Housing and Property Chamber
First-tier Tribunal for Scotland

First-tier Tribunal for Scotland (Housing and Property Chamber) Property Factors (Scotland) Act 2011 ("the Act"), Section 19

The First-tier Tribunal for Scotland, Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017 ("the 2017 Regulations")

Chamber Ref: FTS/HPC/PF/19/0247

Property at 3 Neil Gordon Gate, Blantyre, Glasgow G72 0AP ("the property")

The Parties: -
Mr Greg Hanley, 11 Pommern Parade, Co. Antrim, Belfast, BT6 9FX ("the homeowner")

Newton Property Management Limited, 87 Port Dundas Road, Glasgow, G4 0HF ("the property factor")

Tribunal Members: -

Simone Sweeney (Legal Member) Elaine Munroe (Ordinary Surveyor Member)

Decision of the Tribunal Chamber

The First-tier Tribunal (Housing and Property Chamber) ("the tribunal") unanimously determined that the property factor has failed to comply with section 4.9 of the Code of Conduct for Property Factors ("the Code") as required by section 14(5) of the Act. The tribunal finds no breach of section 4.6 of the Code.

Background

1. By application dated 24th January 2019, the homeowner applied to the Tribunal for a determination on whether the property factor had complied with sections 4.6 and 4.9 of the Code imposed by section 14 of the Act.

2. The homeowner indicated on the application that his complaint included a failure to carry out the property factor duties in terms of section 17 of the Act. No detail was provided by the homeowner in relation to this allegation. A letter was sent to the homeowner by the tribunal administration dated 19th February 2019 requesting specification. The homeowner replied to the letter by email of 7th March 2019 stating, "…my complaints relate to sections 4.6 and 4.9 of the code of conduct. There are no further complaints at this time other than those detailed on my complaint form." The tribunal considered the alleged breaches of the code only.

3. The homeowner formally intimated his complaint to the property factors, in compliance with section 17(3) of the Act by email dated, 19th December 2018. Copies of this email together with further documentation and copy letters from the property factor were produced by the homeowner as part of an appendix to the application.

4. By decision dated 18th March 2019, a Convenor referred the application to the Tribunal for a hearing. Notices of referral were sent to the parties on 22nd March 2019. A hearing was assigned for 9th May 2019 in Glasgow. By email of 9th April 2019, the homeowner indicated that he would not be in attendance at the hearing due to work commitments. He attached written representations in support of his application to the email.

5. A hearing took place on 9th May 2019 at 10am within the Glasgow Tribunals centre, 20 York Street, Glasgow. In attendance at the hearing, on behalf of the property factor was, Mr Derek MacDonald, joint managing director, Mr Martin Henderson, executive director and Ms Alanna Higgins, recoveries manager. The homeowner was absent and not represented.

Hearing of 9th May 2019

6. The legal chair opened the hearing by explaining that the tribunal would hear from the property factor's representative in response to the allegations of sections 4.6 and 4.9 of the Code. No consideration would be given to any breach of the property factor's duties, it having been confirmed that this was not part of the homeowner's complaint. The

property factor's representatives confirmed that they were all familiar with the background to the complaint.

7. The background to the homeowner's complaint was that he had been aware in November 2016 that another owner at the development in which his property is located had accumulated a debt. The property factor had taken the decision to re-apportion the debt between the other homeowners. The property factor requested that the homeowner make payment of £405.27 being his share of the re-apportioned debt. The property factor claimed to have legal authority to make this request. The homeowner refused to make the payment. Around the time of submitting his application, the homeowner had been in contact with the owner who had accrued the debt. The owner had advised that there was an on-going court action against him to recover the debt which he was defending. In the papers attached to his application, the homeowner claimed that,

   "My main complaint is that Newton are pursuing me over a debt that is not mine and is also in dispute and subject to an upcoming court hearing."

