

Housing and Property Chamber

First-tier Tribunal for Scotland



**First-tier Tribunal for Scotland (Housing and Property Chamber)
Statement of Decision in respect of an application under Section 17 of the Property Factors
(Scotland) 2011 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and
Property Chamber (Procedure) Regulations 2016**

Chamber Ref: HOHP/PF/17/0158, HOHP/PF/17/0159, HOHP/PF/17/0160 and HOHP/PF/17/0202

Property: Subjects at Flat 3/3, Block A, The Bridge Apartments, 310 Argyle Street, Glasgow, G2 8ND

The Parties:-

Mr Vinodh Singh Soundararajan, residing at Flat 3/3, Block A, The Bridge Apartments, 310 Argyle Street, Glasgow, G2 8ND ("the Homeowner")

and

MXM Property Solutions Limited, having a place of business at Baltic Chambers, Suite 544-549, 50 Wellington Street, Glasgow, G2 6HJ ("the Property Factor")

The Tribunal consisted of:-

Mr James Bauld – Legal Member

Ms Ann MacDonald – Ordinary Member

Decision

The Tribunal determined that the Property Factor had failed to comply with certain duties arising from the Property Factor's Code of Conduct ("the Code") and accordingly determined to make a Property Factor Enforcement Order.

Background

1. The Homeowner lodged four separate applications with the First-tier Tribunal for determinations that the Property Factor had failed to comply with various sections of the Code. Three of the applications (Reference Numbers: 17/0158, 17/0159 and 17/0160) were lodged 24th April 2017. The fourth application (Reference Number: 17/0202) was lodged on 19th May 2017.
2. All of the applications were considered by the Tribunal president and were referred to the Tribunal for determination
3. By letters dated 19th June 2017, the parties were advised that the Tribunal would convene on 24th July 2017 to consider the various matters and a hearing was set to take place on that date. The hearing set for 24th July 2017 was postponed at the request of the Property Factor. A fresh hearing date was set for 18th September 2017 and a hearing was set to take place on that date in Wellington House in Glasgow.

Hearing

4. The Tribunal convened on 18th September 2017 at Wellington House to consider these four applications. The Homeowner was present at the hearing. The Property Factor was represented at the hearing by Ms Lucy Harrington, solicitor from TLT Solicitors Glasgow. Mr Mark Allan, being Managing Director of the Property Factor was also present at the hearing.
5. The Tribunal decided that the four separate applications should be heard together. Each of the applications raised separate complaints regarding different parts of the Code of Conduct. It would have been entirely competent for the Homeowner to have lodged one single application covering all of these matters. Additionally, the hearing took place along with another application lodged by Mr Vikas Tomar who also resides in the same block and was directed against the same Property Factor. A separate decision will be issued in respect of that case which was heard under Chamber Reference Number: HOHP/PF/17/0236.

6. At the commencement of the hearing, the Tribunal ascertained that both the Homeowner in this application and the Homeowner in the application under Reference Number: FTS/HPC/PF/17/0236 (Mr Vikas Tomar) were happy that the Tribunal considered the complaints together. No objection to this course of action was made by the representatives from the Property Factor. There were several similarities in the complaints made by the two separate Homeowners.
7. At the commencement of the hearing, the Tribunal advised the parties that the Tribunal was bound to deal with the matter in terms of the relevant regulations and drew parties' attention in particular to the provisions related to the overriding objective of the Tribunal to deal with the proceedings justly. Parties were advised that the Tribunal would try to deal with matters in a manner that was proportionate to the complexity of the issues and the resources of the parties, that the Tribunal would seek informality and flexibility in dealing with matters and that the Tribunal would try to ensure that the parties were on an equal footing procedurally and able to participate fully in the proceedings. All parties acknowledged this information from the Tribunal.
8. The hearing in respect of these matters lasted throughout the morning of 18th September 2017 and continued until after 4pm on the afternoon. In the morning, the Tribunal mainly dealt with the application lodged by Mr Tomar and most of the evidence in the morning was directed at his application. However there were contributions throughout the morning from Mr Soundararajan and matters relating to his complaints were also discussed.
9. It was a matter of agreement between the parties that Mr Soundararajan was the owner of Flat 3/3 in Block A, The Bridge Apartments, 350 Argyle Street, Glasgow, G2 8ND. This building is a multi-storey block consisting of commercial premises on the ground floor and residential dwelling houses on the upper floors. The Property Factor was appointed in 2008 to act as the Property Factor by the developers, Mellon (Argyle) Limited. The building had been constructed in 2002. The building contains twelve storeys of flatted dwelling houses and in total there are 132 dwelling houses in the building. Responsibility for common repairs is set out in the title deeds. At the commencement of the hearing it was noted that the Tribunal did not have a copy of any of the title deeds and this was raised with the parties. Similarly, the Tribunal indicated it did not have any

