Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) issued under Section 19(1)(a) of the Property Factors (Scotland) Act 2011

Case reference: FTS/HPC/PF/19/2260

Re:- 100 Rockbank Crescent, Glenboig, North Lanarkshire ML5 2TA

The Parties:-

Mr John Wallace, 100 Rockbank Crescent, Glenboig, North Lanarkshire ML5 2TA ('the homeowner');

and

Newton Property Management, 87 Port Dundas Road, Glasgow G4 0HF ('the respondent')

Tribunal Members:

Richard Mill (legal member) and Mary Lyden (ordinary member)

Decision

The Tribunal unanimously determined that the respondent has breached sections 1, 2.5 and 4.8 of the Code of Conduct for Property Factors ("the Code").

Background

By way of application dated 18 June 2019, the homeowner complains about the respondent having breached a number of sections of the Code. No complaint is raised against the respondent's failure to carry out their duties. The homeowner's complaints about the Code are in respect of sections 1, 2.5, 3, 3.3, 4. 4.1, 4.3, 4.8 and 7.1.

Documentation submitted into evidence

The written application by the homeowner which sets out the relevant complaints was accompanied by correspondence exchanged between the parties in relation to the homeowner's complaints. The application was also accompanied by a number of appendices – 1-10 which incorporated the homeowner's formal intimation to the respondent for the purposes of Section 17(3) of the Act.

The respondent relied upon brief written representations to the application which consisted of two pages. In the course of the hearing the Tribunal requested additional documents from the representatives for the respondent which were produced. This consisted of the welcome letter issued by the respondent to the homeowner dated 31 January 2014, a copy of the Ground Maintenance Specification, a copy of the up-to-date Written Statement of Services, a copy of the respondent's complaints procedure, a copy of the respondent's debt recovery procedure and the up-to-date Factoring Statement for the homeowner.

Hearing

A hearing was assigned to take place on the application on 15 October 2019. The respondent made application to postpone this on the basis that he had other Tribunal commitments on the same day. The homeowner had no objection to the proposed postponement and indicated that he himself was unavailable. The case was relisted for a hearing on 13 November 2019.

A hearing was held in the Glasgow Tribunals Centre, Room 110, 20 York Street, Glasgow G2 8GT at 10.00 am on 13 October 2019.

The homeowner failed to attend. Notice of the fresh hearing had been issued to the homeowner dated 17 September 2019. This had been emailed to the homeowner at his email address of choice. The Tribunal was satisfied that the homeowner had notification of the hearing.

The respondent was represented by Derek MacDonald, Director, and Martin Henderson, Executive Director.

The Tribunal first considered whether or not to proceed to consider the homeowner's application in his absence. The Tribunal had regard to the Tribunal Procedure Rules and in particular the overriding objective. This requires the Tribunal to deal with the proceedings in a manner which is proportionate to the complexity of the issues and to avoid delay so far as compatible with the proper consideration of the issues. The Tribunal also had regard to the fact that the homeowner clearly had no intention of attending the first listed hearing on 15 October 2019 but had taken no steps himself to seek to advise the Tribunal of his lack of availability. The Tribunal were conscious of the fact that the homeowner had failed to return the proforma notice issued to him indicating whether or not he wished to attend the hearing. The Tribunal took into account the fact that the respondent had allocated two senior members of their staff to attend the hearing. In all of the circumstances, the Tribunal concluded that it was fair and just to proceed with the hearing in the absence of the homeowner being satisfied that the nature of his complaints were clearly set out.

The Tribunal commenced by making some basic enquiries with the respondent's representatives in order to make relevant factfinding given the relatively brief amount of information available and the lack of production of relevant documents by the respondent at an earlier stage, despite relying upon such documentation. In the course of the hearing, the Tribunal requested that the respondent's representatives produce a number of documents for consideration. An adjournment was allowed for

this purpose. The documents were produced. The Tribunal reconvened and made further enquiry with the respondent's representatives. At the conclusion of this exercise the respondent's representatives were offered an opportunity to make any further submissions which they wished. The Tribunal reserved their decision in order to give full consideration to the documentary and oral evidence.

