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/20/0783

Re:- 13 Winning Quadrant, Wishaw ML2 7TT

The Parties:-

Mr James Finlayson, 13 Winning Quadrant, Wishaw ML2 7TT ('the homeowner');

and

James Gibb, Residential Factors, 65 Greendyke Street, Glasgow G1 5PX ('the respondent')

Tribunal Members:

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

Decision

The Tribunal unanimously determined that the respondent has complied with the Code of Conduct for Property Factors ("the Code"), and complied with their property factor duties. No Property Factor Enforcement Order (PFEO) is necessary.

Background

By way of application dated 4 March 2020, the applicant complains about the respondent having breached a number of sections of the Code and their property factor duties. The complaints under the Code are with respect to sections 2.1, 3.3, 4.1, 4.4, 4.6, 4.7 and 4.8.

Documentation submitted into evidence

The written application by the applicant is accompanied by a number of supporting documents. The documents are indexed and paginated 1-30. The applicant was subsequently requested to submit a copy of the relevant written statement of services and provide clarification over an invoice which he complains about. He complied with these requests.

The respondent lodged a detailed primary written submission dated 20 September 2020, together with a substantial bundle of appendices numbered 1-18c. A supplementary submission dated 26 October 2020 was lodged with supporting attachments in response to a Direction issued.

Procedure and Hearing

The Tribunal has actively case managed the application and regulated both procedure and the production of documents by the parties. Four Directions have been issued.

Earlier hearings on the application were assigned to take place on both 1 October 2020 and 3 December 2020. These were postponed due to the ill health of the applicant.

The evidential hearing took take place by teleconference on 10 March 2021 at 10.00 am. The applicant joined the teleconference hearing and represented his own interests. The respondent was represented by Nic Mayall, Managing Director (Operations) and Lorraine Stead, Operations Director (Glasgow).

Findings in Fact

1. The applicant is the heritable proprietor and owner occupier of 13 Winning Quadrant, Wishaw ML2 7TT ("the property").

2. The respondent took over management, as factor, of the property on 1 June 2016. For many years prior to this, a charitable committee had run the management of the development within which the property is situated. The development consists of six blocks of flats. Each block has twelve flats. There are a total of seventy-two flats managed by the respondent on the development.

3. The applicant's flat is in Block 1 and is on the first floor. There are a very high number of flats in the development which are rented out by their owners. The applicant, who is an owner occupier, is one of a total of only 5 resident owners in the entire development of 72. The remaining 67 flats are tenanted. Some landlords of the private let flats in the development have more than one flat and it is known that one landlord owns 8 flats in the development. The high number of tenanted properties has a significant and material impact upon the interest and commitment which those who live in the development have to its general upkeep.

4. The respondent is a registered property factor – No PF000103. The respondent has issued a formal written statement of services to the applicant and all other relevant owners in the development. In addition to the written statement of services, the respondent has prepared a Development Schedule with specification of the extent of their remit and relevant charges. The respondent's authority to act, for non-emergency repairs, is stipulated at £350 plus VAT per job. A gardening schedule and cleaning schedule is also

attached to the development schedule. The written statement of services and other schedules are clear in their terms.

5. In accordance with the relevant Title Deeds across the development, charges for common areas of the entire development, including gardening, are divided in the ratio of 1/72 per flat. Costs and repairs associated with each individual block is divided on the basis of 1/12.

6. Attempts have been made to remove the respondent as property factor. The applicant states that he and other owners of his block instructed Apex Property Factor Ltd. The Scottish Ministers removed Apex from the Register of Property Factors from 10 April 2019. The respondent's first contact from Apex was not until June 2019, after that organisation had been removed from the Register of Property Factors. No evidence of the formal instruction of Apex, in accordance with the relevant Title Deeds of the development, has ever been produced by the applicant or to the respondent from any source. In all of these circumstances, the respondent has continued to act as property factor and continued to discharge their duties accordingly.

7. At the time of the respondent's adoption of the development, it was agreed that the monthly management fee would include the insurance premium, the management fee and an allowance for gardening and cleaning. It was made clear to homeowners that this did not leave any extra funds to carry out ad hoc repairs as they were required. A float of £75 per flat was secured by the respondent which increased to £100 in February 2019. Management fees from 1 June 2016, when the respondent took over management of the development, was fixed at £30 plus VAT per flat per quarter. The current quarterly charge is now £33.10 plus VAT per flat per quarter (£132.40 plus VAT annually). These charges are not excessive.

