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: HOHP/PF/17/0064

Flat 0/2, 41 Penrith Drive, Glasgow G12 0DQ
("The Property")

The Parties:-

Mrs. Allyson Dawodu, now known as Breadie, residing at the Property ("the Homeowner and Applicant")

D & I Scott Property Management, 1 Carment Drive, Shawlands, Glasgow, G41 3PP ("the Factor and Respondent")

Tribunal Members:-

Patricia Anne Pryce	**-**	**Chairing and Legal Member**
Carolyn Hirst	**-**	**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 Homeowner's Application, the Factor has not complied with the Code of Conduct for Property Factors.

In all the circumstances of the case, the tribunal did not consider it necessary to make a Property Factor Enforcement Order.

The tribunal makes the following findings in fact:

- The Applicant is the owner of the property known as Flat 0/2, 41 Penrith Drive, Glasgow. There are six flats located in the block in which the property is located.

- The Respondent was the factor of the common parts of the building within which the property is situated until on or about January 2016 when the Respondent resigned.
- 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 Applicant is one of 6 owners of residential properties located in the block which was managed by the Respondent until January 2016.
- The Respondent obtained three court decrees against the Applicant in relation to factoring arrears from 2009 until 2012.
- The Respondent raised a further debt recovery action at Glasgow Sheriff Court against the Applicant in respect of further factoring arrears, which action remains sisted having been sisted on or about July 2012.
- The Applicant considers that the Respondent was no longer her property factor after the court case was sisted in July 2012 as she no longer wished the Respondent to be.

Following on from the Applicant's application to the First-tier Tribunal (Housing and Property Chamber), which comprised documents received in the period of 21 February 2017 to 9 May 2017, the Convenor with delegated powers under Section 96 of the Housing (Scotland) Act 2014 referred the application to a tribunal on 15 May 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 2016 Rules".

The tribunal had available to it, and gave consideration to, the Application by the Applicant as referred to above, representations submitted by the Respondent by way of a letter dated 3 July 2017 together with Inventory of Productions contained therein together with oral submissions made by both parties at the hearing at the hearing.

The Legal Basis of the Complaints

The Applicant complains under reference to Sections 1.D.M, 2.1, 2.2, 2.5, 3.3, 4.2, 4.8 and 4.9 of the Code.

The Code

The elements of the Code relied upon in the application are as follows:-

Section 1.D.M
The written statement should set out……the timescales within which you will respond to enquiries and complaints received by letter or e-mail.

Section 2.1

You must not provide information which is misleading or false.

Section 2.2

You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action).

Section 2.5

You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers).

Section 3.3

You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.

Section 4.2

If a case relating to a disputed debt is accepted for investigation by the homeowner housing panel and referred to a homeowner housing committee, you must not apply any interest or late payment charges in respect of the disputed items during the period that the committee is considering the case.

Section 4.8

You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention.

Section 4.9

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.

Hearing

A hearing took place in Wellington House, 134/136 Wellington Street, Glasgow, G2 2XL on 25 July 2017.

The Applicant attended on her own behalf. The Applicant's son, Mr. Kristopher Breadie attended as a witness on behalf of the Applicant.

The Respondent was represented by Mr. Donald Scott, Partner of the Respondent, and by Mr. Alan Scott, Property Manager and Junior Partner of the Respondent. The Respondent's submissions at the hearing were made by Mr. Donald Scott unless otherwise indicated below.

Preliminary Issues:-

1. The tribunal noted that the Applicant in terms of her application appeared to wish the tribunal to review the terms of the decrees of the Sheriff Court which the Respondent had obtained against her. The tribunal explained to the Applicant that it was not within the jurisdiction of the tribunal to review such decrees. Both the Applicant and the Respondent indicated that they accepted this determination.
2. The tribunal noted that the Applicant sought to raise breaches of the Code which had taken place before 1 November 2012, that is, the date of registration of the Respondent. The tribunal determined that it could not consider any breaches which took place before the date when the Respondent became a registered property factor, that is, on 1 November 2012, and therefore became subject to the Code. Helpfully, both parties accepted the determination of the tribunal on this point.
3. The tribunal noted that the Applicant had ticked the box in Part 7B of her application form that, in addition to complaining about breaches of the Code, she also wished to complain that the Respondent had failed to carry out the property factor's duties in terms of Section 17 of the 2011 Act. However, the Applicant had not notified the Respondent in writing as to why she considered that the Respondent had failed to carry out the property factor's duties. The Applicant accepted that she had not so notified the Respondent and had therefore not complied with Section 17 of the 2011 Act. Given this, the tribunal determined that it could not consider this which, once again, both parties accepted.

