

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Decision on homeowner's application: Property Factors (Scotland) Act 2011
("the 2011 Act"), Section 19(1)

Chamber Ref: FTS/HPC/PF/17/0223

3A Jerviston Court, Motherwell, ML1 4BS
("The Property")

The Parties:-

Mr William Tweedie, 2 Kilnwell Quadrant, Motherwell, ML1 3JN
("the Applicant")

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

Tribunal Members:
Susanne L M Tanner QC (Legal Member)
John Blackwood (Ordinary Member)

DECISION

1.
 - a. **The Respondent has failed to carry out its property factor's duties.**
 - b. **The Respondent has failed to ensure compliance with sections 2.1, 2.2, 2.4, 4.9 and 6.6 of the Code.**
 - c. **The decision of the tribunal is unanimous.**

STATEMENT OF REASONS

2. 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"; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 as "the 2016 Rules"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017 as "the 2017 Rules".

3. The Respondent became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. The Applicant lodged an application (“the application”) with tribunal on 13 June 2017.
2. The Applicant provided an Inventory of Productions listing fourteen productions together with copies of the productions. Further documentation and information, including the Applicant’s formal notification of the complaints to the Respondent, was requested by the tribunal. The Applicant provided the requested additional documentation and information to the tribunal.
3. On 28 July 2017 the application was referred to the tribunal in terms of Section 18A of the 2011 Act.
4. A hearing was fixed for 6 October 2017.

Written Representations and Productions lodged in advance of hearing

5. The Applicant did not lodge any written representations in advance of the hearing.
6. The Applicant lodged an Inventory of Productions containing 14 productions (as noted above).
7. The Respondent did not lodge any written representations relative to the Application. The Respondent’s lodged written representations in the following terms:

*“1. A group of homeowners have apparently voted to remove Apex Property Factor Ltd. as Property Factor to the Development.
2. Based on the information supplied to us, proper procedures have not been followed and we therefore remain the legitimate Property Factor.”*
8. The Respondent did not lodge any productions.

Hearing

9. A hearing took place on Friday 6 October 2017 at Wellington House, Glasgow.

- a. The Applicant attended the hearing.
 - b. Neil Cowan, Office/Legal Manager, and property manager for the Development in which the Property is situated and Saira Ali, Property Manager (formerly Debt Recovery) attended on behalf of the Respondent.
10. The Respondent lodged three late Productions at the hearing, with the consent of the Applicant and the tribunal:
- (1) letter from Respondent to an owner (name redacted) in the Development dated 7 July 2017;
 - (2) letter to owners in the Development dated 8 May 2017 relative to the meeting of owners at which a decision was made to terminate the Respondent's services as Property Factor and
 - (3) telephone call log prepared by the Respondent for calls to/from the Applicant in the period 16 December 2016 to 11 July 2017.

Summary of submissions

11. The tribunal heard submissions from both parties in relation to the alleged breaches of the **Code**, as notified to the Respondent, **sections 2.1, 2.2, 2.4, 4.9, 6.6, 6.7 and 6.8** and alleged breach of property factor's duties. Their submissions are summarised as follows:

12. Section 2.1: "You must not provide information which is misleading or false."

a. Applicant's submissions:

- i. After its appointment as factor the Respondent proposed that works be carried out ("the proposed works") in the development in which the Property is situated ("the Development").
- ii. In May 2016 the Respondent issued a "pro forma invoice" to all owners in the Development, including the Applicant, for £5,015.31 per property (*now document 1e lodged by Factor*). It was sent to the Applicant by letter of 27 May 2016 (Applicant's Production no. 3) and a request was made for payment based on the "pro forma invoice" as soon as possible.
- iii. There was no majority agreement of the owners in the Development in respect of the proposed works prior to the "pro forma invoice" being issued.
- iv. The Applicant and his solicitor contacted Apex Property on a number of occasions requesting information about the

Respondent's right to carry out repairs and invoice owners without the majority agreement of the owners in the Development as the title deeds (Clause Tenth) stated only that the Respondent would be responsible for instructing and supervising the common repairs and maintenance of the development. The wording of the title deeds does not say that the Respondent has the right proceed do any work in the absence of majority agreement. The Applicant's solicitor asked the Respondent where it gained its authority to instruct the proposed works. The Respondent replied by letter of 27 March 2017 (Applicant's Production no. 5) stating *"We are instructed to carry out repairs at the Development as per the title Deeds"* and enclosing a highlighted extract from the title deeds. Clause Tenth: *"There may be appointed a Factor who will be responsible for instructing and supervising the common repairs and maintenance of the Development... and for arranging the common insurance... and apportioning the cost thereof among the several proprietors of the flatted dwellinghouses in the Development. ..."* Further the Respondent stated *"A breakdown of the costs was provided to all owners (copy quotes attached). Your client is entitled [sic] to 1/12 of the share"*.