note of a constitution for the Bridge Building Association, nor any explanation for the repair procedures for the block, or the percentages allocated to each property. At the commencement of the afternoon session of the Tribunal, the solicitor for the Property Factor produced copies of title deeds for the property owned by the Homeowner and also the property owned by Mr Tomar, in respect of the other application which was being considered. Numerous other documents had been lodged in advance of the hearing by both parties which were considered by the Tribunal prior to the hearing and which were used during the hearing by all parties.

10. The hearing proceeded throughout the day. The Tribunal members allowed parties to indicate their respective positions and questioned the parties with regard to the terms of the applications and the responses from the Property Factor. Parties were agreed that the factoring charges for the relevant dwelling houses were issued on a monthly basis and based on a flat monthly charge. That charge was assessed at the commencement of each financial year. The Property Factor would hold an Annual General Meeting of the various homeowners and business premises proprietors and would provide a detailed budget in respect of the likely maintenance and management costs to be incurred in the building over the forthcoming year. The Property Factor indicated that most of this information was provided electronically and that there was a website which was open to the proprietors to access to obtain information regarding various financial matters. The Homeowner's position was that the website was regularly broken and occasionally could not be accessed. It was accepted that invoices were sent electronically. It was also agreed that much of the financial invoicing was carried out by TLT Solicitors rather than directly by the Property Factor.

The Applications by Mr Soundararajan

11. As indicated earlier, the Homeowner in this matter had lodged four separate applications. Each application related to different allegations regarding breaches of separate parts of the Code of Conduct. For ease of reference all of the applications were heard together but can be summarised as follows.

HOHP/PF/17/0158 alleged failures to comply with sections 4.1.1 and 4.1.6 of the written statements of services and sections 2.5, 3.2, 3.5a, 4.7 and 4.9 of the Code of Conduct.

HOHP/PF/17/0159 alleged that a breach of the written statement of services paragraph 2.1.3 and a breach of the Code of Conduct section 6.1.

HOHP/PF/17/0160 alleged a breach of the Code of Conduct section 2.1.

Finally HOHP/PF/17/0202 alleged a breach of the Code of Conduct section 3.1.

The Tribunal proceeded to continue each of these applications separately and sought evidence from the parties in respect of them.

HOHP/PF/17/0158

12. The Tribunal considered this application and obtained comments from the Property Factor and the Homeowner. In this application the Homeowner alleged breaches of section 2.5 of the Code which is a failure to respond to enquiries and complaints within prompt timescales, section 3.2 which relates to returning funds due to homeowner at the point of settlement of final bill following the change of property factor, section 3.5a which requires homeowners floating funds to be kept in a separate account from the property factor's own funds, section 4.7 which requires the property factor to demonstrate they have taken reasonable steps to recover unpaid charges from other homeowners and section 4.9 which requires property factors not to act in an intimidating manner or to threaten homeowners when corresponding with them. The Homeowner in this case sought the return of his deposit of £550.00 and was asking for complete and transparent information regarding the recovery of debts, evidence that the Property Factor had charged owners in the proportion stated in the title deeds, a breakdown of information regarding non-payment by certain owners and a written apology for poor service and compensation for poor service.

13. The Property Factor indicated that they had taken steps to attempt to recover debts owed by other owners within the block. In particular they had a serious problem with regard to a debt owed by one particular owner who was the owner of three of the commercial units. From a total of £144,000.00 of outstanding debts, approximately £110,000.00 was owed by that single owner. She was the wife of the Director of the developer company. She was now resident in Ireland. The Property Factor indicated that they had obtained decrees against her in respect of part of the sums owed and had taken various steps to try to enforce those decrees. However they had been prevented from enforcing the decrees in Ireland by the existence of a body called the National Asset Management Association. This is an Irish governmental body which was set up after the financial crash of 2008. The purpose of this body was to recover monies owed to the Irish Government. This body was able to prevent the enforcement of debts owed to creditors based outside Ireland and effectively this government body held security over properties which were situated in Ireland and would prevent those properties being sold to satisfy debts which were effectively foreign debts. The Property Factor indicated that one of the reasons why they had now been removed as the Property Factor was because they had lodged an inhibition against the wife of the Director of the property development company. The title deeds still allowed the property development company to appoint a factor.