8. The respondent formally inspected the development on 28 March 2017. The inspection was carried out by a technical manager of the respondent's organisation. This identified fifteen items which required attention.

9. Of the fifteen items identified by the respondent requiring attention in March 2017, the applicant has complained about two particular aspects.

10. The applicant has complained about roof repairs being carried out without prior approval. These repairs included gutter cleaning and reconnecting of downpipes, together with the cleaning of bin shed roofs of moss. The respondent obtained three tenders. The most competitive was received from Clark Grant Roofing and Maintenance Ltd in the sum of £3,450 plus VAT to be split by the six blocks at a total cost of £575 plus VAT per block (£57.50 including VAT per owner). The instruction of, and costs of, the works have been fully transparent. Full details were provided in advance of the work being carried out.

11. The applicant has also complained about the door entry system to his block being inoperative. This is his main source of complaint about the respondent. He understands that similar door entry problems exist in all six blocks in the

development. The respondent circulated a ballot to all owners in the applicant's block on or about 4 April 2017. It had been identified that a cheaper repair was not possible as the system was obsolete. Only four votes from the twelve owners in the applicant's block were in agreement to a door entry system upgrade. This is less than a simple majority and in those circumstances the respondent declined to instruct the upgrade. Three proprietors voted specifically against the proposed upgrade. The respondent's ballot was on the basis of a budget of £2,100 plus VAT for upgrade of the door entry system, with each owner's share being £175 plus VAT.

12. The lack of instruction of the door entry upgrade is unconnected to the level of debt in the applicant's block, or over the development. The door entry upgrade has been the subject of a ballot and, if approved would be the subject of a request for funds being made in advance of work being instructed and undertaken.

13. Sometime in 2019 the applicant complained that he had not received the relevant third party invoice in connection with a roof repair. Furthermore, he believed that the roof repair had not been undertaken. The respondent replied by email asking for clarification as to which invoice this related to. The applicant accepts that he did not reply to the respondent's request. Sometime later however, when the respondent became aware of which invoice the applicant's request was about, a copy of the relevant invoice was produced. This is an invoice which is dated 27 December 2018 issued by AGM Roofing and Construction Limited in the total sum of £420 (including VAT).

14. There has been a substantial difficulty in the development with owners not paying the respondent for their management charges, nor being prepared to meet the costs of essential renewals and repairs. The level of debt due at the development has always been of concern since the respondent took over management in 2016. As at 26 October 2020 accounts at debt recovery had a combined debt owing of £42,702.64. As at the same date, a proportion of this sum was being formally pursued legally with the respondent instructing Brechin Tindal Oatts Solicitors for recovery.

15. The huge level of debt, in excess of £40,000, has accrued over a little more than 4 years since the respondent commenced acting a property factor for the development. Such a level of debt, given the size of the development, is extremely high comparatively when looked at in the context of other developments managed by property factors. There is no clear explanation as to why this is so, but the most likely contributing factor is that only 5 of the 72 flats in the development are owner occupied.

16. Due to the applicant's frustration regarding the respondent's perceived failures he ceased paying his management charges in April 2019. He currently has an outstanding balance on his account of £992.86. This outstanding balance is rising quarterly as invoices are rendered and are unpaid. Given the outstanding conflict between the applicant and the respondent, no formal legal action has been taken against the applicant at this time nor has any formal legal action been threatened.

17. The respondent has a debt recovery procedure. Reference is made to such procedure within the written statement of services and is made available on request by contacting the respondent's Client Support Team. The applicant has never requested a copy of the procedure. The debt recovery procedure operated by the respondent is contained within a written document titled "Income Recovery Procedure (Internal)". This contains four stages. Stage 1 is a reminder letter. Stage 2 is a more formal reminder letter explaining further consequences of non-payment. Stage 3 involves passing the account to external Sheriff Officers and Messengers at Arms to carry out external debt recovery. Stage 4 involves the instruction of solicitors to undertake legal action. The respondent follows this debt recovery procedure, with an element of professional discretion from time to time exercised in respect of individual accounts.