- v. The Applicant and his solicitor requested information from the Respondent of any meetings the Respondent had with the owners in the Development and requested copies of minutes. In the Respondent's letter of 27 March 2017 (Applicant's Production number 5) the Respondent stated *"a meeting was arranged and only one Owner attended. ... there was [sic] no such Minutes taken since it was unnecessary in the circumstances"*. The date of the meeting was not specified in the letter.
- vi. The information provided by the Respondent in relation to its authority to instruct works on the basis of the title deeds and to issue a "pro forma invoice" to the owners in the Development in the absence of agreement from the owners on the proposed works was misleading or false.
- vii. The Applicant has requested sight of competitive quotes for the proposed works. The Respondent advised the Applicant that it had obtained three competitive quotes for the proposed works. The Respondent has never provided competitive quotes to the Applicant. The only quotes which the Respondent has provided to the Applicant are all from one company, Real Building Contractors ("RBC"). There is no business address on the quotations from RBC. The Applicant and his solicitor could not find any VAT registration for RBC. The Applicant and his solicitor were concerned about a possible business relationship between the Respondent and RBC. The Applicant's solicitor repeated the requests for sight of the competitive quotes. In its

letter of 27 March 2017 (Applicant's Production no. 5) the Respondent stated, "*we attach herewith quotes received from contractors (same as above) as requested*". Only one set of quotes from Real Building Contractors was provided. The Applicant and his solicitor have never been provided with or had sight of any other quotes.

- viii. The information provided by the Respondent in response to requests for competitive quotations was misleading in that only one set of quotations was provided from a single contractor despite being referred to as "quotes received from contractors".

b. Respondent's submissions

- i. By way of background the Respondent submitted that its core services were outlined in the tender letter to the Applicant and other proprietors in the Development dated 18th August 2015 and Written Statement of Services [Applicant's Production no. 2].
- ii. By the end of September 2015, the Respondent had received seven mandates from the owners for its appointment as factor and it was so appointed.
- iii. After its appointment the Respondent carried out its own surveys of the Development and considered correspondence from North Lanarkshire Council which had been sent to owners prior to the Respondent's appointment as factor of the Development.
- iv. The Respondent identified areas in the Development which in its view were in need of repair ("the proposed works").
- v. All of the proposed works were outwith the regular cleaning and ground maintenance services to be provided by the Respondent and the charges for such would be in addition to those charged for the core services.
- vi. Neil Cowan accepted that there was no specified process for decision-making in the title deeds for the Development therefore the Respondent used the Tenements (Scotland) Act 2004.
- vii. The Respondent accepted that a majority of owners would require to agree to the proposed works. The Respondent accepted that no such majority had ever been obtained.
- viii. Despite those concessions the Respondent stated that the justification for proceeding in the way in which it did in relation to the issuing of "pro forma invoices" to owners was connected to

an application for grant funding in respect of the proposed works which it was intended would be submitted to meet a proportion of the cost of the proposed works.

- ix. The Respondent obtained three quotations for each aspect of the proposed works prior to applying for grant funding. The quotations were provided by Real Building Contractors (RBC), Concept and a third company for which Mr Cowan could not remember the name.
- x. RBC was stated to be the most competitive for each aspect of the proposed works.
- xi. The three sets of quotations were provided to the Council but not to the owners in the Development.
- xii. The Respondent wrote to the owners in the Development on 27 May 2016 (Applicant's Production no. 3) enclosing a "pro forma invoice" dated 27 May 2016 requesting payment of £5015.31 per owner which was a proportion of the total costs in terms of the estimates from RBC (document 1e now lodged by Factor).
- xiii. The Respondent's letter stated in its letter that *"If the Local Authority is forthcoming with grant funding you will be refunded accordingly. If the minority of owners do not comply with the proposed works and payment is not made we will instigate The Missing Shares Scheme"*.
- xiv. Mr Cowan accepted that the Respondent's only response to enquiries from the Applicant and his solicitor about its authority to issue the "pro forma invoice" was to send the stated highlighted section of Clause Tenth of the Title Deeds.
- xv. Neil Cowan accepted that despite repeated requests by the Applicant and his solicitor no quotes other than those from RBC have been provided to the Applicant or his solicitor. He accepted that no reason was given to the Applicant or his solicitor about why the Respondent would not provide them. The various explanations provided on behalf of the Respondent in the hearing were (i) RBC was the most competitive, (ii) there was "no reason in particular" why they had not been provided and (iii) it was for the reason of "expediency" to reduce the number of documents being sent out to owners.
- xvi. The Respondent did not make any offer to the Applicant or his solicitor for the documents to be viewed at its offices. Mr Cowan stated in submissions that there was an "open door policy", which he explained meant that any resident can come in to the Respondent's office but then said that the policy is not in the

