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

Proposal regarding the Making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Chamber Ref: HOHP/PF/16/0133

Flat 7/4, 220 Wallace Street, Glasgow, G5 8AL ("The Property")

The Parties:-

Mr. James Gordon (known as "Gordon") Black, residing at the Property ("the Homeowner and Applicant")

MXM Property Solutions Limited, Baltic Chambers, Suite G2, 50 Wellington Street, Glasgow, G2 6HJ ("the Factor and Respondent")

Tribunal Members:-

Patricia Anne Pryce	-	**Chairperson and Legal Member**
David Godfrey	-	**Ordinary Member (Surveyor)**

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

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

1. Refund to the Applicant the management fees which the Applicant has paid to the Respondent for the last thirteen-month period.
2. Provide documentary evidence to the tribunal of the Respondent's compliance with the above Property Factor Enforcement Order by sending such evidence to the office of the First-tier Tribunal (Housing and Property Chamber) by recorded delivery post.

Section 19 of the 2011 Act provides as follows:

"(2)In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

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

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

Failure to comply with a PFEO have serious consequences and may constitute an offence.

P A PRYCE

Legal Member

10 April 2017

Date

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/16/0133

Flat 7/4, 220 Wallace Street, Glasgow G5 8AL ("The Property")

The Parties:-

Mr. James Gordon (known as "Gordon") Black, residing at the Property ("the Homeowner and Applicant")

MXM Property Solutions Limited, Baltic Chambers, Suite G2, 50 Wellington Street, Glasgow, G2 6HJ ("the Factor and Respondent")

Tribunal Members:-

Patricia Anne Pryce	-	**Chairing and Legal Member**
David Godfrey	-	**Ordinary Member (Surveyor)**

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 and complied with the Property Factor's duties, determines unanimously that, in relation to the Homeowner's Application, the Factor has not complied with the Code of Conduct for Property Factors and has failed to carry out the Property Factor's duties.

The tribunal makes the following findings in fact:

- The Applicant is the owner of the property known as Flat 7/4, 220 Wallace Street, Glasgow which is on the 7th and top floor of the building in which it is located. There are three flats located on the 7th floor of the building.
- The property is a three-bedroomed penthouse flat which has a lounge, kitchen, bathroom and hallway, with one of the bedrooms having en-suite facilities.

- The Respondent is the factor of the common parts of the building within which the property is situated.
- 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 372 owners of residential properties and six commercial units in a development which was constructed on or about 2004 to 2005. The development consists of two buildings. All of the owners are common owners and are jointly responsible, in differing percentages, for communal repairs across the two buildings.
- The property has suffered problems with intermittent water ingress emanating from the roof of the building for the last sixteen months.
- The Applicant made the Respondent aware of the water ingress problem by reporting this to the security officers/concierges located in the office in the building within which the property is located on or about January 2016.
- The security officers took photographs of the damage caused by the water ingress to the property.
- The Applicant and the Respondent believe that the cause of the water ingress is a latent defect in the construction of the building in which the property is located.
- There is a large amount of debt due within the development due to some owners not paying their share of the communal repairs and maintenance of the building.

Following on from the Applicant's application to the Homeowners Housing Panel ("HOHP", which body was succeeded by the First-tier Tribunal (Housing and Property Chamber) on 1 December 2016), which comprised documents received in the period of 13 September 2016 to 8 February 2017, the Convenor with delegated powers under Section 96 of the Housing (Scotland) Act 2014 referred the application to a tribunal on 15 February 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. The Respondent submitted representations by way of an email dated 24 March 2017 and at the hearing.

The Legal Basis of the Complaints

The Applicant complains under reference to Sections 6.1 and 6.2 of the Code.

The Code

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

Section 6.1

You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.

Section 6.2

If emergency arrangements are part of the service provided to homeowners, you must have in place procedures for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for giving contractors access to properties in order to carry out emergency repairs, wherever possible.

Hearing

A hearing took place in Wellington House, 134/136 Wellington Street, Glasgow, G2 2XL on 10 April 2017.

The Applicant attended on his own behalf.

The Respondent was represented by Mr. Mark Allan, Managing Director of the Respondent.

