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

Decision and Statement of Reasons in respect of an Application under Section 17 of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/17/0293, FTS/HPC/PF/17/0294, FTS/HPC/PF/17/0295, FTS/HPC/PF/17/0289, FTS/HPC/PF/17/0292, FTS/HPC/PF/17/0290 and FTS/HPC/PF/17/0291

Flat 2/1, 1276 Argyle Street, Glasgow, G3 8AA
Flat 2/2, 1276 Argyle Street, Glasgow, G3 8AA
Flat 3/3, 7 Radnor Street, Glasgow G3 7UA
9-11 Radnor Street, Glasgow, G3 7UA
13 Radnor Street, Glasgow, G3 7UA
3-5 Radnor Street, Glasgow G3 7UA
Flat 1/1, 1276 Argyle Street, Glasgow G3 8AA
(known collectively as "the Property")

The Parties:-

Mr. Russell Hyslop, residing at 20 Peters Gate, Bearsden, Glasgow, G61 3RY
Mr. Colin Montgomery, residing at 71 Rodger Avenue, Newton Mearns, Glasgow, G77 6JS, represented by Russell Hyslop
Dr Jeremy Roberts, Dr Hilary Melrose, Dr Gillian Eardley, Dr Anne Reid, Dr Patrick MacLaren, Partners of Radnor Street Surgery, 3 Radnor Street, Glasgow, G3 7UB, represented by Russell Hyslop
Mrs. Patricia Sampaio, residing at 24 St Anne's Drive, Giffnock, Glasgow, G46 6JP, represented by Russell Hyslop
(known collectively as "the Homeowner and Applicant")

Apex Property Factor Limited, 46 Eastside, Kirkintilloch, East Dunbartonshire, G66 1QH
("the Factor and Respondent")

Tribunal Members:-

Patricia Anne Pryce	**-**	**Chairing and Legal Member**
Ann MacDonald	**-**	**Ordinary Member (Housing)**

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the tribunal'), having made such enquiries as it saw fit for the purposes of determining whether the Factor has complied with the Code of Conduct for Property Factors as required by Section 14 of the 2011 Act, determines unanimously that, in relation to the

Homeowners' Applications, the Factor has not complied with the Code of Conduct for Property Factors. The tribunal did not consider whether the Respondent had failed to carry out the Property Factor's duties as these had not been properly intimated nor fully described within any of the applications.

The tribunal makes the following findings in fact:

- *Mr Hyslop was the owner of the properties at Flats 2/1 and 2/2, 1276 Argyle Street and Flat 3/3, 7 Radnor Street, all Glasgow.*
- *All of the abovenamed doctors are partners and owners of the surgery at 3-5 Radnor Street, Glasgow.*
- *Mrs Sampaio is the owner of Flat 1/1, 1276 Argyle Street, Glasgow.*
- *Mr Montgomery is the owner of 9-11 and 13 Radnor Street, Glasgow.*
- *The Respondent was the factor of the common parts of the building within which the properties are situated from October 2014 until the owners of the properties brought the Respondent's appointment to an end on or about May 2016.*
- *The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 from the date of its registration as a property factor on 1 November 2012.*
- *The Respondent failed to issue any invoices throughout its appointment as Property Factor in respect of the properties to the Applicants in relation factoring until March 2017.*
- *The invoices issued by the Respondent were all erroneous in their terms which was accepted by the Respondent.*
- *The Respondent failed to answer the queries and complaints raised by the Applicants in respect of these invoices.*
- *The Respondent thereafter raised court action against all of the owners, apart from Mrs Sampaio, founding on the erroneous invoices in respect of the debt recovery actions at court.*

Following on from the Applicant's application to the First-tier Tribunal (Housing and Property Chamber), which comprised documents received in the period of 25 July to 15 August, both 2017**,** the Convenor with delegated powers under Section 96 of the Housing (Scotland) Act 2014 referred the application to a tribunal on 18 August 2017.