Section 4.6 of the Code

8. The homeowner's first allegation was that the property factor had breached section 4.6 of the Code. Section 4.6 of the Code provides that the property factor,

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

9. In support of his allegation the homeowner had produced a letter from the property factor dated 15th November 2016. The letter read,

   "In terms of section 4.6 of the Code of Conduct for Property Factors, we are obliged to keep homeowners informed of any debt recovery problems of other homeowners which may have implications for them.

   The amount of outstanding debt at the development is currently is (sic) in the region of £8,923.83, and Newton hold floats in the sum of £3,250. This means that the development is overall in debt of approximately

£5,673.83, and these debts are fluid as matters stand. Presently, the debtor's shortfall is being met by our office.

If these outstanding debts were re-apportioned at this present time, in terms of Rule 5, (Tenements (Scotland) Act 2004 each owner would be due to pay approximately £405.27 excluding any of the sums that we are also unable to refund relative to the floats.

We wish to confirm that we are actively pursuing these debts through our debt recovery department. We have also placed a Notice of Potential Liability (NPL) in terms of Section 12 of Tenements Act (Scotland) 2004, this has been attached to the property title of each debtor, creating a heritable debt on the individual title."

10. In his application the homeowner submitted that this letter did not show that the property factor was, *"taking "action early to prevent non-payment from developing into a problem"* as per Section 4." The homeowner submitted that the property factor ought to await the outcome of the court action against the other owner prior to pursuing the debt from the homeowner.

Property factor's response to section 4.6 of the Code

11. In response to the allegation of a breach of section 4.6 of the Code, this was denied by the property factor. Mr Henderson referred to the letter of 15th November 2016 from the property factor to the homeowner. The letter put the homeowner on notice that a debt recovery problem existed and that it could have implications for him. By issuing this letter to the homeowner, Mr Henderson submitted that the property factor had satisfied the requirements of section 4.6.
12. Ms Higgins explained the background to the debt arising. A debt of £8,293 had accrued from 3 owners failing to pay. One of these debtors owned 3 properties at the development and the largest part of the debt belonged to him. The property factor had taken court action against this owner some years previously. By the time Ms Higgins came to work with the property factor in 2014 a payment decree had been granted against this owner. The owner had been ordered to pay £40 per month to the debt. However the owner's monthly bills continued to be issued and the owner failed to meet

these. The sum of £40 was not enough to cover the existing debt and the on-going charges. As a result the debt increased. A second action for payment was taken against the owner in 2017. This was the court action to which the homeowner was referring in his complaint.

13. Mr MacDonald highlighted that this section of the Code fails to provide any indication of when a property factor should intimate to homeowners issues of debt recovery which may impact on them. The property factor aims to deal with debtors discreetly and looks at each case individually. Mr Macdonald submitted that re-apportioning a debt is very much a last resort and not a decision which the property factor had taken lightly.

Section 4.9 of the Code

14. The homeowner's second allegation was that the property factor had breached section 4.9 of the Code. Section 4.9 of the Code provides that the property factor,

> *"When contacting debtors you, or any third party acting on your behalf must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position."*

15. In his application, the homeowner submitted that the property factor had pursued him for his share of the re-apportioned debt by letter. He alleged that the property factor had advised that he would be due to pay additional fees if the payment was late. He submitted,

> *"I believe that Newton's practise of continuing to bombard me with both red, unpaid invoices and letters threatening to put this (disputed) debt into the hands of a debt collection agency with the threat of further fees represents them acting "in an intimidating manner" and threatening me, contrary to section 4.9 of the Code of Conduct."*

16. By way of evidence the homeowner had produced a common charge invoice dated, 27th November 2018 which showed, a *"re-apportioned debt"* of £431.65 added to the account on 21st June 2018; the homeowner's share of the electricity bill of £3.53 on 22nd June 2018 and a, *"float repayment"* of £250 on 25th September 2018.