14. The Homeowner indicated he had been instrumental in the formation of an owners group and they had organised a petition to the developer to remove the Property Factor due to various areas of dissatisfaction with their services

15. . It was agreed by all parties that MXM had been removed as a Property Factor with effect from February 2017.

16. The Property Factor indicated that when they received notice that they were to be removed they took the decision at that stage that the various debts which they had been attempting to manage during their tenure as Property Factor would now require to be spread amongst the various other owners. The total debt was approximately £144,000.00 and this debt was split amongst the various owners when the final bills were issued in or around December 2016. Each owner was effectively sent a bill for approximately £995.00 in respect of these irrecoverable debts. The

Property Factor indicated that they would not have decided to spread that cost at that time had they continued to act as Factor. It was clarified that the title deeds do not require the spreading of any other owners debt to be split in the same proportion as the deeds state for common repair costs and that it was up to the Managing agent to decide how the spread of any outstanding other owners debt would be calculated. MXM had decided to do this equally. It was also clarified that the deeds allow for the Factor to recover their expenses of debt recovery actions.

17. The Property Factor indicated that there was a separate bank account for the Bridge Block and that all funds received from owners were kept in that account. They did not have a separate account where the floats were kept untouched. The Property Factor explained that the floats were not required to be kept untouched. The purpose of the float is to have a source of funds which can be used to deal with bills and to pay various contractors for their services during the year. The Property Factor indicated that each individual owner was given a credit for their float in the final account sent to them. The final bill eventually sent to Mr Soundararajan was £98.00 after credit of his float. He indicated he has not yet paid the £98.00 and is awaiting a new statement of account.

18. The Homeowner complained that the Property Factor had failed to respond to enquiries and complaints. This complaint was similar to the complaint made by Mr Tomar in the linked case. The Property Factor admitted and accepted that they had failed to respond to various emails sent by the Homeowner in respect of this matter after they had demitted office. In particular he produced copies of emails which he had sent to the Factor on 27th March 2017, 21st April 2017, 24th April 2017, and 19th May 2017. It seemed to be accepted by the Property Factor that Mr Soundararajan had received no response to these emails. The Tribunal made enquiries of the parties with regard to whether failing to respond to these emails was a breach of the Code of Conduct and in particular in respect of section 2.5 of the Code of Conduct. That section requires Property Factors to respond to enquiries and complaints received by letter or email within prompt timescales. The representatives of the Property Factor conceded that the failure to respond to the emails from March onwards was a breach of this section of the Code. They offered an apology to Mr Soundararajan and explained that they had been receiving lots of similar

complaints and correspondence from other homeowners and they were simply overwhelmed. Their position was that the information which was being sought in these emails had been previously provided time and time again and accordingly they did not think they continued to require to provide it. They had also thought that since they were no longer Factors for the property there was anyway no requirement for them to comply with the code, however they were aware now of a recent Tribunal decision which clarified that the code continued to apply. They accepted that this was a breach of section 2.5 of the Code.

19. The Tribunal then heard evidence regarding the manner in which the Property Factor dealt with complaints. Their policy stated they would not accept any complaint from any owner who was "in debt" in terms of the written statement of service. The Property Factor did not give the Homeowner credit in respect of the funds held in his float when they sent him the final bill. This was because Mr Soundararajan had been slightly late in paying his November bill. The Property Factor seemed to have no explanation for this practice and noted that Mr Soundararajan was not a persistent non payer. This matter, however, did not form part of the actual complaint being made by Mr Soundararajan to the Tribunal. The Tribunal noted that the final bill initially sent to the Homeowner on 5th March was for a sum of £709.98 and gave him no credit for his £550.000 float and also included a charge for alleged legal expenses of £63.60. It was noted that after correspondence the Property Factor had deleted the charge of £63.60 and had issued a final bill to Mr Soundararajan on 5th June which included credit for his float.
20. The Tribunal considered the complaints made by the Homeowner in respect of sections 3.2 and section 3.5a of the Code. It appeared that the factor had complied with these sections. Section 3.2 of the Code requires a Property Factor to return any funds due to Homeowners at the point of settlement of the final bill. In this case there were no funds due to the Homeowner. He was liable to make a final payment in terms of the final bill. With regard to section 3.5a the Code requires homeowners floating funds to be kept in a separate account from the Factor's own funds. It was clear that there was an account specifically for the Bridge Block and that account was used by the Factor in respect of all payments. Accordingly, the Factor was compliant with the relevant parts of the Code.