The day following the hearing, a brief email was received from the homeowner. He indicated that he had got his days confused and had missed the hearing on 13 November 2019. He made no further representations. He did not seek a further opportunity to participate in a future oral hearing. The homeowner has made no relevant submissions following his initial application being submitted with the enclosures. He has not responded to the written submissions of the respondent. The Tribunal considered the homeowner's apparent desire to have participated in the oral hearing and came to the conclusion that this would have made no material difference to the outcome of the Tribunal's determination. The Tribunal had already reached a decision on the application. There was no prejudice to the homeowner.

Findings in Fact

1. The homeowner is the heritable proprietor of 100 Rockbank Crescent, Glenboig, North Lanarkshire ML5 2TA ("the property").

2. The property is a detached new build property on a modern housing estate.

3. In terms of the homeowner's Title Deeds and those of his co-proprietors on the housing estate, there is a management scheme. A Property Manager is appointed for the purposes of maintenance of the areas of common grounds and garden area in the estate. On 19 December 2006 the respondent was appointed by the developers, Springfield Homes (formerly Redrow).

4. The respondent is responsible for the maintenance of common landscaping areas in the homeowner's development. A ground maintenance specification is in place for the relevant work. The costs associated with the service provided by the respondent is minimal. At the time of the homeowner's purchase of his property in 2014 the annual management fee was £26 plus VAT per property. After apportionment of the public liability insurance to cover the communal grounds, each owner's annual share of common liabilities excluding reactive maintenance and repairs was fixed at £80. The average total monthly charge was around £6.50. This has increased slightly over the 5 years since.

5. Since the homeowner took up occupation in early 2014 he has not voluntarily paid any factoring invoice issued by the respondent. In or about 2015 he made an enquiry regarding third party invoices. Such further details were provided to him. The homeowner's main complaint has been in relation to the addition of late payment management fees. The respondent adds late payment management fees at a rate of £30 plus VAT. This is not an automatic penalty which is added in the absence of further work being undertaken. It is a charge to reflect extra administrative work being carried out by the respondent.

6. The Appellant made contact with the respondent's organisation on a regular basis in relation to late payment management fees since mid 2016. It was clear to the respondent's organisation that the homeowner had such a complaint regardless of the merit of this. Notwithstanding and acknowledging that the homeowner had a complaint, no complaints process was followed. The only reason the complaints process was not followed was due to the homeowner not sending his complaint to the designated email address stipulated in the respondent's complaints process document. The respondent was otherwise very clear that a complaint was being made but did nothing to consider and deal with the complaint. No decision was ever reached on the complaint.

7. In the absence of concluding a complaints procedure the respondent initiated Sheriff Court proceedings against the homeowner in 2016 for the principal sum of £365.01. Decree as awarded against the homeowner. After expenses, interest and other charges, the total amount due by the homeowner totalled £598.58. The Appellant made payment of this sum in full but continued to complain about the addition of the extra costs such as judicial expenses and interest. He had the opportunity of defending these proceedings in the Sheriff Court and stating a defence. The Sheriff awarded the Decree in favour of the respondent in respect of the principal sum which the Sheriff was clearly satisfied was legally due and owing. As a gesture of goodwill the respondent has offered the homeowner a reduction in his factoring charges of £365.

8. Notwithstanding the Sheriff Court Decree and the homeowner's payment of the sums required in terms thereof, he has continued to fail to make any payments of any regular factoring invoices. The respondent has initiated further legal proceedings against the homeowner at Airdrie Sheriff Court under case number AIR-SG1221-17. The homeowner did not initially defend the proceedings and Decree was granted against him. He then applied to Recall the Decree which was granted and the proceedings have been paused to await the outcome of these proceedings before the Tribunal.

Reasons for Decision

Section 1

The homeowner has been consistently clear that he did not receive any Written Statement of Services from the respondent at the commencement of his occupation of his property. He accepts that he was provided with an introductory letter which set out general information regarding the relationship between himself and the respondent. Both of the respondent's representatives were vague at the hearing as to whether the Written Statement of Services had been issued to the homeowner at that time. Reliance was placed upon what was described as welcome letter which would have had the Written Statement of Services attached to it. The Tribunal requested a copy of the referenced welcome letter. This was produced. It is dated 31 January 2014. The letter makes no reference to the Written Statement of

Services. There is no reference to the Written Statement of Services being attached. There is reference to other items and reference to those other items being attached.

Having regard to the totality of the evidence, the Tribunal found the claims made by the homeowner to the effect that he had never received the Written Statement of Services credible. The respondent's representatives had not been able to vouch the fact that the Written Statement of Services had been issued to the homeowner at the time of his take up of occupation. They had been vague about the issuing of the Written Statement of Services. The Tribunal found that they could not rely upon their evidence.