Written Statement of Services and owners at the Development had not been made aware of it in any other way.

- xvii. Mr Cowan indicated that the Respondent still has a hard copy of three quotes for each item of the proposed works and would have no problem with showing the quotes to the Applicant if an order is made by the tribunal.
- xviii. In relation to RBC, Mr Cowan did not know the exact address, but said it was somewhere on the South side of Glasgow. He said that the information would be available in its offices. The Respondent understands the contractor to be VAT registered. Mr Cowan stated that as far as he is aware the Respondent is not connected to RBC, has no financial interest in RBC and does not receive any commission or discount for instructing work with it.

13. 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).*”

a. Applicant’s submissions:

- i. The Applicant telephoned Ms Saira Ali after the “pro forma invoice” was issued and he asked a number of questions about the document. The Applicant was told by Ms Ali that he would be as well to pay the “pro forma invoice” as the “pro forma” would “*then turn into*” an invoice. The Applicant asked who authorised the works and whether there had been any meetings of homeowners and whether there had been majority agreement. Ms Ali said that the Respondent intended to carry out the works anyway, that they were the factors and they would decide. The Applicant submitted that the payment demand was clearly an intimidation tactic.
- ii. Further in another conversation with Neil Cowan, the Applicant offered to pay outstanding common charges despite poor service but not those on the “pro forma invoice”. The Applicant was in the process of selling his property. His solicitor, Freemans, had sent a letter to the Respondent asking for a note of any outstanding factoring charges. The Applicant was told by Mr Cowan that as well as any outstanding common charges the Applicant should “*pay the pro forma*” otherwise the Respondent would place a Notice of Potential Liability on the Property which would block the upcoming sale. This was not put in a letter but was said by Mr Cowan to the Applicant. The Applicant did not know what it meant at the time but he does now. The threat to place a NPL on the Property was clearly another intimidation tactic and blatant misuse by the Respondent of the Factor’s

powers. The Applicant felt like he was being held to ransom. He was aware that he had a liability to pay common charges for factoring services but the Respondent had not provided any basis for issuing the “pro forma invoice”. An NPL has in fact been registered as a result of the Respondent’s application.

b. Respondent’s submissions

- i. In response, Ms Ali said that she recalled the conversation with the Applicant and that it was on 16 December 2016. She was the debt recovery manager at the time. She has spoken to the Applicant on the phone twice. When calls are received from homeowners they are manually recorded on a spreadsheet. Ms Ali produced the spreadsheet during the hearing and it records a call logged by “SA” at 9.30 on 16 December 2016. (Factor’s Production no. 3). The content of the record is: *“Spoke to and advised of outstanding amount – he isn’t agreeing in paying the proforma but was willing to pay the full maintenance factoring invoices – I also advised that there is a NPL being lodged as we speak, he said that he will to stop the sale and will need to seek legal advice before he agrees in paying anything – wasn’t happy at all and hung up”*. She made the Applicant aware of the debt of over £5000. She considered it to be a debt because it was on a spreadsheet of the client’s outstanding balance. She accepted that when she was speaking to the Applicant there was no majority agreement on the works. She said that in addition to the Applicant’s Property there were NPL’s registered against a number of other owners in the Development. She said that prior to her conversation with the Applicant Mr Cowan had already spoken to him. She told the applicant that a NPL was being lodged “as we speak”. Ms Ali ran the matter past the Director of the company, Christine Davidson-Bakhshae.
- ii. On 23 January 2017 the Applicant paid £1100 by bank transfer. It was allocated against all outstanding factoring invoices and the balance was credited against part of the amount on the “pro forma invoice”.
- iii. Mr Cowan was asked about the phonecall between him and the Respondent. He said that he was the legal manager at the time, looking after the legalities of the company. He was not a solicitor or a member of IRPM or PMAS. He did not have access to an up to date copy of the Tenements (Scotland) Act 2004.
- iv. Mr Cowan said that the Respondent looks at each case internally, the circumstances surrounding it and the balance, before deciding whether to make an application to register a NPL. He does it to protect the Respondent’s position, after a discussion with the Director. From memory, Mr Cowan thought

