By 6 September 2016 the lock had not been repaired. The Respondent emailed the Homeowner to say that the contractor told them that the locked does not require repair. On hearing from the Homeowner, the Respondent contacted the contractor again, and within three days the lock was repaired.

(d) The Homeowner's complaint is that the Respondent's representation throughout August that the lock been repaired is misleading. The weight of reliable evidence indicates that the Respondent was simply repeating what the Respondent had been told by the contractor. When the Respondent was told that the repair had not been carried out, the repair was arranged within three days. The Respondent has not provided false or misleading information. It is the Respondent who has been misled by the contractor. The contractor provided misleading information. The Respondent did not know that the information was inaccurate and had no reason to doubt it. There was no reason why the Respondent should not pass on the message from the contractor.

(e) On the facts as the Tribunal finds them to be, the Respondent has not misled the Homeowner. The Homeowner accepts that the Respondent has not deliberately provided false information. Both the Homeowner and the Respondent had been let down by the contractor. When both parties identified that they had been let down by the contractor, the Respondent resolved the problem within three days. There is no breach of section 2.1 of the code of conduct.

(f) The Homeowner complains that the Respondent has breached section 6.9 of the code of conduct which says

> 6.9 You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.

(g) The inadequate work complained of by the Homeowner is the work to the defective lock on the front door of the block dwellinghouses. The weight of reliable evidence indicates that the Homeowner contacted the Respondent to complain about the lock on 8 August 2016. Although there was contact between the Homeowner and the Respondent throughout the rest of August 2016, it was not until 6 September 2016 that the Homeowner told the Respondent that the defect in the lock persisted. On 7 September 2016 the Respondent emailed the appellant saying

> I can confirm the contractor shall attend today and report back to me the action/repairs that are required.

(h) Parties agree that by 9 September 2016 the lock was repaired. The weight of reliable evidence indicates that the Respondent pursued the contractor to remedy a defect in the work provided as soon as the Respondent was aware that the defect existed. There is no breach of section 6.9 of the code.

(i) The main part of the Homeowner's complaint relates to the Respondent's debt recovery procedures. The applicant complains that the Respondent has breached section 4.6 of the code of conduct, which says

> 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).

(j) The documents lodged by the Respondent clearly demonstrate that the Respondent became the property factor for this estate in 2002. Those documents contain an acknowledgement that the property factor has had a problem with unpaid invoices since 2002. The Respondent's oral evidence is that the problem with unpaid invoices escalated in 2010.

(k) The weight of reliable evidence indicates that it was not until May 2012 that there was correspondence between the Homeowner and the Respondent concerning the effect of unpaid invoices. It is clear from the Homeowner's letter to the Respondent dated 15 May 2012 that correspondence between the Homeowner and the Respondent started because he received a sixth monthly maintenance invoice which included a request for an increase payment to the reserve fund.

(l) In his letter of 14 May 2016 (reproduced at item 6 of the Respondent's second inventory of productions) the Homeowner acknowledges that he has known that there was a problem with bad debts for four years. In his oral evidence and in his application the Homeowner insists that the bad debt problem was drawn into focus when homeowners were balloted about redecoration in August 2016.

(m) The problem for the Homeowner is that by August 2016 he had known about the bad debt problem for more than four years. The problem for the Respondent is that although the Respondent made the applicant aware of the bad debt problem, it was

not until July 2016 that specific details of the bad debt problem, and the extent of indebtedness, was disclosed to the Homeowner.

(n) Section 4.6 of the code of conduct requires the Respondent to keep the applicant

> "informed of any debt recovery problems of other homeowners which could have implications for them".

The weight of reliable evidence indicates that since the summer of 2016 the Respondent has honoured that obligation. The Respondent has not, however, covered themselves in glory. The documentary evidence indicates that in years prior to the summer of 2016 the Respondent had been aware of problems of bad debt and that for 14 years prior to the summer of 2016 the Respondent knew that the bad debt problem was growing.

(o) Prior to the summer of 2016 the Homeowner had not been provided with a statement of account showing the extent of a bad debt which would have an impact on him. The correspondence from the Homeowner to the Respondent in 2012 demonstrates that the Homeowner was aware of a bad debt problem affecting the property factor's finances, but that correspondence also demonstrate that he was unaware of the extent and potential impact of the bad debt problem. Those are historic failings. By the time this application was submitted, the gaps in the Homeowner's knowledge have been filled in by the Respondent.

(p) It would have been helpful if the Respondent had provided the Homeowner with details of unpaid accounts and debt issues on a periodic basis and details of the steps taken to pursue recovery. It would have been helpful if the Homeowner had been advised, with each six-monthly invoice, of the extent of unpaid invoices and bad debt and the impact those negative figures were likely to have on the Homeowner. If the Respondent had been more fulsome in their disclosure this application may never been made.

(r) Since 2012, the Respondent has made the Homeowner aware of debt recovery problems and the implications those problems have for the Homeowner. Those implications are that the Homeowner is asked to pay more money to the reserve. In answer to questions from the Tribunal, the Homeowner candidly conceded that refusal to pay the increased contribution sought created difficulty for the Respondent in fulfilling their duties.

(s) The Tribunal considers carefully the terms of section 4.6 of the code of conduct. On the facts as this Tribunal find them to be the Respondent has done just enough to meet the requirements of section 4.6 of the code of conduct. The Homeowner's own evidence is that he has known the bad debt problem exists, and he has known that the impact of the debt problem requires a greater financial contribution from him.

(t) In terms of the deed of conditions registered in the land register of Scotland on 3 December 2001, the Respondent is entitled to recover a proportion of the unpaid invoices from the Homeowner and his co-proprietors. That is what the Respondent has sought to do. In fairness, the Homeowner does not fully understand why he has to pay when some of his co-proprietors have refused to pay. In the simplest of terms

the first reason is that the title conditions imposes that obligation on the Homeowner. The second reason is that the Respondent has tried and failed to recover the funds. It is for the Homeowner and his co-proprietors to provide the funds for maintenance of the estate. It is not for the Respondent to provide those funds. It is for the Respondent to manage those funds.

(u) Taking a holistic view of each strand of evidence, and acknowledging that the Respondent could have made disclosure setting out the extent of indebtedness and the reasons for writing off some debt earlier, the Tribunal comes to the conclusion that the Respondent has not breached section 6.1 of the code of conduct.

(v) The Homeowner's complaint that the Respondent has breached the property factors duties proceeds entirely on his claim that the Respondent has breached the code of conduct. As the Tribunal finds that, on the particular facts and circumstances of this case, there is no breach of the code of conduct, by analogy the Tribunal finds that the Respondent has not breached the property factors duties.

(w) The Tribunal therefore finds that the Homeowner does not establish that the Respondent has breached either the code of conduct or the property factor's duties.

**Decision**

8. A property factor enforcement order is not necessary.

**Appeal Rights**

**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.**

Signed P Doyle Date 12/4/2017
Legal Member