The Tribunal concluded that the respondent had breached section 1 of the Code.

Section 2.5

This section of the Code requires the respondent to respond to enquiries and complaints received by letter or email within prompt timescales. It is quite clear, setting aside the merits of any complaint of the homeowner that he was complaining about the respondent's services. Mr Henderson advised that the homeowner's complaints had been ongoing since at least mid-2016. In March 2017 the relevant property manager for the development had emailed the homeowner and advised that his complaint required to be made in accordance with their own formal complaints process. On 26 May 2017, Mr Henderson sent an email to the homeowner personally. This sent a copy of the complaints procedure. Importantly, the email commenced by acknowledging the homeowner's "... ongoing complaint". Despite acceptance of such a complaint it was never processed nor determined.

Upon production of the complaints procedure document during the hearing, the Tribunal noted that the only failure of the homeowner in relation to the respondent's complaints process was not to have sent his complaint to a specifically nominated email inbox of the respondent. There was no requirement for him to, for example, complete a proforma complaints application. Additionally, the complaints process adopted by the respondent is a simple two stage one. The initial complaint requires to be responded to within 7 days and if that does not resolve matters then there is a further 30 day period by which other alternatives can be explored. The complaints procedure is straightforward. Despite knowing that the homeowner had a complaint and regardless of the merits of the complaint, it should have been properly considered and the complaints procedure adopted by the respondent ought to have been followed and concluded. There is no reasonable excuse or explanation for avoiding the handling of the homeowner's complaint simply because it was not sent to the correct email inbox. The homeowner by that time already had a rapport and had been exchanging emails. The requirement to make him send the same information to a different email inbox is unnecessary and was obstructive.

The reality of the situation is that the homeowner made a complaint. Whilst the complaint was acknowledged it was not dealt with and was not therefore responded to properly within prompt timescales. Accordingly, the Tribunal finds that section 2.5 of the Code is breached.

Section 3, 3.3

The homeowner complains about section 3 generally, but his complaint is specifically in relation to section 3.3. This requires homeowners to be provided in writing at least once a year a detailed financial breakdown of charges made and the description of activities and works carried out which are charged for. In response to reasonable requests there was a supply of supporting documentation and invoices should be available for inspection or provided. The homeowner only asked for some information on one occasion in 2015. This information was provided. Otherwise regular invoices are provided on a quarterly basis in March, May, August and November each year. The quarterly invoices show a running credit or debit balance with clarity. The administration of the homeowner's account in the manner described does not breach section 3.3 of the Code.

Section 4, 4.1, 4.3 and 4.8

Section 4 relates to debt recovery. The respondent has a clear system of debt recovery in operation. Though not provided with the Written Statement of Services at the commencement of his occupation the homeowner could have requested and sourced this easily by the time the issue of debt recovery arose. The Written Statement of Services contains details of the debt recovery procedure which the respondent adopts. Additionally, a standalone debt recovery procedure leaflet is available which is both clear and consistent with the Written Statement of Services. This outlines the various steps which are taken to recover sums which are due. As there is a clear written procedure for debt recovery in place, section 4.1 is not breached.

The homeowner complains about a breach of section 4.3 which requires that any charges that are imposed relating to late payment must not be unreasonable or excessive. The homeowner insists that the late payment management fees are excessive. The Tribunal finds otherwise. What is imposed by the respondent is a "late payment management fee". This is charged at £30 plus VAT. £30 is not excessive. It is clear on the basis of the evidence from the respondent's representatives that the fee is justified as a consequence of the extra administrative work undertaken in pursuit of the sums outstanding. Additional services are therefore being provided. The late payment charge is not simply a penalty. As further services are being provided to the homeowner as a consequence of their actions, then the charge is subject to VAT. The application of VAT is something which the homeowner had raised as being invalid. He referred to an HMRC direction in his submissions. The Tribunal was satisfied that such reference was erroneous. The direction relates to the provision of financial services and the references to "factoring" in that context is not applicable to the respondent's business. A professional fee of £30 plus VAT is not excessive. It is commensurate with the time undertaken to pursue charges outstanding. It is also a charge commensurate with such fees imposed by other property factors and other professionals seeking to recover late fees. There is no substance to the homeowner's complaints in this regard.