17. A covering letter to the invoice was produced. It read,

"At present this is a debt for the remaining owners to pay and will be subject to the usual debt recovery procedures with late payment fees and legal fees possible where payment is not made just like any other debt. As justified as owners may feel not pay this, (sic) legally this is not an option, so we would ask owners to pay this final account promptly. At a later date we hope to refund owners accordingly."

18. In his complaint email to the property factor of 19th December 2018, the homeowner had expressed his dissatisfaction with the invoice. The email read,

    "I wish to raise a complaint in relation to the above numbered account. Currently my £250 float is being withheld on the basis that one of the co-owners of a development is behind in his fees…. I do not believe it is fair or reasonable to ask me to pay towards this disputed bill before a judge makes a decision on the matter. I do not appreciate the vague mention of "late payment fees and legal fees" in the letter and believe this contravenes Section 4.9…In light of the above I would ask you to refund me £226.66, being the £250 float minus my own balance £19.76) and my share of the final electricity bill (£3.58)."

19. The property factor denied a breach of this section of the Code. Mr Henderson confirmed that letters had been sent to the homeowner requesting payment of the re-apportioned debt. He accepted that *"red"* letters had been issued demanding payment. There was nothing within the letters which could be considered, intimidating or threatening. The content of the letters made reference to possible court action but were no different to those issued by any agency seeking recovery of a debt.

20. The tribunal chair referred to the homeowner's written representations (received by email of 9th April 2019) in which he claimed that the property factor had referred the matter to a "*collection agency*." Within the written representations, the homeowner submitted,

    "…my initial notification of the end of the complaints process was on 22nd January 2019 and I notified Mr Henderson that the matter was being submitted to the First Tier Tribunal. Several weeks later….I opened a letter…dated 31st January 2019, from Gordon & Noble giving me 7 days to settle the disputed debt and saying I had been charged a

£60 administration fee. I do not feel that this was an appropriate course of action given Newton's communication failures and the matter being up for consideration by the Tribunal."

Mr Henderson submitted that the debt had been referred to sheriff officers, Gordon and Noble to pursue on behalf of the property factor. This is within the property factor's usual practice. The letter of 31st January 2019 had been lodged by the homeowner to illustrate intimidating or threatening behaviour on the part of the property factor. It read,

"We herewith give you seven days from the date of this letter to pay outstanding arrears to Newton Property or to reach a payment agreement. If neither of the above options are satisfied, we are instructed to pursue recovery of this debt and to commence litigation proceedings accordingly. We should advise that you have also been charged an administration fee for our appointment….Failure to pay outstanding arrears within seven days will result in our requiring to follow up this letter, initially via a variety of methods including contacting you by telephone at your home or work address."

Mr Henderson denied, again, that there was anything within this letter which breached section 4.6 of the code. He submitted that this was typical of an industry standard letter issued in pursuit of a debt.

21. Mr Henderson advised that the money due from the homeowner remained outstanding. He denied any suggestion that the property factor had pursued the debt during investigation of the homeowner's complaint. Mr Henderson referred to a letter to the homeowner dated 31st December 2019. In his submission this letter indicated the end of the complaints process as far as the property factor was concerned. The letter includes the paragraph,

"This is our final response in this regard and I appreciate that this is not the outcome that you were looking for. Should you feel that our complaints procedure has failed to satisfy your concern….forward your complaint to the First-Tier Property Tribunal…"

22. The tribunal chair enquired what the property factor's position was in relation to any breach of the second part of section 4.9 of the Code ie. *Nor must you knowingly or carelessly misrepresent your authority and/or the*

correct legal position. The tribunal chair enquired the legal basis on which the property factor relies to re-apportion the debt of one owner to other homeowners.

23. Mr MacDonald submitted that the title deeds (specifically sections 18.2 and 18.3) allow the property factor to look to the homeowner to pay his share of another owner's debt. A copy of the title deeds had been produced by the property factor attached to their written submissions. Sections 18.2 and 18.3 provide,

    "18.2 The Factor can recover unpaid costs on behalf of the Proprietors and may do so in his own name.