Preliminary Issues:-

1. Mr. Allan produced a written submission and five documents upon which he wished to rely at the hearing. He accepted that these were very late in being produced but he did not think that he could send them in to the Administration in advance of the hearing as he had missed the date for lodging these documents which was contained in the letter of referral he had received. He did not appreciate that he could still submit them in advance of the hearing and then seek permission of the tribunal to formally accept them at the hearing. In short, he submitted that he had misunderstood the process. The tribunal sought the views of the Applicant. The Applicant confirmed that he wished to read and consider the documents before he gave his views. The tribunal adjourned for a short period to consider the documents.
   After the adjournment, the Applicant helpfully confirmed that he did not object to the late submission of these documents although he would have preferred it if they had been submitted sooner.
   The tribunal reluctantly allowed the written submission and documents to be submitted as they did assist in clarifying the Respondent's position as regards

the present application. However, the tribunal noted its displeasure in the late submission of the documents which contained information which was quite clearly easily accessible to the Respondent in advance of the hearing. However, in terms of dealing with the matter justly and preventing delay, the tribunal accepted the late submission of these documents.

2. In his application, the Applicant sought to rely on a breach of Section 6.2 of the Code. The tribunal asked the Applicant to demonstrate where, within his application and supporting documents, he had raised this as an issue with the Respondent. The Applicant could not direct the tribunal to any part of his application or supporting documentation wherein a reference to a breach of this part of the Code was contained. The tribunal advised that it would consider this point during the adjournment and deliver its decision thereafter.
   After the adjournment, the tribunal advised parties that it would not consider the alleged breach of Section 6.2 of the Code as this did not form part of the present application nor had it been raised with the Respondent in advance of the application being made. The Applicant helpfully accepted this.
3. Following on from the point raised by the tribunal in point 2 above, Mr. Allan referred to his email to the tribunal of 24 March 2017 wherein he had complained about the present application being premature as the Applicant had not undertaken the Respondent's complaints procedure before making his application to the tribunal. In short, he complained that the Applicant had not complied with Section 17 subsection (3) of the 2011 Act and that the Respondent had not refused or unreasonably delayed in attempting to resolve the issue.
   The Applicant's position was that he had first raised the issue of the water ingress sixteen months ago, and, despite various emails, the Respondent had failed to keep him updated on progress. He confirmed that he had heard nothing from the Respondent since the AGM for the development within which the property is located had taken place on 13 October 2016. Mr. Allan sought to rely on its complaints procedure but did not produce this to the tribunal. He referred to the two hyperlinks which he had produced within his email of 24 March 2017 but he did not produce the documents to the tribunal. The tribunal confirmed that it was for parties to produce documents to the tribunal upon which they wished to rely.
   After the adjournment, the tribunal advised parties that it rejected the Respondent's argument that the present application was premature. It was clear from the application that the Applicant had sent several emails to the Respondent over the past year and that the issue of water ingress remained outstanding. The tribunal accepted that the water ingress problem was more than likely due to a latent defect and would require a communal repair to be carried out, however, in terms of the submissions lodged at the hearing by the Respondent, the Respondent had only produced two emails it had sent to the Applicant, one dated 16 March 2016 and the other dated 11 August 2016. In short, in terms of the Respondent's own submitted documents, it appeared on the face of it that the Applicant had attempted to seek confirmation of progress from the Respondent but had not received this within the last six months.
   Furthermore, the tribunal was appalled to note that in terms of the final paragraph of the written submission produced by the Respondent that "As is (*sic.*) clearly states within the MXM complaints process, any owners cannot

raise formal complaints when they have outstanding common charges,.....". In essence, the Respondent appeared to refuse to allow an owner to follow its complaints procedure where that owner owed the Respondent money, apparently even where any money due could be the source of dispute. This seemed to the tribunal, at best, somewhat self-defeating as an approach such as this would afford an owner no option but to make an application to the tribunal.

4. Within his email of 24 March 2017 to the tribunal, Mr. Allan had sought to postpone the present hearing citing that he would be away on business. The tribunal had refused this request as the Respondent is a limited company and could have sent another representative. When asked about this, Mr. Allan confirmed to the tribunal that he had rearranged his business trip in order to attend the hearing.

Breach of Section 6.1

The Applicant confirmed that he had owned the property since 2008. He confirmed that the property is situated on the 7th floor, which is the top floor, of the building and is part of a development which consists of two buildings. There are 372 residential properties and six commercial units within the development and it was constructed between 2004 and 2005.