Introduction

In this decision, the tribunal refers to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure as "the 2017 Rules".

The tribunal had available to it, and gave consideration to: the Applications by the Applicants as referred to above; representations submitted by the Respondent, Note of Concessions by the Respondent and productions lodged by all parties.

The Legal Basis of the Complaints

The Applicants complain under reference to various Sections of the Code as follows. The Applicants also complained about a failure of the Property Factor to carry out its duties, however, this was not intimated in advance of the applications nor was it clearly described in the applications. The tribunal decided to proceed on the basis of the alleged breaches of the Code.

Procedural History

There had been various hearings prior to the evidential one which took place on 20 August 2018. These had consisted of a Case Management Hearing and adjourned hearings. In short, no evidence was heard until the hearing on 20 August 2018.

Hearing

A hearing took place in Wellington House, Wellington Street, Glasgow on 20 August 2018.

The Applicants all attended and were all represented by Mr Russell Hyslop. Mrs Sandra McGraw, Practice Manager, attended on behalf of the Doctors but was happy to be represented by Mr Hyslop.

The Respondent was represented by Mr Neil Cowan, Legal Manager, who was supported by Mr Gary Russell, Property Manager, both employed by the Respondent.

Preliminary Issues:-

1. There were before the tribunal seven applications from four different owners but all applications were identical in form and substance. The tribunal had previously conjoined these applications without objection from the parties.
2. On the day of the hearing the Respondent attempted to have a witness allowed at the hearing. The Respondent could not provide a reason as to why this witness was considered appropriate so late in the day. The Respondent accepted that the witness should have been intimated at least 7 days in advance of the hearing in terms of Rule 22. Given this, together with the lengthy history of this case, the tribunal decided that this witness for the Respondent should not be allowed to give evidence. The tribunal considered that these applications had been ongoing for almost a year and that the Respondent had been afforded ample opportunity and leeway by the tribunal to prepare its case.

Breaches of 1.C I,J & K, 1.1.a.D(l-n), 2.3, 2.4, 3.5a, 6.2 and 6.3

The Applicants confirmed that they were not insisting on alleged breaches of these parts of the Code.

Breach of Section 2.1

Mr Hyslop submitted that the Respondent had provided false and misleading information to the Applicants as a result of the false and misleading invoices which the Respondent had issued to the Applicants. Mr Hyslop referred to the various invoices which had been produced to the tribunal. By way of an example, he referred to the varying amounts of attendances each owner had been charged for cleaning at the properties, the Doctors were charged for 85 attendances, Mr Montgomerie for 81 and 34 respectively and Mr Hyslop for 86, 84 and 77 attendances. All of the invoices showed different figures yet these invoices all related to the same addresses and purportedly to the same service. He submitted that these made no sense. Figures for litter picking within these same invoices showed the same level of discrepancy.

Mr Cowan accepted that the Respondent had not issued any invoices to the Applicants during the 20 months of its appointment as factor. Invoices were finally issued in March 2017. He could not explain the discrepancies and accepted that these invoices were erroneous. He also accepted that these same invoices had been used as the basis for the Sheriff Court debt recovery actions which were presently ongoing (though sisted) despite that fact that the terms of these invoices were wholly inaccurate. He advised that there had been an issue about the unusual apportionment of the charges at these properties when the Respondent had initially taken over factoring the properties. He had cancelled previous invoices which had been issued on the basis of equal apportionment and issued fresh ones once the apportionment of the charges had been clarified but the terms of these invoices were still erroneous. An upgrade was subsequently carried out on their IT systems but they had not issued fresh invoices after this upgrade.

Mr Hyslop submitted that the sale of one of his properties was held up for nearly a year as a result of the false and misleading information which the Respondent had provided. He referred to the emails between his solicitor and the Respondent which formed part of his productions. In these emails, the Respondent had claimed to the potential owner that there were major repairs required as a result of water ingress to the property which formed the doctors' surgery.