    18.3 Where a cost cannot be recovered from a Proprietor for some reason such as that:-

    (a) the estate of the Proprietor has been sequestrated

    (b) that Proprietor cannot, by reasonable inquiry, be identified or found, or

    (c)That Proprietor refuses or delays to make payment then that share must be paid by the other Proprietors as if it were a cost mentioned in rule 18.1."

24. The tribunal chair sought clarity on what efforts had been made by the property factor to recover the debt which has been accrued prior to re-apportioning the debt between other owners. Mr Henderson confirmed that the debt which was being re-apportioned was the subject of the 2017 court action against the owner. This case had been raised under the simple procedure rules of the Sheriff court. The case had called before Hamilton Sheriff court on 10th May 2018. The owner defended the action. The action was paused for settlement discussions between the parties. An offer was received from the owner. He offered to pay half of the total sum due if the property factor wrote off the remaining debt and did not insist on the court expenses. The offer was refused by the property factor. The property factor understood that the pause was recalled by a sheriff after a period of 6 months. Unfortunately, neither the property factor nor the owner had been made aware of the hearing and, there being no appearance, the case was dismissed by the court around November 2018.

25. The tribunal chair enquired what the usual practice is for the property factor when pursuing a debt. Ms Higgins explained that court action will be taken. Once a decree for payment is granted, the property factor will pursue avenues of enforcement. Advice will be sought from the property factor's litigation team and from sheriff officers to identify what solutions are available to them to recoup the funds. The property factor confirmed to the tribunal chair that this process had not been followed here to recover the money from the owner as the court action had been dismissed.
26. In light of the action against the owner having been dismissed by the court on a technical point, the tribunal chair whether the property factor intended to commence fresh legal proceedings against the owner who had accumulated the large debt. Mr MacDonald confirmed that this was not the intention. Mr MacDonald's position was that the property factor had no legal basis to pursue another court action against the owner. The owners at the development had dismissed the property factor from managing the development in June 2018. Mr MacDonald submitted that it would not be right for the property factor to accumulate expenses on behalf of all the owners given that the property factor was no longer managing the development. A court action had been pursued against the owner in 2017 and had been "unsuccessful." The property factor had committed itself to doing all it could to secure the debt up and until its services ceased in June 2018. Mr MacDonald directed the tribunal to the property factor's letter of 22nd March 2018. The letter read,

> *"as we will continue to be your agents up to the termination date we will continue to pursue all common charges due to the best of our ability….When we no longer act as your managing agents, after the date of termination however, we have no obligation to continue to pursue debts on behalf of the collective owners. Nonetheless we may still continue to pursue charges underwritten by us and therefore due to us and as such the situation regarding accumulated arrears becomes slightly more complicated, however fundamentally we will work towards a position where we can make an assessment based on the balance of common charges due at that point as to whether we can: A. Refund some or all owner's float deposits (£250 per flat) in entirety. Or B.*

Reapportion any uncollectable debts at the date of termination between the remaining owners. If the total debt position remains the same by date of termination, what will the effect be? We will need to invoice all owners out-with the debtors who have neglected their responsibilities with their share of the arrears. Currently this would be in the sum of £598.46 per owner this in terms of clause 18.3 of the Deed of Conditions (sic). Please note that this sum is fluid and subject to change depending on receipt of outstanding charges. We should also make the owners aware that the largest debtor is currently subject to court action which may result in additional legal expenses which if not paid by the debtor will be added to the common charge account, thereby increasing the overall development debt. Will I get my float back? Yes, if we manage to ingather all debit balances before or after the date of termination….We will guillotine all charges as at 22nd June 2018 and refund any unused portion….We will invoice you at or around this date with your latest common charge account and ask you to settle this failing which our debt recovery procedure will be employed…"

27. Mr MacDonald submitted that a business decision had been taken by the property factor not to pursue the debt from the owner. The property factor had reached the view that the debt could not be recovered from the owner. In any event, the debt was not owed to the property factor. The debt belonged to the owners, collectively. It was the owners' debt to pursue, not the property factor. Mr MacDonald directed the tribunal to the terms of section 18.2 of the title deeds. It provides that the *"Factor"* can recover unpaid costs on behalf of proprietors. Mr MacDonald submitted that, from June 2018, there was no legal basis for the property factor to pursue any court action against the owner.