that the Applicant had told him during the telephone conversation that he was intending to sell his property.

- v. Mr Cowan accepted that the Applicant was told by him in a telephone call that unless he paid the pro forma invoice the Respondent would impose a NPL which would block the upcoming sale. Mr Cowan did not consider it to be intimidating but rather part of debt recovery.
- vi. The Respondent decided to place a NPL on the Applicant's property. This was approved by the Director and the Application was made on 16 December 2016.
- vii. The tribunal asked the Respondent to state the legal basis for making the application to register the Notice of Potential Liability against the Property.
- viii. After an adjournment, during which time the Respondent was permitted time to locate statutory provisions, Mr Cowan submitted that the Section 12 and Schedule 2 of the Tenements (Scotland) Act 2004 allows for the inclusion of works "to be carried out" on an application to Registers of Scotland for a Notice of Potential Liability.
- ix. Mr Cowan relied on those statutory provisions as a legal basis for considering the amount on the "pro forma invoice" to be a debt and for applying to register an application for a NPL against the Applicant's Property on the basis of the sum in the "pro forma invoice".
- x. When asked further questions by the tribunal on this matter later in the hearing Mr Cowan stated that he was not legally qualified and wished time to take legal advice. The tribunal agreed to the request and the matter was dealt with in Directions issued to parties after the hearing.

14. Section 2.4. "You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies)."

a. Applicant's submissions

- i. There was no consultation or approval from the owners in the Development for the work which the Respondent said it intended to carry out at the Development.

- ii. The Applicant referred to his previous submissions.

b. Respondent's submissions

- i. Mr Cowan accepted that the Respondent has never obtained majority agreement for the proposed works which clearly fell outwith the core services.
- ii. The Respondent organised one meeting of homeowners on 8 June 2016. Homeowners were notified by letter of 16 May 2016 (Respondent's production no. 1f). Only one owner attended. The meeting was not quorate. No minutes were taken.
- iii. Neil Cowan accepted that the Respondent had no delegated authority up to a certain threshold which would allow for instruction of the proposed works.
- iv. Only one owner has paid the sum in the "pro forma invoice".
- v. Four NPL's have been registered against owners in the Development.
- vi. The proposed works have not been carried out.

15. 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".*

a. Applicant's submissions

- i. The Applicant referred to his previous submissions about the content of letters in which he was told he had to pay the "pro forma invoice" within 28 days of it being issued, and telephone calls with the Respondent, in particular the call with Neil Cowan where he threatened to place a Notice of Potential Liability for Costs on the Property to block its prospective sale.
- ii. The Respondent acted in an intimidating manner and threatened the Applicant and this was not a reasonable indication that the Respondent may take legal action given that the demands were based on a "pro forma invoice" for proposed works which were never agreed to by the owners, so there was no debt.

- iii. On the same date that the Respondent found out the Applicant was in the process of selling his property the Respondent made an Application to place a Notice of Potential Liability for Costs on the Property. The NPL was registered and the sale of the Property fell through as a result.
- iv. The Applicant referred to his previous submissions in relation to his requests and his solicitors request to the Respondent to state the basis upon which the “pro forma invoice” had been issued and was being pursued as a debt in the absence of majority agreement from the owners and the Respondent’s response by reference to Clause Tenth of the title deeds.

b. Respondent’s submissions

- i. The Respondent referred again to the phrase “to be carried out” in the amended Form of Application for a NPL as specified in Schedule 2 of the 2004 Act and claimed that this was the basis for a debt being due and for the threats to make an application to register a NPL on the Applicant’s Property to prevent or delay any sale.
- ii. Mr Cowan accepted that the application for the NPL was made shortly after the Respondent found out that the Applicant intended to sell the property and on the same day that the Applicant had a telephone call with Saira Ali (16 December 2016).