Mr Cowan submitted that he had attended at the property and had seen an issue with dampness. He thought the issue was internal to the Doctors property and not a common repair issue. He confirmed that he did not hold any technical qualifications nor was he a surveyor. However, he thought that a structural survey was required. He did not ask the owners for funds for this. He did not subsequently liaise with the Doctors about this.

Mrs McGraw confirmed that the Doctors had instructed a damp proofing company to carry out tanking works to the basement. The Doctors had paid for this work and had not sought recompense from anyone else. She confirmed that Mr Cowan had not liaised with the Doctors about this nor had he corresponded to find out if there had been an update.

Mr Cowan accepted that he had emailed the prospective purchaser for Mr Hyslop's property advising that a structural survey was required. He accepted that, with hindsight, this was probably improper.

The tribunal noted that the Applicants have attempted to raise their concerns about the erroneous invoices but that these have been ignored by the Respondent. In addition, the tribunal is appalled to note that the Respondent accepts that these invoices are erroneous yet has founded on these for the purposes of debt recovery actions within Sheriff Courts. Furthermore, the tribunal is also appalled to note that the Respondent misrepresented the position as regards an alleged repair to a prospective buyer, thus causing distress to both that buyer and to Mr Hyslop and, in turn, delaying the settlement of the sale by almost one year.

Given this, the tribunal finds that the Respondent breached Section 2.1 of the Code.

Section 2.2

Mr Hyslop submitted that the Respondent had breached this due to the excessive number of calls that it had made to various owners. He made reference to the telephone call logs which had been produced by the Respondent. For example, Mrs Sampaio, who is an elderly lady who has not kept the best of health, was subjected to over 30 telephone calls from the Respondent demanding that she pay the invoices, regardless of any queries she may have had in relation to them.

Mrs Sampaio confirmed that the actions of the Respondent had left her feeling harassed and intimidated. She felt forced into settling a payment with the Respondent despite that fact that she did not agree with everything contained within the invoices.

Mr Hyslop also referred to the difference in levels of calls received. The Doctors had only received two calls.

Mr Hyslop also referred the way the Respondent had undertaken its debt collection process. For example, the Respondent had lodged a Notice of Potential Liability (NOPL) on one of his properties despite the fact that he had queried the amounts in the invoices and thus was disputing the debt due.

In response, Mr Cowan explained that he had undertaken the NOPL as the Respondent's appointment had been terminated and was about to take effect so he wanted to be able to register an NOPL as once the termination took place, he would not be able to. In short, he accepted that he had done this to get "under the wire".

Mr Hyslop submitted that the Respondent had used erroneous invoices as the basis on which to register an NOPL against his property. In addition, his queries about the invoices had never been answered and the Respondent had also imposed huge late payment fees.

Mr Cowan disagreed that the Respondent's approach was excessive as it was simply designed to get people to pay. He accepted issuing a second reminder letter

within the three months which had been allowed for the owners to make payment. However, he explained that three months had been allowed from the issue of the invoices in March 2017 for owners to make payment but it was implied that payment would be spread over that three-month period. He advised that this was his interpretation and if an owner had not made any payment then reminders would be issued. He accepted that no reminder letters had been sent to Mr Hyslop but that phone calls had been made.

The tribunal considered that the Respondent's behaviour in relation to these matters was reprehensible. The Respondent was aware that Mr Hyslop disputed the invoices he received. However, rather than answer his queries, the Respondent registered an NOPL against his property while it still could. In addition, calling an elderly person over 30 times in respect of an invoice which she was querying appeared to the tribunal to be excessive.

Given this, the tribunal finds that the Respondent breached Section 2.2 of the Code.

Section 2.5

The Respondent accepted that it had not replied to correspondence within the timescales as laid out in its written statement of service (WSS). Mr Cowan accepted that the Respondent had not replied to emails and queries raised by the Applicants. He could provide no explanation for this. He accepted that, rather than respond to the emails and queries, the Respondent had raised court actions for debt recovery against the Applicants (apart from Mrs Sampaio who had reached an agreement with the Respondent and had paid money to the Respondent to prevent court action).