The Applicant advised that the water ingress commenced in between Christmas and New Year of 2015 when there were a couple of bad storms.

When questioned by the tribunal, both the Applicant and Mr. Allan confirmed that the water ingress was due to a latent defect within the building and not due to storm damage. They both confirmed that there were a number of latent defect issues within the development as a whole.

Mr. Allan submitted that the National House Building Council ("NHBC") would not provide a warranty for the defect in the roof over the Applicant's building as there was only a single membrane flat roof covering installed. He referred to a report by Graham Sibbald dated from 2009 which confirmed this. Mr. Allan did not produce this report to the tribunal.

However, it was a matter of agreement between the parties that the water ingress was the result of a latent defect in the construction of the property and was not an insurable risk. In short, both agreed that the repair required to the roof would not be covered by insurance.

The Applicant submitted that 50% of the rooms within his property now suffered from water ingress and that he requires to keep a bucket in the hallway to catch water.

Mr. Allan referred the tribunal to his Document 2 entitled "Emergency & Essential Common Repairs", as submitted by him at the hearing. This document was produced and sent to owners in 2015. He confirmed that the Respondent required payment in advance in respect of these works as debt was a serious issue at the development. He confirmed that the figures referred to in page 3 of that document were produced in 2015 and, in short, the Respondent was seeking £54,031.81 from

the owners to carry out these essential repairs. He confirmed that in terms of Document 5 which he had produced, there were substantial debts in this development and, for example, as at October 2016, the Respondent had 102 litigation cases ongoing against the common owners.

Mr. Allan confirmed that some roof repairs had been carried out at other parts of the development but this was where the repairs were more straightforward, simpler and cheaper as access was easier. He submitted that the repairs which required to be carried out to the roof over the Applicant's property were more complex due to access issues and height restrictions. He further advised that, to date, £30,000 of the £54,000 (or thereabouts) had been ingathered and had been spent thus far on rectifying latent defects within the development including fixing the water pumps. He advised that the management fee which the owners paid was £10 per month per property.

The Applicant submitted that he had followed the procedure as laid down by the Respondent in terms of reporting the water ingress, that is, that he had reported it to the security officers within the concierge's office in the development. These officers had attended at his property in January 2016 and had taken photographs of the damage caused by the water ingress. This was not disputed by Mr. Allan.

The Applicant advised that he had sent emails to the Respondent and had produced these as part of his present application. He had asked that Mr. Tim Allan, who is the property manager employed by the Respondent to look after the development within which the property is situated, to come and inspect his property. He confirmed that, as at the date of the hearing, Mr. Tim Allan had not attended at his property.

The Applicant referred to the invoice dated 30 March 2016 he had produced to the tribunal from Premier Properties Limited. He advised that this was for £282 which he had paid to this company for emergency works to be carried out to the lighting in the bathroom of the property as water ingress had penetrated the light within the bathroom causing the light to short. The Applicant advised that he was concerned about health and safety and the fact that water had entered the electrics in his property and this was why he had instructed the work to be carried out. He advised that he had then sought payment for this sum from the Respondent as this was a repair which was required which was common in nature and should be shared by the other owners.

Mr. Allan did not deny that the repair was common in nature, however, he referred the tribunal to his email to the Applicant of 11 August 2016, entitled Document 4, wherein he raised various questions with the Applicant about the nature of this invoice including referring to the "alleged call out", that the company was not a registered company, that it had no VAT number but had charged VAT and that he could find no trace of this company together with the telephone number on the invoice being unobtainable. Mr. Allan advised that he was accountable to any money being paid out of the common repairs account and therefore needed to be sure that any invoice was correct. Mr. Allan admitted that he thought that the Applicant was "at it" and was being "spiteful" as the Respondent had required to raise court action against the Applicant for factoring arrears. He believed that the invoice was a work of fiction.

When questioned by the tribunal that the email of 11 August 2016 was not particularly helpful, that it did not help to progress matters and that it did not offer a solution to the Applicant, Mr. Allan admitted that he thought that the Applicant was trying to be difficult as a result of the court action which had been raised. Mr. Allan did accept when giving evidence that he could have simply asked for another invoice showing the correct information. Instead, Mr. Allan advised that he had referred this invoice to the Police as being potentially fraudulent.