16. Section 6.6. “If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance.”

a. Applicant’s submissions.

- i. The Applicant requested sight of competitive quotations from the Respondent for the proposed works, which request was repeated by his solicitor after it was necessary for the Applicant to instruct legal advice. The Respondent failed to provide competitive quotations. The only quotations produced at any time was one set of quotations from RBC (and that remained the position as at the date of the hearing).
- ii. The Applicant referred to his previous submissions.

b. Respondent's submissions.

- i. The Respondent accepted that competitive quotations had not been provided to the Applicant or his solicitor at any time, despite repeated requests for the same and a letter sent to the Applicant's solicitor stating that quotations were enclosed (when in fact only the RBC quotations were enclosed).
- ii. The reasons stated above were given during the hearing.

17. Section 6.7. "You must disclose to homeowners, in writing, any commission, fee or other payment or benefit that you receive from a contractor appointed by you."

a. Applicant's submissions

- i. The Applicant was concerned that there was an undisclosed commission, fee or other payment to the Respondent by RBC for instruction of the proposed works and had asked the Respondent about this.

b. Respondent's submissions

- i. Mr Cowan said that as far as he was aware there was not commission, fee or other benefit or payment from RBC and that this could be confirmed with the Respondent's Director.
- ii. The tribunal agreed to deal with the matter by way of Directions.

18. Section 6.8. "You must disclose to homeowners, in writing, any financial or other interests that you have with any contractors appointed"

a. Applicant's submissions:

- i. The Applicant was concerned that there the Respondent had an undisclosed financial or business interest in RBC and had asked the Respondent about this, as had his solicitor.
- ii. The information provided on the quotations from RBC was lacking in information such as an address for the contractor.

b. Respondent's submissions:

- i. Mr Cowan said that so far as he was aware there was no financial or other interest with RBC and that this could be confirmed with the Respondent's director .

- ii. The tribunal agreed to deal with the matter by way of Directions.

19. Property Factor's duties

a. Applicant's submissions.

- i. The Respondent's Written Statement of Services provided that services and works provided in addition to the core services would be arranged and carried out where authorised by the requisite number of owners.
- ii. The homeowners in the development had not authorised the proposed works prior to the Respondent issuing a "pro forma invoice" and thereafter treating homeowners including the Applicant as debtors.
- iii. The applicant made reference to his submissions in respect of breaches of the Code.

b. Respondent's submissions

- i. The Respondent made reference to its submissions in respect of breaches of the Code.

Directions

1. Following the hearing, the tribunal required further information before reaching a decision on the Application.
2. Directions dated 10 October 2017 were issued to parties. Reference is made to the full terms of those Directions which are adopted herein.
3. Both parties were late in complying with the Directions. The tribunal decided to have regard to the information produced despite the parties' failure to comply timeously.
4. The Applicant otherwise complied with the THIRD Direction by production of an invoice from Freelands Solicitors number 20171171 in the sum of £663.60 in respect of professional services and outlays in connection with the dispute with the Respondent.
5. The Respondent otherwise complied with the FIRST Direction by (1):
 - a. Production of copies of contractors' quotations from Bee Construction and Concept Building Contractors.

- b. Production of a copy of a letter from the Respondent to North Lanarkshire Council dated 27 May 2016.
 - c. Provision of the full business address, Company number and Director's details for Real Builders Limited, trading as Real Building Contractors; as well as a statement that the VAT number on the contractors' quotations (already lodged as productions) is valid.
 - d. Production of a letter from the Respondent's Director dated 2 November 2017 stating that other than a potential contractual relationship there is no business connection, financial or other interests, and no commission fee or benefit payable to the Respondent for instruction works with RBC.
 - e. Production of a copy of "Pro Forma Invoice" to the Applicant dated 27 May 2016.
 - f. (i) Statement that a meeting was arranged for 8 June 2016 to discuss the proposed works; (ii) production of copy of invitation letter dated 16 May 2016; (iii) agenda dated 16 May 2016 is not in the bundle; (iv) statement that only one owner attended the meeting and it was therefore not quorate; (v) statement that no motions were made and no votes were taken (vi) statement that minutes were not taken as they were deemed inappropriate in the circumstances; and (vii) production of copy "update" letter sent to all owners on 27 September 2016 which is said to enclose invoices for February to August 2016 (no invoices attached); (viii) letter of 21 October 2016 to Owners asking for grant application form to be returned.
- (2) Production of the Application Form for the Notice of Potential Liability for Costs ("NPL"); a copy of The Tenements (Scotland) Act 2004 (Notice of Potential Liability for Costs) Amendment Order 2004; together with a written submission that Schedule 2 of the Tenements (Scotland) Act 2004 which includes the words "to be carried out" therefore allows the proposed works to be incorporated into a Notice of Potential Liability for Costs.
- (3) Provision of the details of 3 other properties in the Development for which a NPL has been registered by the Respondent.
- (4) The Respondent's letter states "See attached" but signed mandates were not produced so there has been a failure to comply with the SECOND Direction part 4.
6. The Respondent property factor otherwise complied with the SECOND Direction by confirming that it does not accept that its appointment as factor of the Development has been validly terminated on the basis that its position is that there were only 6 out of 12 votes cast in favour of its removal as property