Section 4.8 of the Code requires that the respondent must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of their intention. The Tribunal refers to their findings and also

reasons in relation to section 2.5 of the Code. The respondent chose not to resolve, or even seek to resolve, the homeowner's complaints. This is notwithstanding the fact that they knew the homeowner wished to complain. They chose to avoid dealing with the complaint and the reasons for doing so are not justifiable. No attempt was made to resolve the homeowner's complaint. Despite the fact that the Tribunal finds the homeowner's complaint without merit the fact is that the respondent took legal action against the homeowner without taking reasonable steps to resolve the matter. Additionally, the respondent has not evidenced that any notice was given of their intention to initiate proceedings against the homeowner. Accordingly, the respondent has breached section 4.8 of the Code.

Section 7.1

This section requires the respondent to have a clear written complaints resolution procedure in place. It is clear that this exists. The respondent even provided the homeowner with a copy of it. The existence of the policy is clear evidence of the fact that Section 7.1 has not been breached by the respondent.

Further Comment

There are a number of peculiar issues in this case. The homeowner has never paid a single penny of the factoring charges which are due by him, despite having been in occupation of the property for some 5 years. His underlying originating complaints frankly do not amount to very much. The Tribunal has found that the respondent has technically breached section 1 of the Code and failed to provide the Written Statement of Services. However, the homeowner could never have been in any doubt about the existence of the contract between himself and the respondent for ground maintenance work.

The homeowner on purchasing the property would have been advised by his solicitor with regards to the terms of his Title Deeds and the burdens which existed. These legal burdens include the existence of a Property Manager which role the respondent fulfils. It is quite incredible that the homeowner should choose not to pay any fees whatsoever. It appears that at a relatively early stage he asked for additional information in relation to the third party invoices provided to him. Thereafter his main source of complaint has been in relation to the application of late payment management fees. His belief that the sum of £30 plus VAT is excessive is fanciful. Professional businesses do not carry out work for nothing. Further work was being undertaken and further services provided. Goods and services are vatable. The homeowner appears to have an erroneous understanding as to the applicability of VAT to be added to such services. He has relied upon an HMRC document which is of no relevance.

The homeowner similarly misunderstands the legal processes which have been undertaken to date before the Sheriff Court. He makes reference to the existence of a CCJ. This does not exist. A CCJ is a County Court Judgement. These only exist in England and Wales. In the initial Court proceedings in the Sheriff Court in 2016, a Sheriff Court Decree for payment was issued. He has now paid this. In the second action initiated, and now paused, a further Sheriff Court Decree is sought. Such proceedings should not be initiated until such time as the complaints procedure has

been fully concluded and prior notice given. It is the view of the Tribunal that those further proceedings should be dismissed. This is reflected within the proposed Property Factor Enforcement Order. The Tribunal would hope that any outstanding sums are paid by the homeowner following the issuing of this Decision.

Despite the Tribunal having considerable sympathy with the respondent given the lack of merit in the homeowner's underlying complaints, it is beyond bemusing that acknowledging that the respondent had a legitimate complaint, the issue of an attempt to resolve it was sidestepped purely on a technical ground that the complaint had been sent to the incorrect email address. This is disappointing. The consequences of this have now come back to haunt the respondent as it is quite clear that they breached the Code by not responding to the complaint in a proper and professional manner.

It is quite possible and indeed likely that if the complaints procedure had been undertaken that the homeowner having been provided with a greater degree of explanation and courtesy would have accepted the respondent's policies and paid the sums outstanding which would have obviated the need for any Court proceedings at any time.

The Tribunal noted that the version of the Written Statement of Services provided to the homeowner previously is inconsistent with the version provided by the respondent's representatives at the hearing. The Statement itself could be presented in a better manner. The typeset is particularly small. The apparent previous version was better laid out and had subsections. The current version lacks headings and paragraph numbers which are not user friendly. Perhaps the respondent should reflect upon their Written Statement of Services accordingly.

The Tribunal's intentions in the proposed Property Factor Enforcement Order to follow hereon are a means by which to compensate the homeowner and place him back in the same position as he would have been, but for the sections of the Code having been breached by the respondent.