28. Mr MacDonald confirmed to the tribunal chair that the property factor continued to pursue recovery of the debt they say is due from the homeowner. When asked to show the tribunal how that debt could be distinguished from the debt of the other owner, Mr MacDonald submitted that the larger debt from the owner could simply not be recovered but offered no further specification. Mr Macdonald accepted that court action against the owner may result in a decree but again emphasised that the

property factor would not pursue another action against him. Mr MacDonald emphasised that the property factor remains intent on recovering money from the homeowner despite no longer being his factor. Mr MacDonald did not dispute that court action would be pursued against the homeowner. He submitted that the homeowner had been asked in good faith to meet his obligations to the other owners by paying his share of the debt. Mr MacDonald expressed his view that the homeowner is aggrieved that he is being asked to pay for a debt for another owner despite having instigated a change in factor. The property factor confirmed that they had no more to say in response to the homeowner's application.

29. The tribunal noted that, within his application, the homeowner had provided detail of how his complaint could be resolved. He stated that,

> *"…I want Newton to stop sending me red invoices or threats of debt collection agencies. I also want Newton to refund me my float of £250 minus my closing balance (£19.76) & some small closing bills (£3.58), totalling £226.66. I also want £150 in compensation to cover the time I have spent dealing with this matter and the stress it has caused me. Finally I also want Newton to ensure, and confirm to me, that any Notice of Potential Liability (NPL) or similar attachments are removed from the property title."*

Findings in Fact

30. That the homeowner is the owner of the property.

31. That the property factor provided management services to the property until June 2018.

32. That 3 owners at the development accrued debts totalling £8,923.83 due to failure to pay factoring charges.

33. That the greatest share of this debt was accrued by one owner.

34. That the property factor wrote to the homeowner on 15th November 2016 advising that a debt of £8,923.83 existed at the development; that the property factor held floats in the sum of £3,250; that, when the debt minus the value of the floats was re-apportioned between the owners, that each owner would be due to pay £405.22.

35. That the property factor took court action against the owner with the greatest share of the debt in 2017.
36. That the owner made an offer to the property factor to pay half the debt in or around May 2018 which was refused by the property factor.
37. That the court action against the owner was dismissed by the court in or around November 2018 due to the property factor failing to appear at a court hearing on that date.
38. That the property factor has taken no further legal action against the owner.
39. That no enforcement action had been taken against the owner by the property factor.
40. That the property factor issued an invoice to the homeowner on 27th November 2018 seeking payment of a, *"re-apportioned debt"* of £431.65.
41. That section 18.2 of the title deeds provides, *"18.2 The Factor can recover unpaid costs on behalf of the Proprietors and may do so in his own name."*
42. That section 18.3 of the title deeds provides,

    "*18.3 Where a cost cannot be recovered from a Proprietor for some reason such as that:-*

    (a) the estate of the Proprietor has been sequestrated

    (b) that Proprietor cannot, by reasonable inquiry, be identified or found, or

    (c)That Proprietor refuses or delays to make payment then that share must be paid by the other Proprietors as if it were a cost mentioned in rule 18.1."
43. That these circumstances are when the estate of the proprietor is sequestrated, the proprietor cannot be found or where the proprietor, *"refuses or delays to make payment."*
44. That the property factor wrote to the homeowner requesting payment of the re-apportioned debt on several occasions after June 2018.
45. That the complaints process came to an end on 31st December 2018.
46. That the property factor instructed sheriff officers to pursue the debt from the homeowner on its behalf in January 2019.