The tribunal noted that the Respondent accepted this breach. However, the tribunal notes that, despite accepting that the invoices are erroneous and that it had not replied to any of the queries raised by the Applicants, the Respondent had continued to raise court actions for debt recovery against almost all of the Applicants. The tribunal notes its further dissatisfaction at the conduct of the Respondent.

Given this, the tribunal finds that the Respondent breached Section 2.5 of the Code.

Section 3.1

Mr Hyslop submitted that this breach was established by the fact that the Respondent had failed to issue the financial information relating to their account after termination of its appointment in May 2016.

Mr Cowan submitted that the issuing of the erroneous invoices was the final accounts.

The tribunal had no hesitation in accepting that there had been a breach of this section of the Code. The invoices were not a proper accounting of the financial position. They remain erroneous and have not been corrected by the Respondent.

Given this, the tribunal finds that the Respondent breached Section 3.1 of the Code.

Section 3.2

Mr Hyslop submitted that the Applicants had not received return of the float. He had been asked to pay a float of £400 in total for his three properties but every other owner had been asked to pay £100 per property. None of these have been returned.

Mr Cowan explained that none of these had been returned due to the outstanding debt which the Applicants owed, although he accepted that Mrs Sampaio did not owe any money yet her float had not been returned to her.

The tribunal opined that there had been a breach of this section of the Code in relation to Mrs Sampaio. Mrs Sampaio was no longer considered by the Respondent to owe a debt. Given this, she should have received repayment of the float. The tribunal notes that the other amounts refer to disputed debts and therefore the floats remain a matter within that dispute.

Given this, the tribunal finds that the Respondent breached Section 3.2 of the Code.

Section 3.3

This breach was accepted by the Respondent and referred to within its Note of Concessions. The Respondent accepted that it had not issued any invoices to the owners during its whole term of appointment as factor and only issued invoices around 10 months after the termination of its appointment as factor.

Given this, the tribunal finds that the Respondent breached Section 3.3 of the Code.

Section 3.5a

Mr Hyslop submitted that the owners did not know if the Respondent had kept the float monies separate. He had no evidence to offer in respect of this.

Mr Cowan submitted that the funds were kept in a separate account.

In light of the above, the tribunal considered that, on a balance of probabilities, the Respondent did keep the monies separately.

Given this, the tribunal finds that the Respondent had not breached Section 3.5a of the Code.

Section 4.1

Mr Hyslop referred to, and relied on, the circumstances outlined above surrounding the NOPL placed against his property. In short, the Respondent had gone straight to

an NOPL without carrying out any of the other more preliminary stages referred to in its debt procedure.

Mr Cowan accepted that the debt procedure had not been applied consistently. He accepted that the debt recovery process in the WSS does not have timescales linked to each step. He accepted that the Doctors had received two chase-up phone calls yet Mrs Sampaio had received over 30.

The tribunal noted that there was a debt recovery procedure within the WSS but that there were no time scales attached to these. In addition, there were no procedures for dealing with a disputed debt. The procedures were also inconsistently applied, for example, an NOPL being registered against Mr Hyslop's property without warning or the hugely different numbers of phone calls received by the Applicants. Mr Cowan accepted this breach.

Given this, the tribunal finds that the Respondent breached Section 4.1 of the Code.

Section 4.3

Mr Hyslop submitted that he had been charged £600 plus VAT for an administrative charge. Mr Montgomery had been charged £450. They both referred to the invoices which showed these amounts.

Mr Cowan could not explain the differences in these amounts. However, he explained that the £600 would cover the cost of sheriff officers' fees and warrant dues in respect of the court action. He accepted that the Respondent would also seek these amounts in any court action. He advised that these would also account for the time involved in their staff dealing with these court actions.