There is an additional matter which does not form part of the homeowner's principal complaints before the Tribunal feel obliged to comment upon. The respondent has registered a Notice of Potential Liability (NOPL) against the homeowner. When the homeowner asked for an explanation, he was advised that it was under the Tenements (Scotland) Act 2004. This, of course, is entirely erroneous and misleading. The homeowner's property is not a tenement property with common parts. It is a detached villa. The respondent is providing ground maintenance management. The correct piece of legislation underpinning the ability to register a NOPL is under section 10A of the Title Conditions (Scotland) Act 2003. The respondent misinformed the homeowner about this. Whilst it was legitimate for them to pursue this course of action, it was equally important to be clear and to provide fair notice to the homeowner of their intentions and the legal basis for such application to be pursued. This was raised with the respondent's representatives at the hearing, but the Tribunal were not satisfied that either Mr MacDonald or Mr Henderson really had any appreciation of the importance or impact of failing to provide the clear statutory basis for such a NOPL being registered. Steps should be taken now to clarify this with the homeowner.

Proposed Property Factor Enforcement Order (PFEO)

The Tribunal proposes to make a PFEO given the Tribunal's findings that the respondent has breached sections 1, 2.5 and 4.8 of the Code. The terms of the proposed PFEO are set out in the attached notice in terms of section 19(2) of the Act.

The Tribunal has found that the homeowner was not provided with a Written Statement of Services at the commencement of his occupation of his property. He has subsequently been provided with one. That former defect cannot be remedied. The homeowner has not suffered any material loss as a consequence. He was provided with a welcome letter.

The Tribunal has found that despite being well aware of a complaint by the homeowner that the respondent chose not to deal with it due to a technical formality. Despite the fact that the homeowner's complaint, if properly dealt with by the respondent, would not have led to any substantiated complaint being upheld, their failure to conduct a proper examination of the homeowner's complaint fairly and reach a conclusion upon it, led the respondent to initiate former Court proceedings in the Sheriff Court without having exhausted their own complaints procedure. This led to Decree being granted against the homeowner. The effect of this process has been significant for the homeowner and led to additional costs being awarded against the homeowner.

The culpability of the respondent however is mitigated significantly by virtue of the fact that the homeowner had every opportunity of defending the Court proceedings and it was clearly found in the Sheriff Court that he had no defence. He was due the principal sum sued for. Nonetheless in accordance with the respondent's own procedures, and the need under the Code for there to be an effective complaints procedure in place, and for that to be followed, the homeowner faced legal proceedings which he ought not to have – at least at that time. The legal proceedings were, if nothing else, premature.

The Tribunal concluded that in the absence of any defence to the action, the homeowner was due the principal sum sued for which amounted to £365.01. In addition to the consequences of having a Sheriff Court Decree registered against him, he also required to pay additional sums representing judicial expenses, interest, warrant fee and the costs of arranging and instructing the Court action which amounted to a further £233.57. If the complaints procedure had been triggered and the complaint properly addressed, it may well be that the homeowner would have paid the principal sum and thus obviated the additional costs. Accordingly, it seems reasonable to the Tribunal that the additional sums beyond the principal sum sued for amounting to £233.57 be accounted for back to the homeowner.

The respondent has already offered to the homeowner to credit his account to the extent of £365.00 as a gesture of goodwill and the Tribunal was advised at the hearing that this offer remains. It is accordingly reasonable that the homeowner's account be credited to that extent. The Tribunal notes that such sum is almost (1 penny difference only) the same as the principal sum sued for which is interesting

though the respondent's representatives did not state that this was in lieu of the principal sum earlier sought in the Sheriff Court. Those two sums when added to the extra court charges of £233.57 total a round figure of almost £600.00.

The Tribunal are of the view that the second set of Court proceedings in the Sheriff Court currently paused to await the outcome of the proceedings before the Tribunal should be dismissed. The respondent's formal complaints process should be followed and concluded before any Court proceedings are initiated.

The respondent should also compensate the homeowner for inconvenience and stress. The Tribunal considers that a sum of £250 is reasonable in all of the circumstances. Added to the £600.00 credit which the Tribunal is otherwise ordering the respondent to make to the homeowner's account, this makes a total of £850.00. The homeowner's factoring account should be credited by this total amount of £850. There will remain a debit balance on the homeowner's factoring account which the Tribunal would expect that the homeowner would pay in full within 14 days but cannot make an order to this effect.

The respondent is also ordered by the Tribunal to issue a letter of apology to the homeowner and to issue a clear letter of satisfaction to the homeowner making it clear that all debts due under any Court Decree have been paid and settled in full.

Appeals

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.

Legal Member

Date 15 November 2019