factor and in terms of the Tenements (Scotland) Act 2004 a majority of the owners is required to make such a decision.

The tribunal make the following findings in fact:

20. The Applicant is the owner of the Property. He is a non-resident owner and the Property is tenanted.
21. The Property is a flat within the block of properties at 1-12 Jerviston Court, Motherwell, ML1 4BS ("the Development").
22. The Respondent became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.
23. On 18 August 2015 the Respondent submitted a tender to the owners in the Development to provide factoring services. Its letter attached the Respondent's Written Statement of Services ("WSS") (App Pro no. 2). The WSS includes a description of the core services.
24. In about September 2015 the Respondent had receive mandates from a majority of owners and was appointed by the owners of the Development to perform the role of the property factor of the Development.
25. The title deeds for the Property do not provide a procedure for the making of decisions by the owners. The default provisions of the Tenement Management Scheme in Schedule 1 of the Tenements (Scotland) Act 2004 apply to the making of decisions about scheme property by owners in the Development, including Rule 2.5: *"A scheme decision is made by majority vote of all the votes allocated."*
26. Clause Tenth of the Title Deeds to the Property provide that: *"There may be appointed a Factor who will be responsible for instructing and supervising the common repairs and maintenance of the Development... and for arranging the common insurance... and apportioning the cost thereof among the several proprietors of the flatted dwellinghouses in the Development. ..."*
27. After its appointment the Respondent inspected the Development and identified a number of areas of maintenance and repair at the Development which it considered to be desirable ("the proposed works").
28. A majority of homeowners in the Development required to vote in favour of the proposed works before any such works could be instructed at the Development.
29. The Respondent did not consult with homeowners in the Development in relation to the proposed works.

30. A meeting was arranged for 8 June 2016 relative to the proposed works. Homeowners were notified by letter of 16 May 2016.
31. On or about 27 May 2016 the Respondent issued a "pro forma invoice" to all owners including the Applicant in respect of the proposed works in the sum of £5,015.31 per property. Nine items of work were listed, all followed by the word "Estimate". The payment terms stated payment within 28 days from date of invoice.
32. The pro forma invoice was issued with a letter of 27 May 2016 which stated "please forward payment based on the pro forma invoice as soon as possible. ... If the minority of owners do not comply with proposed works and payment is not made we will instigate The Missing Shares Scheme".
33. The proposed works were outwith maintenance and gardening services provided as part of the Respondent's core services and the costs of such were outwith the core service.
34. The homeowners in the Development had not agreed a level of delegated authority for works up to an agreed threshold which would allow the Respondent to instruct the proposed works without seeking further approval.
35. The Respondent did not follow a procedure to consult with the homeowners in the Development to seek their written approval before instructing the proposed works.
36. There was no majority agreement of the owners in the Development in respect of the proposed works prior to the "pro forma invoice" being issued by the Respondent on 27 May 2016.
37. After the pro forma invoices had been issued a meeting of owners in the Development was convened on 8 June 2016 to discuss the proposed works. It was non-quotate. No minutes were taken by the Respondent. No decisions were taken by homeowners.
38. The Respondent obtained quotations from three contractors in relation to the proposed works.
39. Despite repeated requests by the Applicant and his solicitor for sight of competitive quotations for the proposed works, the Respondent has provided only one quotation for each item of the proposed works to the Applicant and his solicitor, each dated 3 May 2016 from the same contractor, Real Building Contractors. There was no business address provided for the contractor.
40. The Respondent has failed to provide copies of or sight of competitive quotations to the Applicant and his solicitor.
41. The Respondent has made repeated requests and demands to the Applicant that the full sum on the "pro forma invoice" should be paid.