The Applicant referred to his email response to Mr. Allan wherein he provided Mr. Allan with an alternative contact telephone number for the contractor in question. He confirmed that he had paid this invoice in good faith as he felt he had no other choice as the Respondent did not advise him about when the water ingress would be dealt with. The Applicant advised that is was a matter of health and safety and that it had to be resolved quickly. He further submitted that the contractor who had carried out the work had set up a new business and this would have been why there was an issue with the contact details on the invoice.

The Applicant confirmed that he had not instructed any redecoration works within his property as water ingress is an ongoing issue and it would be throwing good money after bad until such times as the water ingress is resolved. He did not see the point in costing the owners money unnecessarily. He had provided a written quote to the Respondent for these works and had submitted this quote to the tribunal.

Mr. Allan advised that the Respondent uses litigation and other means to secure the debt due in the development. He advised that the management fee per property on the development if £10 per month. As at end March 2017, he submitted that the Respondent was owed £40,000 by the common owners.

The Applicant accepted that the Respondent had raised court action against him last year but that he was up to date with his payments. He had disputed sums due but had paid all sums outstanding including the court costs. He felt that all he was doing was paying out money with nothing to show for it. He accepted that the development was a difficult one for the Respondent to manage but he had been left suffering water ingress for 16 months without progress and without being provided with the comfort of knowing if progress would be likely, having not been provided with updates by the Respondent.

Mr. Allan submitted that the Respondent had sent out various communications to the owners regarding securing debt and outstanding repairs issues. He further submitted that the Respondent is in the process of trying to set up an owners' group to try and make decisions regarding the prioritisation of repairs within the development. He submitted that the Respondent had asked for funds all along but that a number of owners failed to pay this and the Respondent was left having to litigate to get the money from owners to effect repairs. He further confirmed that owners were sent monthly statements through an automated email and provided with a financial report every quarter.

Mr. Allan submitted that invoices had already been sent to the owners seeking money to effect the roof repairs over the Applicant's property.

However, when asked by the tribunal, Mr. Allan confirmed that investigations still required to be carried out in respect of the roof repairs which would need to be effected over the Applicant's property. In other words, after 16 months, the actual repairs required to the roof above the Applicant's property had still not been properly investigated. Given this, the tribunal could not understand how owners had been invoiced for work, the scope of which had not yet been identified.

The Applicant submitted that he had not been aware until the hearing that the problem with the roof had still not been properly identified. He further confirmed that he had not had a further conversation with Tim Allan since March 2016, other than to acknowledge him at the AGM on 13 October 2016.

The Applicant advised that in terms of the alleged breach of Section 6.1 of the Code he simply wanted the Respondent to keep him advised of the up to date position as regards the common repairs. He acknowledged that debt was an issue in the development but he just wanted to know what was happening. He submitted that another owner had told him that there had been people up inspecting his roof just before Christmas 2016 but that he had not heard from the Respondent regarding this.

Mr. Allan confirmed that Tim Allan, along with others, had inspected the roof at that time to attempt to assess what type of repairs and the extent of repairs which might be required.

When questioned by the tribunal as to why the Respondent had not provided the Applicant with an update as to progress and, in terms of the documents the Respondent had lodged at the hearing, the Respondent appeared to have only emailed the Applicant regarding this issue on 30 March and 11 August, both 2016, Mr. Allan confirmed that, in hindsight, the Respondent should probably have provided further updates to the Applicant and that he now understood the Applicant's frustration with the situation. Mr. Allan also submitted that he did not realise until the hearing the level of the water ingress which the Applicant had suffered.

When questioned by the tribunal if matters could not simply have been dealt with by offering to meet with the Applicant, Mr. Allan submitted that Tim Allan had discussed the matter at length with the Applicant, albeit he accepted that this had taken place in March 2016. When questioned again by the tribunal, Mr. Allan accepted that a meeting would have been helpful and that, during a short adjournment of the hearing, he had agreed with the Applicant that he would go and inspect the Applicant's property.