The tribunal was not convinced by Mr Cowan's explanation of these fees. No clarity was provided as to how these were arrived at. In addition, the tribunal was uneasy with the idea that the Respondent purported to charge for matters which was the subject of a court action and which was being sought in the amount of the court action. These amounts appeared to be arbitrary and excessive.

Given this, the tribunal finds that the Respondent breached Section 4.3 of the Code.

Section 4.5

Mr Hyslop referred to the history of non-production of invoices and reminders as outlined above. He referred to the fact that only Mrs Sampaio had received written reminders. No other Applicant received these.

Mr Cowan submitted that regular reminders were given through phone calls. He could not, however, explain why only Mrs Sampaio had received written reminders.

The tribunal considered that the Applicants were not issued with timely written reminders.

Given this, the tribunal finds that the Respondent breached Section 4.5 of the Code.

Section 4.6
Mr Hyslop submitted that he and the other owners were not informed of any debt problems.

Mr Cowan explained that debt was not a problem during the Respondent's appointment due to debt not becoming an issue until after the termination of the appointment when the invoices were issued 10 months later.

The tribunal accepted the submission made by Mr Cowan.

Given this, the tribunal finds that the Respondent had not breached Section 4.6 of the Code.

Section 4.8

Mr Hyslop referred the tribunal to his previous submissions and evidence at the hearing.

Mr Cowan submitted that the Respondent had taken reasonable steps in respect of the Applicants apart from the NOPL it had registered against Mr Hyslop's property. He accepted that the Applicants had not received letters in respect of the alleged debts. However, he submitted that phone calls were sufficient. He could not explain why no letters had been sent to the Applicants in respect of the alleged debts (apart from Mrs Sampaio).

The tribunal considered that the Respondent had not taken reasonable steps to resolve matters. The Respondent had, by its own admission, not replied to any of the emails or letters querying the invoices. The Respondent had proceeded to register an NOPL without warning and had initiated court actions without entering in to correspondence with the Applicants. The tribunal did not consider that the phone calls were sufficient in the circumstances.

Given this, the tribunal finds that the Respondent breached Section 4.8 of the Code.

Section 4.9

Mr Hyslop referred to the imposition of the NOPL without warning and the level of phone calls made to both Mrs Sampaio and Mr Montgomerie. He submitted that these were intimidating acts.

Mr Cowan submitted he did not consider the level of phone calls to be intimidating. He advised that 90% of the time, the Respondent did not speak to anyone it tried to call.

The tribunal considered that the level of calls received by some of the Applicants was excessive. Mrs Sampaio stated in evidence that she felt harassed and intimidated. In addition, the imposition of an NOPL without warning could also be intimidating. In the present case, the use of an NOPL was misrepresentative of the authority and legal position as the invoices upon which this is based are, at best, erroneous in their terms.

Given this, the tribunal finds that the Respondent breached Section 4.9 of the Code.

Section 6.1

Mr Hyslop referred to the repair of the fire door to the backcourt of the building. All of the owners were asked for payment of money to allow this to be repaired. However, despite some of the owners paying for this, the backdoor was never repaired.

Mr Cowan explained that the door was not repaired as the Respondent had not been able to ingather the funds for this from all of the owners. He accepted that this work had not been done but that this was due to lack of funds. He accepted that the money was not repaid to owners who had paid for this. He also accepted that the Respondent had failed to keep the owners advised of the progress in relation to this issue.

The tribunal noted that the Respondent could not complete this repair due to lack of funds received from the owners. However, the tribunal also noted that the Respondent failed to keep owners informed of the progress, of lack thereof, of the repair in question.

Given this, the tribunal finds that the Respondent breached Section 6.1 of the Code.

Section 7.1

Mr Hyslop referred to the complaints procedure within the WSS and referred to the lack of timescales therein. In addition, this part also refers to the complaints procedure, a copy of which can be obtained on request.