47. That the sheriff officers wrote to the homeowner by letter of 31st January 2019 requesting payment within seven days failing which they sheriff officers were instructed by the property factor to pursue court action.
48. That the homeowner has not paid the re-apportioned debt and it remains outstanding.

Reasons for decision

49. It was a matter of agreement between the parties that a debt had accrued at the development in 2016. The evidence before the tribunal was that the greatest share of the debt was due to one owner, in particular. This owner had accrued debt in the past which had necessitated court action before 2014. In 2016, the intention of the property factor was to commence a second court action against the owner. The property factor took the decision to re-apportion the debt amongst the owners. The property factor intimated this decision to the homeowner by letter of 15th November 2016. Leaving aside any issues of whether or not the property factor had authority to reach its decision, the tribunal is satisfied that the property factor informed the homeowner of a debt recovery problem which may have implications for him. Accordingly the tribunal finds no breach of section 4.6 of the code by the property factor.
50. The tribunal accepted the evidence of the property factor that its debt recovery procedure is correspondence to a debtor requesting payment, litigation and, where appropriate, debt enforcement procedures. It was a matter of agreement that the property factor wrote to the homeowner requesting payment of the re-apportioned debt which he refused. It was a matter of agreement that the property factor instructed sheriff officers who wrote to the homeowner on 31st January 2019 requesting payment in seven days failing which litigation may follow. Leaving aside whether the property factor had authority to pursue the debt, the tribunal is satisfied that, in the context of a debt recovery process, there is nothing within the letters which is intimidating or threatening. Accordingly the tribunal finds no breach of this part of section 4.9 of the code by the property factor.
51. Mr MacDonald claimed that sections 18.2 and 18.3 of the title deeds gave the property factor legal authority to re-apportion the debt of the owner. It was upon this section Mr MacDonald was relying to recover from the

homeowner a re-apportioned share of the debt. Section 18.3 (c) provides that the property factor can recover unpaid costs on behalf of proprietors where the cost *cannot* be recovered from a proprietor because the proprietor refuses or delays to make payment. Mr MacDonald's evidence was that, as of, 22nd June 2018, section 18.2 did not apply to the property factor; that section 18.2 only applied to a property factor acting on behalf of the owners; that the debt belonged to the owners collectively. It was the owners' debt to pursue, not the property factors'. This is, of course, correct. As of 22nd June 2018 the property factor was no longer a property factor in terms of section 18 of the title deeds. However, this also means that section 18(2) is no longer available to them. The property factor cannot have it both ways. This is not a debt which "cannot" be recovered in terms of section 18(3). As correctly identified by Mr MacDonald, this is the owners' debt to pursue and it remains their debt to pursue through their present property factor, should they wish to do so,

52. For these reasons the tribunal finds the property factor to have knowingly misrepresented its authority and to have knowingly misrepresented the correct legal position. Accordingly, the tribunal finds the property factor to be in breach of section 4.9 of the code.

Decision

53. The tribunal, having found the factor to be in breach section 4.9 of the Code, propose a Property Factor Enforcement Order ("PFEO") to accompany this decision.

54. The property factor is ordered to pay to the homeowner the sum of £226.66. This sum represents the float of £250 minus the homeowner's closing balance of £19.76 together with a closing bill of £3.58.

55. The property factor is ordered to remove the debt from the homeowner's account and to confirm to the homeowner in writing that the debt has been removed and that no further action will be taken in this regard.

56. The property factor is ordered to remove and Notice of Potential Liability which has been attached to the property and to confirm this to the homeowner, in writing, once this has been done.

57. The tribunal recognises that the homeowner has been inconvenienced by the acts and failures of the property factor and that inconvenience should be recognised. The tribunal orders the property factor to pay to the homeowner compensation in the sum of £150 being the sum which the homeowner has specified on his application.

Appeals

58. 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.

……

Simone Sweeney, Legal member, 20th May 2019