18. The respondent is transparent in the steps which they take to pursue homeowners who currently are due funds in respect of factoring and third party invoices. Their actions in this respect are in accordance with their Income Recovery Procedure (Internal). In addition the client online portal (available to all homeowners and accessible by the applicant) details live information on the current debt levels within the development, together with stages of recovery. The information cannot detail individual names and addresses due to data protection laws. The specifics of the debts due for the individual blocks is not available.

19. The respondent's written statement of services clearly states at Section 5.10.6 that it is important that each development is "in funds" in order to allow continuous delivery of services. If significant debt has accrued, and the development funds have a result in debit balance, contractors' services may have to be suspended until the financial position is rectified. Despite the significant levels of debt, the respondent has not withdrawn any services nor has the respondent sought to recover unpaid debt due from homeowners, from any other homeowners.

20. Since the respondent took over acting as property factor for the development, no Annual General Meeting or other meeting of homeowners has been convened.

21. In terms of the relevant title deeds for the property which the applicant owns, and the development, it is open to the individual proprietors of any of the blocks to call a meeting at no less than 7 days' notice. So long as four or more proprietors of the individual block (of 12 proprietors) are in attendance or mandated to vote and act, then such four proprietors shall form a quorum at any such meeting and it shall be competent at any such meeting by a majority of the votes of those present to order to be executed any repairs, renewals, etc of the common subjects or any part thereof of the individual block. The applicant has never convened such a meeting. He does not know who all the other relevant heritable proprietors of the other 11 properties in his block are. There are means available to the applicant to identify such details for the purposes of seeking to convene a meeting. He has not taken any such steps.

Such entitlement under the title deeds would enable him to seek to progress common repairs and renewals to his block. The entitlement under the title deeds to instruct common repairs fails to take account of the very real problems with the failure of a majority of homeowners being prepared to fund such repairs.

Reasons for Decision

The Tribunal was satisfied that it had sufficient detailed evidence upon which to reach a fair determination of the application.

The Tribunal considered each of the complained about sections of the Code in turn.

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

The applicant's intimated complaint under this section of the Code, for the purposes of Section 17(3) of the Act, refers to the applicant's assertion that he was told that the common repairs to the door entry system of his block were not being undertaken because of the level of debt due to the respondent over the development. This is untrue. His subsidiary complaint under this section, as developed by the applicant in the course of the oral hearing, was that unfounded excuses have been given to him as to why legal action under the simple procedure in the Sheriff Court has not been undertaken.

The Tribunal found that an assessment of the applicant's own evidence suggested that he had conflated more than one issue. He was unclear about the specifics of conversations which had taken place in the past. He has not and was not able to produce any documentary evidence or vouching to support his claims. The Tribunal preferred the clear and substantiated evidence of the respondent to the contrary. The oral evidence for the respondent was credible and supported by documentary evidence. The pre-existing level of debt is irrelevant to the undertaking of the door entry upgrade. The door entry upgrade was the subject of a ballot as long ago as April 2017. The appellant does not dispute this. There has clearly been no attempt by the respondent to delay seeking to advance the door entry upgrade. Any door entry upgrade would be the subject of the ingathering of funds in advance prior to the instruction and undertaking of any relevant work.

So far as the complaint that the simple procedure recovery processes in the Sheriff Court have not been undertaken, the Tribunal found that there was no substance to this complaint. The respondent's debt recovery procedure highlights the staged steps which are undertaken. These staged steps are industry standard and have been followed by the respondent. It is the last level (stage 4) of the debt recovery procedure which involves the recovery of relevant debt by relevant legal proceedings being raised. This involves the respondent outsourcing the work to a relevant third party, ie a firm of solicitors. It is unreasonable for the applicant to expect that the respondent, in the course of their habitual duties, would be directly involved in the raising of Court proceedings. Regard would have to be had by the respondent to the economics of raising relevant proceedings. There may be jurisdictional issues in terms of where relevant debtors are situated. All of such matters means that any

such legal proceedings are not, in fact, simple. The respondent does pursue relevant debtors by way of Court proceedings when justified.

The Tribunal concluded that the respondent has not provided any information to the applicant which is either misleading or false.

Section 3.3: You must provide the homeowners, in writing at least once a year (whether it is 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.