Mr Cowan submitted that the timescales which should be referred to are those referred to in the WSS for response times to general correspondence. He believed that this was sufficient. He advised that there was no separate procedure and that the procedure for complaints was that as contained within the WSS.

The tribunal does not consider that the Respondent's WSS is sufficient in terms of its complaints procedure. There are no timescales referred to within this and these should be stated clearly and without reference to another part of the WSS. It is by no means clear that the timescales for ordinary correspondence should and would be followed in relation to complaints handling by the Respondent. In addition, the tribunal notes that the procedure within the WSS does not clearly state how the Respondent would deal with complaints against contractors. The tribunal does not agree with Mr Cowan's submission that complaints about the service of the

Respondent would automatically include complaints in relation to dealing with contractors.

Given this, the tribunal finds that the Respondent breached Section 7.1 of the Code.

Section 7.2

Mr Hyslop submitted that the owners had not received any correspondence from the Respondent about their complaints.

Mr Cowan accepted that the Respondent had not replied to the letters from the Applicants.

The tribunal noted that the Respondent had failed to respond to correspondence from the Applicants. Given this, the Applicants had never been afforded the opportunity to exhaust the Respondent's complaints procedure and therefore no breach of this section could have taken place.

Given this, the tribunal finds that the Respondent had not breached Section 7.2 of the Code.

Failure to carry out the property factor's duties

The tribunal treated this as a preliminary matter as noted above and decided that it could not consider a failure.

Observations

The tribunal was appalled to note that the Respondent accepted that the invoices, which were only issued 10 months after the termination of the Respondent's appointment as factor, were wholly erroneous in their terms. Despite this, the Respondent has founded on these wholly misleading documents when raising debt recovery actions at the Sheriff Court. The Respondent failed to correspond with the Applicants when they, quite correctly, raised questions about the invoices. In response, the Respondent resorted to using an NOPL without warning and to excessive phone calls to brow beat owners to pay up. In short, the tribunal is extremely concerned about the conduct of the Respondent in these cases.

The tribunal noted that the Applicants also suffered varying degrees of stress and inconvenience as a result of the Respondent's actions. It noted that Mrs Sampaio had suffered through excessive phone calls. The remaining Applicants have had to undergo court action as a result of the Respondent failing to answer their queries in relation to wholly misleading invoices. Perhaps the worst behaviour exhibited by the Respondent was the misleading information provided to a prospective purchaser of Mr Hyslop's property along with the use of an NOPL which, on the face of it, amounts to an abuse of process.

Property Factor Enforcement Order

The tribunal proposes to make the following property factor enforcement order:-

Within 28 days of the date of communication to the Respondent of the property factor enforcement order, the Respondent must:-

1. Pay to Mrs Sampaio the sum of £500 for the inconvenience and distress she suffered.
2. Pay to the Doctors the total sum of £500 for the inconvenience they have suffered.
3. Pay to Mr Montgomery the sum of £600 for the inconvenience and stress he has suffered.
4. Pay to Mr Hyslop the sum of £1,000 for the inconvenience and stress he has suffered.
5. Issue correct final invoices to all of the Applicants which account for all transactions between the Applicants and the Respondents and which include both the float and any refunds due.
6. Provide documentary evidence to the tribunal of the Respondent's compliance with the above Property Factor Enforcement Order by sending such evidence to the office of the First-tier Tribunal (Housing and Property Chamber) by recorded delivery post.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the tribunal proposes to make a property factor enforcement order, they must before doing so—
(a) give notice of the proposal to the property factor, and
(b) allow the parties an opportunity to make representations to them.

(3) If the tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the tribunal must make a property factor enforcement order."

The intimation of this decision to the parties should be taken as notice for the purposes of section 19(2) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal's office by no later than 14 days after the date that this decision is intimated to them. If no representations are received within that timescale, then the tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a property factor enforcement order may have serious consequences and may constitute an offence.

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.

Patricia Anne Pryce

Legal Member and Chair

20 August 2018

…… Date