21. The other parts of this application related to complaints that the Property Factor had not complied with sections 4.7 and 4.9 of the Code. Section 4.7 requires a Property Factor to be able to demonstrate they have taken reasonable steps to recover unpaid charges from other Homeowners, prior to charging remaining Homeowners. In this case, it was clear that the Property Factor had taken significant steps to recover the outstanding debts. They had lodged inhibitions against the particularly significant debtor. They indicated they had raised court actions against debtors. They had lodged notices of potential liability against non-paying owners. Accordingly, the Tribunal determined that the Property Factor had not breached section 4.7 of the Code in that they had taken reasonable steps to recover unpaid charges.
22. The Homeowner also complained that the Property Factor had breached section 4.9. Section 4.9 requires Property Factors when contacting debtors not to act in an intimidating manner nor to threaten them apart from a reasonable indication they may take legal action. There appeared to be no suggestion that the Property Factor in any way had acted in a manner which was intimidating or threatening to the Homeowner.
23. The application lodged by the Homeowner did not allege a breach of section 4.6 of the Code. In the application lodged by Mr Tomar under reference HOHP/PF17/0236, he did specifically indicate that he had not been kept informed of debt recovery problems. However his position was different from this Homeowner. Mr Tomar had only become a homeowner in June 2016. He had no knowledge whatsoever of the existence of any debts bad or otherwise. In this particular case, Mr Soundararajan had had access to all manner of reports provided by the Property Factor over a number of years. These reports included information regarding debts. While the Tribunal would not go so far as to say that the Property Factor had kept Homeowners specifically informed about a specific debt problem in their communication and the communication could have been made much clearer to owners in their explanation of the accounts,, the Tribunal were satisfied that the Property Factor had provided information to Homeowners regarding other debtors within the block and that this information was available to them via the accounts provided. As Mr Soundararajan had not raised any particular complaint about breach of section 4.6 the Tribunal were not

required to make any determination with regard to this particular section of the Code in respect of this particular application.

HOHP/PF/17/0159

24. In this application Mr Soundararajan alleged a breach of section 6.1 of the Code. Section 6.1 of the Code requires the Property Factor to have in place procedures to allow Homeowners to notify the Factor of matters requiring repair or maintenance and to keep Homeowners informed of the progress of any work.
25. In respect of this particular application Mr Soundararajan's position was that he had made complaints with regard to the state of repair of the internal lift. His position was that there had been a wooden board placed in the lift which had become affected by fungus. On considering matters and on taking evidence from the parties, it appeared that the Homeowner had raised this matter on 16th August and that the Property Factor had made arrangements for works to be done to remove the relevant boards on or around 31st August. Emails were produced from the Property Factor to their contractor asking for these works to be done. The Property Factor also disputed that there was any fungus on the board.
26. Having listened to the evidence on this from the parties and having considered the documents which were lodged, the Tribunal determined that there was no breach of section 6.1 of the Code in respect of this particular matter, procedures were in place to report repairs and email request had been actioned promptly. No further complaint had been received.

HOHP/17/PF/0160

27. In this application the Homeowner indicated his view that there had been a breach of section 2.1 of the Code. Section 2.1 of the Code indicates that the Property Factor must not issue information to Homeowners which is misleading or false.

28. Having listened to evidence from the parties, it was clear that the alleged false or misleading information was contained in a common buildings issues update which was sent by the Property Factor and in which information was given regarding a shortfall in the development owner's account. The information was in connection with work being done to the first floor paving slabs. The Property Factor in their report had indicated to the owners that they had planned to start some work in the area of the first floor canopy having secured an agreement with the developer for outstanding common charges payable on the empty commercial units. They then indicate that this work unfortunately did not progress. The update then goes on to say "which means that the development owner's account has a shortfall of over £90,000.00 for the commercial units alone, which is increasing each month by over £2,500.00." The Homeowner read that as meaning that outstanding debts for the commercial units were increasing each month by over £2,500.00. The Property Factor's position was that the debts were increasing by approximately £2,500.00 per month over the whole block not just the commercial units. Accordingly, it appeared that each had a different interpretation of that wording. The Tribunal having read the relevant communication and having considered matters took the view that although the meaning might be ambiguous it was not clearly misleading or clearly false and accordingly determined there was no breach of section 2.1 of the Code.