The applicant's complaint in this respect relates to his claim that he did not receive supporting documentation in relation to a relevant roof repair. He states that he was also sceptical about whether or not such work had been undertaken as he had spoken to tenants on the top floor of the block who had been unaware of the work. The applicant states that he requested a copy of the invoice. He cannot remember specifically when he did this. The respondent's primary bundle includes an email from the applicant to the respondent on 30 September 2019 asking for a copy of the invoice which refers to an earlier request having been made. A timeous response was sent to the applicant at that time, asking which roof repair he was referring to. He is clear that he did not respond to this. It was ultimately identified by the respondent that the repair had carried out a number of months earlier, in December 2018. Once this was identified the relevant invoice was provided to the applicant. He accepts this. He has not yet paid the invoice, although has undertaken to do so after the completion of these proceedings before the Tribunal. All financial information has been provided as requested.

The Tribunal finds that the respondent has complied fully with section 3.3 of the Code.

Section 4.1: You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how they will deal with disputed debts.

The respondent has a clear written procedure for debt recovery. This is all comprised within their document which is titled "Income Recovery Procedure (Internal)". The Written Statement of Services indicates that a copy of the procedure is available upon request. The applicant has never asked for a copy of this document. The Tribunal was satisfied that, in the circumstances, such procedure for debt recovery as required under the Code exists and that given the detailed description provided on behalf of the respondent, that the procedure is consistently applied. There may be occasional deviations which reasonably arise due to the particular circumstances of individual cases.

Section 4.4: You must provide homeowners with clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations.

The impact or any effect on service delivery and charges is specified within the respondent's Written Statement of Services clearly at section 5.10.6. This states that if significant debt is accrued and development funds have resulted in a debit balance, contractors' services may have to be suspended until the financial position is rectified. The level of float may also be revisited. There is complete transparency. To date there has been no suspension or reduction of services, despite the very high level of the debt due to the respondent in the development. The other potential impact is that recovery of undue sums due by homeowners may be recovered from other homeowners. Section 5.9.3 of the Written Statement of Services is clear in its terms in this respect and stipulates that the outstanding amount may be distributed, as a cost, between the other homeowners. This situation has not arisen.

The Tribunal finds that all relevant information required in terms of this section have been adhered to.

Section 4.6: You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations and data protection legislation).

The development debt position is available at all times to be viewed by the applicant and other homeowners. The Client Portal which is available to all clients and which the applicant indicated he can easily access, details live information on the current debt levels directly from the respondent's computer system. There is full transparency though understandably the specifics regarding names and addresses are withheld for data protection purposes.

The Tribunal finds that the requirements of this section are fully complied with though observes that the specifies of the debt which exist on individual blocks would be helpful for homeowners such as the applicant to know given that there is a possibility that such debt will be apportioned and reallocated in the event of failed attempts to recover the debt.

Section 4.7: You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs.

The respondent has not elected to distribute any debt yet and has not made any proposals to do so. The respondent continues to actively pursue any and all debtors via the steps outlined within the current debt recovery procedure. As no redistribution has taken place, the respondent cannot have breached this section. The respondent is otherwise following their debt recovery procedure and is actively pursuing debts by way of legal proceedings in appropriate cases.

Section 4.8: You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and then giving notice of your intention.

The respondent has not taken legal action against the applicant. The respondent has approached the debt due by the applicant in accordance with their debt recovery procedures. This has included the instruction of external debt recovery agents who are Sheriff Officers/Messengers at Arms. Instructing such an organisation to perform debt recovery duties is not a formal legal action by way of initiating of Court proceedings. The respondent has specifically refrained from initiating any formal Court proceedings given this current dispute before the Tribunal. The respondent has produced, for clarity, (within Appendix 16 of their documents which accompany their primary submission) the full timeline in respect of the credit control steps which have been taken against the applicant to date. There is nothing untoward or unreasonable about the steps specified therein.

The respondent has not breached section 4.8 of the Code.

Property Factor Duties

Within the applicant's written application he also asserts that the respondent has failed to carry out relevant Property Factor duties. Based upon his written application, and the matters which he referred to in his own oral evidence and submissions, the Tribunal identified, in total, the following four matters which the applicant complains of. The Tribunal adopted a generous and flexible approach to the consideration of the applicant's complaints under the duty complaints. Not all had been formally intimated in advance. The Tribunal concluded that it was better to comment on all matters in the hope of resolving all ongoing issues of dispute between the parties.