Breach of Section 1.D.M

The Applicant confirmed that she owned the property. She further confirmed that the Respondent had obtained three court decrees against her in relation to factoring arrears. However, she submitted that the breach of this part of the Code was demonstrated by the Respondent failing to provide her with a clear breakdown of the debt which the Respondent claims that she still owes.

The Applicant submitted that she had paid around £1,400 to the Respondent in respect of the decrees and invoices submitted by the Respondent. She submitted that not only did she not owe money to them but that she had overpaid them.

The Applicant referred to the emails she had submitted as part of her application and which she had marked as productions F to K inclusive. These were emails between the Applicant and the Respondent wherein on 10 January 2017 the Applicant had asked for clarity surrounding the amount which the Respondent stated that she owed. She advised that she did not understand that Statements of Accounts produced by the Respondent. The Applicant had sent this as a result of a visit she had received from Sheriff Officers instructed by the Respondent who had served two charges on the Applicant in respect of debt which the Respondent stated that the Applicant still owed in terms of two previous decrees which the Respondent had obtained.

The final email in this chain of emails between the Applicant and the Respondent is one dated 18 January 2017 by the Applicant to the Respondent wherein the Applicant states "I think you should explain to me why you have only recorded payments of £7.05 to my account, yet, I have proof that you have received a total of £1,215.00 to date." The Applicant submitted that she received no response to this final email.

The Respondent could not produce a reply to this email.

The Applicant's position simply put was that the Respondent had not replied to the essence of her question, that is, that she had received a reply but it did not answer her question.

Furthermore, the Applicant noted that the Respondent's written Statement of Services ("WSS") only contained time limits for replying to complaints but not to queries.

The Respondent, by way of Mr. Donald Scott, submitted that he was shocked that the Applicant could not understand the Statements of Accounts as these were very clear. He submitted that he did not take from the emails in January 2017 that the Applicant required any further information.

The Applicant advised that the Statements showed around six different accounts for her and she could not understand this.

The Respondent advised that there was only one account for the Applicant but, when legal action is necessary, an "A" account is made up in respect of that legal action. If further legal action is necessary, a further account would be set up as a "B" account, and so on and so forth. The Respondent advised that there were five accounts for the Applicant, her main factoring account and four legal accounts under A, B, C and D.

The Applicant advised that she had previously been unaware of the creation of new accounts for each legal action.

When questioned, Mr. Scott confirmed that this process had not been explained to the Applicant prior to the hearing.

When questioned by the tribunal, Mr. Scott confirmed that the same time limits operated in respect of enquiries as in relation to the handling of complaints. However, he conceded that the Respondent's WSS did not presently contain time limits in respect of dealing with enquiries despite the fact that this part of the Code required that these timescales should be included. He confirmed that the Respondent would review its WSS in light of this.

In light of the foregoing, the tribunal finds that the Respondent breached Section 1.D.M of the Code.

Breach of Section 2.1

The Applicant submitted that the Respondent had provided false and misleading information to her neighbour as the Respondent had stated in its letter of 5 September 2013 to the neighbour, which is production 12 of the Respondent's productions, that there was only one property which had caused the debt problems in the block. The Applicant then referred to production 10 of the Respondent's productions which was a letter to the Applicant of 22 December 2015 wherein the Respondent referred to "a number of properties have accumulated a high level of debt".

The Applicant submitted that by advising her neighbour in 2013 that her property was the sole property which had debt problems, this had caused difficulties with her relationship with her neighbours. She submitted that it was false and misleading for the Respondent to say that she was the only person in debt then to change this in a later letter.

The Respondent replied that the 2013 letter referred only to the block in which the Applicant lived, hence the reference in the letter to "the extensive debt problem with one of the flats at the property". The Respondent further submitted that the 2015 letter referred to "properties" which was distinct from flats. The review of the management services, which was the purpose of the 2015 letter, referred to four blocks, of which the Applicant's was one. The Respondent submitted that it should have been clear from the terms of this letter that the Respondent was not referring to individual flats.

On being questioned by the tribunal, the Respondent accepted that the wording of the letters could have given rise to confusion and it "might have been clearer".

The tribunal noted that, although the terms of the two letters could have given rise to a level of confusion, the letters were not themselves false or misleading.

Given this, the tribunal finds that the Respondent did not breach Section 2.1 of the Code.

Breach of Section 2.2

The Applicant confirmed that she did not wish to insist on this breach of the Code.

Breach of Section 2.5

The Applicant submitted that her complaint in relation to this breach was established by the same emails upon which she had relied in respect of the breach of Section 1.D.M of the Code above. In short, in relation to the email chain which had taken placed between the parties in January 2017, the Respondent had failed to respond to her enquiries, with her final email of 18 January 2017 remaining unanswered and her substantive question also remaining unanswered.