HOHP/PF/17/0202

29. In this application the Homeowner alleged a breach of section 3.1 of the Code of Conduct. Section 3.1 requires the Property Factor on the termination of their arrangement to make available to the Homeowner "all financial information that relates to their account". In connection with this matter, the Homeowner was asking the Factor to provide information not just in connection with their own account but information regarding all the accounts for the entire

building. The Homeowner wanted the Property Factor to hand over the full billing address of every owner within the development, the debt details of the development including any notice of potential liabilities and decrees awarded and a current balance list and payment history for all owners in the building.

30. The Homeowner indicated he wanted a full breakdown for all the charges and wanted to see all the legal costs and all the late payment fees which had been charged. The Property Factor indicated that there was a breakdown in the various financial statements provided to the Homeowners and produced various documents which included the Bridge Building Update No: 28 which explained to owners the reason for the additional invoice which they had and included a table of various unpaid debtors and creditors. Further information regarding the various debts was contained in the financial statements provided to the AGM each year.

31. Having listened to the parties, the Tribunal determined that there had been no breach of section 3.1. This section relates to a Property Factor making information available to a Homeowner in respect of the Homeowner's account. It is not a requirement that the Property Factor provides all sorts of information regarding every other owner in the building or block. The Property Factor had followed the relevant process in the title deeds. They had prepared and issued final accounts to each Homeowner. The Property Factor indicated that if any Homeowner had intended to raise action against defaulting owners they were entitled to ask for specific information in connection with a court action. Mr Soundararajan was not raising a court action against the non-paying owners and accordingly they would not provide that information to him. The Tribunal took the view that the Property Factor had complied with section 3.1 of the Code and had not breached same.

Decision

32. Having listened to the Homeowner and the Property Factor and having considered the papers which had been lodged, the Tribunal determined that the only breach of the Code which applied to Mr Soundararajan was a breach of section 2.5 of the Code. The tribunal determined that the Property Factor had failed to respond to his complaints and enquiries in the period from March

2017 onwards. It was noted by the Tribunal that the Property Factor had conceded this failure during the hearing. They had offered an apology to Mr Soundararajan. Indeed it was clear that during the lunch break on the day parties had had discussions with regard to a possible settlement of this part of the case. Agreement could not be reached. The Property Factor had explained that they had received similar complaints and correspondence from many other Homeowners and were simply overwhelmed by the correspondence which had been received. Their position was that the information being sought in these emails had previously been provided time and time again and accordingly, they did not think they continued to require to provide it. They had also thought that since they were no longer Factors for the property there was anyway no requirement for them to comply with the code, however they were aware now of a recent Tribunal decision which clarified that the code continued to apply. They therefore accepted this was a breach. .

33. Having determined that there was a breach of section 2.5 of the Code, the Tribunal required to determine whether they should make a Property Factor Enforcement Order in terms of the 2011 Act. The Tribunal took the view that such an order should be made. The terms of the proposed draft order are attached. The proposed Property Factor Enforcement Order will require a payment to be made to the Homeowner by the Property Factor in the sum of £300.00. This sum is designed to act as compensation in respect of the Property Factor's failure to comply with the code and their failure to deal with reasonable enquiries and emails from the Homeowner. The Tribunal regarded the breach of section 2.5 as a clear and serious breach of the Code of Conduct. The Code of Conduct is designed to ensure that property factors deal with homeowner's complaints in a responsible and prompt fashion. By simply ignoring the correspondence the Property Factor had failed not only to act in accordance with the letter of the Code but with the spirit of the Code.
34. Accordingly, the Tribunal decided that a Property Factor Enforcement Order should be made and a draft of that proposed order is attached to this decision. The parties are invited to make representations to the Tribunal in respect of the proposed order in terms of section 19(2) of the

Property Factors (Scotland) Act 2011 and the Tribunal require that such representations are remitted within fourteen days of the date of the intimation of this decision.

35. 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.

36. Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

James Bauld, Chairperson

..... Date

16 October 2017

..... Witness

Donna Jones Full name

..... Designation

Secretary