1. The applicant states that the respondent has failed to adequately pursue homeowners who have not paid management and other charges. He relied again upon the respondent's alleged failure to initiate simple procedure applications in the Sheriff Court. The Tribunal finds that there is no merit in that submission made by the applicant and the Tribunal refers to their earlier reasoning referred to when analysing the respondent's alleged breach of section 2.1 of the Code.

2. The applicant complains that the respondent's refusal to instruct the required door entry system upgrade is in direct conflict with the way in which they approached the instruction of roof repairs in 2017. He complains that prior approval ought to have been sought. At that time, three tenders were obtained by the respondent and Clark Grant Roofing and Maintenance Ltd were instructed as their quote was the most competitive. The total cost of the works was in the sum of £3,450 plus VAT. This exceeded the non-emergency repairs limit in terms of the respondent's authority to act in the sum of £350 plus VAT per job. The respondent's position on this is that there is a significant distinction which can be drawn between the two areas of work. The roofing works were effectively of an emergency nature given that water ingress would likely lead to significant damage and additional costs for all homeowners. Despite not requiring to be done immediately on the basis of a strict interpretation of the word "emergency", the work did require to be undertaken in early course and it was the responsible thing for the respondent

to do to obtain competitive quotes for the benefit of the homeowners and inform them in advance. This type of work is wholly different from the instruction of work to replace the door entry systems which would not give rise to additional costs being incurred. The lack of a suitable door entry system can expose the relevant properties to security issues and damage, but it is a distinct and different category of work compared with roof repairs. The respondent also referred to the significant level of ongoing debt and the difficulty in recovering costs from homeowners. The replacement of the door entry system instructed was unlikely to be repaid by relevant homeowners given the results of the ballot in 2017. The Tribunal found the respondent's full and detailed explanation understandable and reasonable.

3. The applicant complains about the respondent's failure to replace the door entry system, which seemed to the Tribunal to be the core of all of the applicant's complaints. The Tribunal finds however that the respondent's approach to this has been both proactive and reasonable. As early as April 2017, within one year of taking over responsibility as Property Factor for the development, the respondent balloted relevant homeowners. As at the end of May 2017, only 4 of the 12 homeowners in the applicant's block had voted for the relevant works to be carried out. The respondent deemed that that was not a majority and as such the work was not undertaken. The respondent has not failed to appreciate, understand or seek to address the applicant's concerns regarding the lack of appropriate door entry system. Given the passage of time since 2017 it seems to the Tribunal to be prudent for the respondent to arrange an AGM and or further ballot regarding this issue.

4. The applicant complains regarding the respondent's continued acting as Property Factor. The applicant relies upon his own block having instructed Apex Property Factors in 2019. The respondent is quite clear that the first approach from Apex followed their removal from the Property Factors Register by Scottish Ministers. This is accepted by the Tribunal. Furthermore, and in any event, no documentary or other evidence was produced by Apex, nor has it ever been produced by the applicant to show that Apex had been instructed in accordance with the relevant Title Deeds. Again this is accepted. The applicant has lodged nothing to support a relevant vote to appoint Apex. The applicant accepts that no steps have been taken to appoint anyone other than Apex at any time. Though arguably competent in terms of the Title Deeds for the individual blocks to appoint different factors, which would have been the case in the event of Apex having been capable of being instructed, the Tribunal finds that such a suggestion is unlikely to best serve the applicant or any other homeowners. The applicant recognises that it is a legal requirement to have a Property Factor operate and is fully aware of the need for the individual blocks and the development to be covered by relevant insurances. Despite acknowledging this, the applicant complains that the respondent should not continue to act. The applicant's arguments in this respect lack any merit. The respondent cannot fail to undertake their relevant duties a Property Factor. The respondent is the appointed Property Factor. Any suggestion that they should stop acting and, for example, stop arranging relevant insurances is a strange suggestion for the applicant to make when he otherwise complains that the respondent has failed in their duties.

The Tribunal found, in conclusion, that the respondent has not failed in their duties.

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 March 2021