It appeared to the tribunal that the Respondent had simply failed to keep the Applicant advised of progress, or lack of progress, in relation to the roof repairs. There had been a time lapse of six months by the time of the hearing of the present application wherein the Applicant had received no update from the Respondent. The Respondent had not advised the Applicant regarding the inspection of the roof or the fact that the actual nature of the repair required to the roof had still to be identified. In terms of the Respondent's own submitted documentation, only two emails were

sent by the Respondent to the Applicant in relation to this specific matter in the last twelve months.

It also struck the tribunal that it would not have been unduly onerous for the Respondent to provide the Applicant with a brief update of matters and to have inspected the Applicant's property.

It was clear from Mr. Allan's responses that he had initially assumed that the Applicant was "at it" and being "spiteful" as a result of the litigation which had taken place. He did acknowledge that he may have misread the situation, although he did, on more than one occasion during the hearing, appear to change his evidence, for example, initially submitting that the work required to the roof above the property had already been invoiced to the owners and then later admitting that the extent of this work had yet to be identified which appeared to the tribunal to be contradictory.

In light of the foregoing, the tribunal finds that the Respondent breached Section 6.1 of the Code.

Breach of Section 6.2

The tribunal heard parties on this as a preliminary matter and, after an adjournment and consideration of parties' submissions, decided that it could not hear evidence in relation to this specific breach as the Applicant had not included it within his correspondence in advance of the application nor had he incorporated within his application.

The tribunal therefore did not require to consider whether there had been a breach of this particular section of the Code.

Failure to carry out the property factor's duties

The Applicant advised that his complaint in relation to this was based on more or less the same set of facts as he had relied upon to establish the breach of the Code. He complained that the Respondent had failed to meet with him or give consideration to the health and safety risks posed by the water ingress to his property when the water came through the light fitting in his bathroom. He also complained that the Respondent did not respond to him.

Mr. Allan submitted that he had thought that the Applicant was "at it" but, given all that he had heard at the hearing, he understood the Applicant's frustration. He accepted that the Respondent could have communicated more. Furthermore, he submitted that he had not to date considered the health and safety aspect of the water ingress and the electrics but now appreciated this.

In light of the foregoing, the tribunal finds that there was a failure by the Respondent to carry out the property factor's duties but the tribunal also notes that this failure was established by the same specific set of circumstances as the breach of Section 6.1 of the Code.

Observations

The tribunal notes that the Respondent has required to litigate against various owners at the development in question to try and obtain sufficient funds to carry out essential repairs. The tribunal notes with some sympathy that this is not an easy development to manage. However, the tribunal is concerned that the Respondent appeared to assume that the Applicant was "at it" and being "spiteful" without carrying out the necessary inspection of the Applicant's property and, rather than seeking an alternative invoice in relation to the electrical repairs, the Respondent appears to have assumed that the invoice was a work of fiction and that the repairs were "alleged" repairs.

In the course of the hearing, the tribunal noted that the Applicant gave his evidence in a straightforward manner without embellishment and, remarkably, without anger, given that he has suffered water ingress in his property intermittently for the last 16 months. Mr. Allan was less straightforward in his submissions and appeared to change his evidence on various occasions throughout the hearing, including regarding debts due to the Respondent by the owners and what had been invoiced and what had not been so invoiced. At best, it appeared to the tribunal that there was confusion over what repairs were actually covered in terms of the funds which had been sought from the owners by the Respondent.

The tribunal was concerned to note that, some sixteen months after the Applicant had first suffered water ingress, no investigations had been carried out to identify the source of the problem and, thus, there was no indication as to how much rectification of the problem would cost.

Finally, the tribunal noted that the Applicant had simply wanted a meeting with the Respondent and that this had not been forthcoming. The tribunal notes that had such a meeting taken place, there is every chance that the present application would not have come before the tribunal. The tribunal notes, however, that the Respondent has now agreed to meet with the Applicant.

Property Factor Enforcement Order

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

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

1. Refund to the Applicant the management fees which the Applicant has paid to the Respondent for the last thirteen-month period.
2. Provide documentary evidence to the tribunal of the Respondent's compliance with the above Property Factor Enforcement Order by sending such evidence to the office of the First-tier Tribunal (Housing and Property Chamber) by recorded delivery post.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the tribunal proposes to make a property factor enforcement order, they must before doing so—

(a) give notice of the proposal to the property factor, and

(b) allow the parties an opportunity to make representations to them.

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

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

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

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

P A PRYCE

Chairing Member

10 April 2017

.....

Date