The Respondent referred to the earlier submissions that had been made in relation to these emails. The Respondent advised that enquiries were dealt within the same timescales that complaints would be dealt with but confirmed that there was no response to the Applicant's final email before the tribunal nor could the Respondent confirm if such a response had been sent.

In light of the foregoing, the tribunal finds that there was a breach of Section 2.5 of the Code.

Section 3.3

The Applicant submitted that she no longer wished to insist on this breach of the Code.

Section 4.2

The Respondent submitted that it had not applied interest at any time to any money which the Applicant had owed. Furthermore, the Respondent confirmed that no late payment charges had been applied since 2012. The Respondent submitted that it was recognised that the Applicant was suffering financial difficulties and therefore the Respondent was willing to allow the Applicant a payment plan of three or five years to pay of the outstanding debts. However, the Respondent advised that, at the reduced repayment rate of £10 per month from £25 per month, it would take around 14 years for the Applicant to pay off the debts due.

While the Applicant disputed the level of debt, she accepted that the Respondent had not charged interest or late payment charges since this matter had been referred to the tribunal.

In light of the foregoing, the tribunal finds that there has been no breach of Section 4.2 of the Code.

Section 4.8

The Applicant submitted that there was no need for the Respondent to instruct Sheriff Officers to attend at her property at Christmas 2016 to serve charges on her. She submitted that the Respondent could have easily sent her a letter requesting that she increase her payments again. She believed that the Respondent had not taken reasonable steps to resolve the matter.

The Respondent submitted that emails had been sent to the Applicant requesting that payments be increased although these emails were not produced to the tribunal.

The Respondent advised that the normal process before instructing Sheriff Officers would be to try and get payments increased as instructing these officers cost money and normally letters would be sent to a debtor asking for an increase in payments.

The Respondent submitted that it had taken legal advice and on the basis of advice obtained had instructed Sheriff Officers to serve the charges. The Respondent advised that it was a small family business which could not afford to write off £1,700 of debt.

The tribunal accepts that the Respondent followed due process and was entitled to act upon the open decrees it held against the Applicant. However, as a matter of good practice, the tribunal would simply observe that would be better if the Respondent sent a letter in these circumstances in advance of taking such further action.

However, in light of the foregoing, the tribunal finds that there has been no breach of Section 4.8 of the Code.

Section 4.9

The Applicant submitted that she found that attendance of the Sheriff Officers at her home in 2016 as intimidating and threatening. She advised that she was upset and embarrassed by this. She also advised that the charge she was served with warned her that she could be sequestrated but that she said that the debt was not large enough for this to take place.

The Respondent submitted that this was normal legal process as part of enforcing an open decree which had only been instructed after legal advice had been obtained. The Respondent reiterated that the debt amounted to over £1,700 and that legal advice had been obtained about the instruction of the Sheriff Officers.

While the tribunal accepts that the Applicant may have been distressed at the attendance of the Sheriff Officers at her property, the tribunal finds that the Respondent was simply acting on legal advice to recover sums due in terms of court decrees.

In light of the foregoing, the tribunal finds that there was no breach of Section 4.9 of the Code.

Failure to carry out the property factor's duties

The tribunal dealt with this as a preliminary matter as noted above. The tribunal determined that it could not consider this.

Observations

The tribunal was assured at the hearing that the Respondent has taken on board the need to amend its WSS and recognised the need to respond to all queries from homeowners. The tribunal notes that the Respondent has undertaken to review its WSS and would strongly urge the Respondent to review its WSS without delay. In particular, the tribunal would urge the Respondent to include a reference to appropriate time limits in response to dealing with enquiries from homeowners. The tribunal notes that the WSS presently refers to the ability of a homeowner to refer a complaint to the "FTT" but does not contain an explanation of what "FTT" means nor are contact details provided for the First-tier Tribunal (Housing and Property Chamber). Finally, the tribunal would recommend that the Respondent increases the font size within its WSS to at least a 12.

Reasons for Decisions

Section 19(1)(b) affords the tribunal discretion as to whether or not to make a Property Factor Enforcement Order. The tribunal concluded that there would be no purpose, justification or necessity to do so in this particular case. The two breaches of the Code which the tribunal determined had occurred arose from the same set of circumstances. The Respondent provided a clear explanation at the hearing about the Statement of Accounts and in light of this explanation, the terms of the Statements were clear to the tribunal. Furthermore, the Respondent confirmed that it would review its WSS and the wording of the correspondence it sends to homeowners. All of the above appears to be a fair and equitable resolution of these breaches in all the circumstances of the case.

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.

P Pryce

…….. Chairing Member

6 August 2017
……. Date