42. The Respondent's employees have threatened the Applicant that should the full amount on the pro forma invoice not be paid the Respondent would apply to place a Notice of Potential Liability for Costs ("NPL") on the Applicant's property which would prevent or delay any sale of the Property.
43. The Applicant was in the process of selling his Property in late 2016. He had instructed solicitors relative to the same. The Respondent became aware of the Applicant's intention to sell the Property on or about 16 December 2016.
44. On 16 December 2016 the Respondent made an Application to Registers of Scotland to Place a NPL on the Burdens Section of the Title Sheet for the Property in terms of Section 12 of the Tenements (Scotland) Act 2004. The Application was made principally on the basis of the sum of £5015.31 on the "pro forma invoice". The Application was signed by the Respondent's Director.
45. The NPL was registered on the title sheet for the Property on 19 December 2016. There has been no Discharge of the NPL and it remains on the Applicant's title sheet.
46. The sale of the Property was aborted as a result of the registering of the NPL. The Applicant incurred costs in the sum of £678.70 in respect of the professional legal services and outlays relating to the abortive sale of the Property as detailed in invoice number 2017122 from Freelands Solicitors Estate Agents dated 12 January 2017 (Applicant's Production number 8).
47. The Respondent has registered NPL's on three other properties in the Development (numbers 1, 2 and 12).
48. Majority agreement of the homeowners in respect of the proposed works has never been obtained and the proposed works have not been carried out.
49. The Applicant required to instruct his solicitor in relation to the ongoing dispute with the Respondent. The Applicant incurred costs in the sum of £663.60 in respect of the professional legal services and outlays provided to the Applicant for all work in connection with the dispute with the Respondent Property Factor, as detailed in invoice number 20171171 from Freelands Solicitors Estate Agents dated 16 November 2017.
50. There is no failure to disclose commission, fee or other payment or benefit that the Respondent receives or would receive from Real Building Contractors in respect of its instruction by the Respondent to carry out the proposed works.
51. The Respondent has not failed to disclose financial or other interest with RBC.

Reasons for Decision

52. Section 2.1

- a. Having regard to the tribunal's findings in fact the tribunal is satisfied that the Respondent provided information to the Applicant and his solicitor which was misleading and false about its authority to instruct the proposed works and issue a "pro forma invoice" to the Applicant in respect of the same in the absence of majority agreement from the owners of the Development in relation to a scheme decision.
- b. The tribunal is also satisfied that the provision of only one set of quotations from a single contractor, when asked for sight of competitive quotations for the works, together with a statement in a letter that quotations were enclosed, was the provision of misleading information.
- c. **The Respondent did not ensure compliance with the Code Section 2.1**

53. Section 2.2

- a. Having regard to the tribunal's findings in fact the tribunal is satisfied that the Respondent communicated with the Applicant in a way which was intimidating and which threatened him, both in correspondence and on the telephone. In particular the Applicant was intimidated and threats were made by Neil Cowan that should the pro forma invoice not be paid the Respondent would place a Notice of Potential Liability for Costs on the Property which would block its prospective sale (which in fact happened).
- b. Given that there was no legal basis for the said payment demands, the statements made by the Respondent were not a reasonable indication that it may take legal action.
- c. **The Respondent did not ensure compliance with the Code Section 2.2.**

54. Section 2.4

- a. Having regard to the tribunal's findings in fact the tribunal is satisfied that the Respondent did not follow a procedure to consult with the homeowners in the Development and seek their written approval before invoicing them for the proposed works which would have incurred charges in addition to those relating to the core service.
- b. The tribunal is satisfied that the homeowners had not agreed a level of delegated authority for the Respondent to incur costs up to an agreed threshold or to act without seeking further approval in certain situations.

- c. **The Respondent did not ensure compliance with the Code Section 2.4.**

55. Section 4.9

- a. Having regard to the tribunal's findings in fact the tribunal is satisfied that having issued its "pro forma invoice", the Respondent considered the Applicant to be a debtor, and thereafter acted in an intimidating manner and threatened him, in particular by stating that should the "pro forma invoice" not be paid the Respondent would place a Notice of Potential Liability for Costs on the Property which would block its prospective sale.
- b. In the circumstances in which there was no basis for treating the "pro forma invoice" as a debt, the Respondent's actions were not a reasonable indication that it may take legal action.
- c. The tribunal is also satisfied that the Respondent knowingly or carelessly misrepresent its authority to instruct the proposed works and the correct legal position.
- d. The tribunal decided that the Respondent is incorrect in stating that there is a legal basis for considering that there is a debt owed by the Applicant in the circumstances as found. The Respondent cannot rely on the wording "or to be carried out" in the amended statutory Form of a Notice of Potential Liability in Schedule 2 the Tenements (Scotland) Act 2004 as a basis for allowing it to instruct works without express or implied authority, impose an invoice on the Applicant and homeowners and thereafter treat non-paying homeowners as debtors, all in the absence of the requisite majority agreement for a scheme decision required in terms of the default Tenement Management Scheme which applies to the Development.
- e. In terms of Section 11(1) of the 2004 Act an owner is only liable for relevant costs arising from a scheme decision from the date when the scheme decision to incur those costs is made.
- f. **The Respondent did not ensure compliance with the Code Section 4.9.**

56. Section 6.6

- a. Having regard to the tribunal's findings in fact the tribunal is satisfied that the Respondent failed to make available for inspection by the Applicant free of charge or to provide paper or electronic copies of the competitive quotations relating to the tendering process for the proposed works, despite repeated requests for sight of the same by the Applicant and his solicitor.

- b. The Respondent did not ensure compliance with the Code Section 6.6.**

57. Section 6.7

- a. Having regard to the tribunal's findings in fact the tribunal is not satisfied that satisfied that the Respondent has failed to disclose commission, fee or other payment or benefit that the Respondent receives or would receive from Real Building Contractors in respect of its instruction by the Respondent to carry out the proposed works.
- b. The Respondent ensured compliance with the Code Section 6.7.**

58. Section 6.8

- a. Having regard to the tribunal's findings in fact the tribunal is satisfied that the Respondent had not failed to disclose any financial or other interests that you have with RBC.
- b. The Respondent ensured compliance with the Code Section 6.8.**

59. Property Factor's duties

- a. Having regard to the tribunal's findings in fact the tribunal is satisfied that the Respondent breached its property factor's duties.
- b. The Respondent's Written Statement of Services provided that services and works provided in addition to the core services would be arranged and carried out where authorised by the requisite number of owners.
- c. The homeowners in the Development had not authorised the proposed works prior to the Respondent issuing "pro forma invoices" to all homeowners on the basis of estimates from one contractor together with a demand for payment and thereafter treating homeowners including the Applicant as debtors.

Observations

- 60. Although not part of the subject matter of the Application, the tribunal observed on the basis of the written submissions of the Respondent and the oral submissions of both parties that there is an apparent dispute between the Applicant and the Respondent about whether the Respondent remains appointed as property factor of the Development or has been removed by a majority of the owners.

61. The Applicant stated that a meeting of homeowners had taken place on 8 April 2017 and a majority of homeowners had voted in person or by proxy for the removal of the Respondent as factor. This decision was communicated to the Respondent.
62. The Respondent replied to owners by letters of 8 May and 7 July 2017 (Respondent's productions nos. 1 and 2) stating that it appears that the termination process has not been adhered to, that it was unable to accept the decision and that it would therefore continue to provide its contracted services and invoice accordingly.
63. The Respondent accepted in the hearing that a number of owners in the Development voted to remove the Respondent as Property Factor but submitted that it was not a majority.
64. The Respondent has refused to accept the termination of its appointment.
65. The Respondent's response to the Second Direction of the tribunal is that it does not accept that its appointment has been terminated. The proxy votes from one owner Mr Mitten (who owns two flats) dated 7 April 2017 are not signed and there is no indication how the proxy was transmitted to the Applicant. The owner Mr Mitten has signed the Minutes of a meeting which was held relative to the termination of the Respondent's services but this was on 23 April 2017 and the Respondent does not consider that it is a vote cast at the meeting. On the basis that the Respondent considers that only 6 votes were cast in favour of removing the Respondent as property factor and a majority is required in terms of the Tenements (Scotland) Act 2004 a majority of 12 is required and the decision is therefore "invalid".
66. The Respondent apparently continues in its appointment as property factor of the Development.

Proposed Property Factor Enforcement Order

67. The tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) Notice.

Appeals

68.A homeowner or property factor 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.

S Tanner

Susanne L M Tanner QC
Legal Member

14 December 2017