

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Decision in respect of the Homeowners Application made under the Property Factors (Scotland) Act 2011 Section 19

Chamber Reference: FTS/HPC/PF/18/0601

The Parties:-

Miss Jacqueline Doherty residing at Flat 7 Dalziel House, Dalziel Estate, Motherwell, ML1 2SJ ("the Homeowner")

And

Speirs Gumley Property Management Limited, 194 Bath Street, Glasgow, G2 4LA ("the Property Factors")

The Tribunal Members comprised:-

Mr James Bauld (chairman)

Mr Robert Buchan (ordinary member)

Introduction & Background

1. The Homeowner lodged an Application dated 30 March 2018 alleging that the Property Factor had failed to comply with the Code of Conduct for Property Factors ("the Code"). After sundry procedure a hearing was set to take place on 7 September 2018 and appropriate intimation of that hearing was sent to both the Homeowner and the Property Factor.
2. The hearing on 7 September 2018 proceeded and was adjourned. The Tribunal issued a Direction to the Homeowner. Reference is made to the Decision issued by the Tribunal following upon the hearing on 7 September.
3. The Direction required the Homeowner to produce and lodge a statement of the evidence she wished to put forward at the hearing addressing the alleged breaches of the Code of Conduct and specifically setting out examples of how the Code had been breached.

4. The Homeowner complied with the Direction by lodging a note purportedly setting out her position. A copy of that note was sent to the Property Factor and they responded by brief email dated 17 October lodging some additional productions. Prior to the original hearing on 7 September the Property Factor had lodged a substantial Inventory of Productions which were used at the hearings and are mentioned in the Decision issued by the Tribunal.

Hearing on 24 October

5. The Tribunal reconvened on 24 October 2018. The Homeowner was in attendance but was not represented nor did she have anyone to assist her at the hearing. The Property Factors were again represented by three members of their staff namely Tom McKie director of inspection, John Bryson credit control manager and Chloe Morrison property inspector. The Tribunal noted that the Homeowner in her note was claiming that the Property Factor had agreed and had approved a debt payment programme which had been entered into by the Homeowner under the Debt Arrangement Scheme. The Homeowner's position was that having accepted such a scheme the Property Factors were effectively barred from taking the actions which they had taken following upon a meeting on 31 August 2017.
6. Mr McKie indicated that the Property Factor's position was that the debt owed by the Homeowner had been apportioned among the other owners on 5 June 2017. He said letters had been sent to all Homeowners in Dalziel House. The various Homeowners had had their debt apportioned in accordance with their respective liabilities for common repairs. The amount allocated to the various Homeowners ranged from approximately £300 to approximately £1100. All had been billed for this amount. It was the property factor's position that as at 5 June 2016 they were no longer owed any money in respect of the outstanding factoring accounts of the Homeowner at that date.
7. Reference was made to a minute of the meeting which took place on 31 August 2017. The minute of that meeting had been lodged as a production. Mr McKie indicated that the Property Factor's position was that they had called the meeting of the various owners of the properties within Dalzell House to ascertain their view with regard to payment of the now apportioned debt. By that date they had received a letter from the Debt Arrangement Scheme administrator indicating that the Homeowner's application for a debt payment programme had been approved. In that debt payment programme the Homeowner had made proposals for repayment of total debts of £46,880.43 of which £11,650 was owed to Speirs Gumley. The letter from the Debt Arrangement Scheme indicated that the debt payment programme had been approved despite the opposition of two non-consenting creditors. It was agreed by the parties that the non-consenting creditors did not include Speirs Gumley. Mr McKee's position was that Speirs Gumley had no knowledge that the Homeowner had sought to enter into a debt payment programme prior to receiving the notification of 29 August 2017 confirming that

the debt payment programme had been approved. The Homeowner's position was that the Debt Arrangement Scheme had written to all creditors on 3 August 2017 setting out the proposal. Her position was that by not objecting the creditors were deemed to have consented. The Property Factors explained that they had received no notification by letter dated 3 August. They explained their mail opening system. They explained that incoming mail was opened by Mr Bryson and was then scanned into the relevant client files with the hardcopies passed to directors. They had checked their system and had no trace of any notification from the Debt Arrangement Scheme prior to the letter of 29 August 2017.

8. At the meeting on 31 August 2017 the Property Factor explained to the other Homeowners that they received notification of the approval of Ms Doherty's Debt Arrangement Scheme application. They advised that the proposal was that £149.99 per month would be received and they indicated in the meeting that they would be happy to receive these payments and make appropriate credits to each Homeowner's account if the various Homeowners at Dalziel House accepted responsibility and made payment of the apportioned debt. The Property Factor indicated in the meeting that if the Homeowners from Dalziel House did not agree to this proposal then Speirs Gumley would resign as Property Factors. At the meeting on 31 August it was clear that the Homeowners at Dalziel House were not willing to confirm that they would make payment of the apportioned debt and accordingly Speirs Gumley indicated that they would resign from their appointment. On 1 September 2017 the Property Factors wrote to every resident at Dalziel House intimating their withdrawal from management with effect from Thursday 28 September. They set out their reasons for withdrawal in the letter and indicated to the various owners to whom debt had been apportioned that they wished these amounts to be paid and if they were not they would take appropriate steps to recover them.
9. When listening to the evidence from the Property Factor it was accepted that the Property Factor had been aware that another creditor of Ms Doherty had attempted to Petition for her sequestration at Hamilton Sheriff Court in or around June 2017. Ms Doherty confirmed such a Petition had been lodged and that she had attended court and it had been the Sheriff who had suggested to her that she may wish to consider taking advice with regard to seeking to enter the debt payment programme. At that stage, the Property Factor had taken various steps to try to recover the sums owed by Ms Doherty without success. The Property Factors position was that they had apportioned her debt in late May 2017. Their position was that they did not accept that they were liable to agree to receive payment of the debt via the debt payment programme. Their position was that they offered the owners in the meeting on 31 August the opportunity to have those payments made via Speirs Gumley and transferred onto the owners to whom the debt had been apportioned. That proposal was not accepted.

10. It was accepted by the Property Factors that subsequent to the commencement of the debt payment programme they received one payment from the payment administrator of £128.48. This was returned to the payment administrator. They also confirmed that on 24 July 2018 they had been asked by one of the current residents at Dalziel House to provide information on the manner in which they had apportioned the debt and they responded to that owner setting out the various proportions which had been assessed against each proprietor at Dalziel House.
11. The Homeowner then addressed the Tribunal and indicated that she has made all payments towards her debt payment programme since it came into force paying approximately £650 per month for distribution to her creditors. She indicated that the property at Dalziel House was now factored by Blythswood Properties. It was agreed between the parties that after the termination of their appointment that Speirs Gumley had sent final accounts to all proprietors. With regard to Ms Doherty's final account it shows a credit due to be paid to her of £362. The property factors indicated they have offered to make payments of that sum to the scheme for transmission to the creditors. They have received no response. The Property Factors indicated that of the debts which had been apportioned all have been paid with the exemption of two co-owners. In respect of these debts the sums involved are £300 and £200 and the owners to whom the debt has been apportioned are disputing whether they are liable for the debt as they were not the owners of the properties at the time the debt was accrued but were only the owners at the time the debt was apportioned.
12. The Homeowner was then asked to address the Tribunal and to indicate to the Tribunal the manner in which the Property Factor had breached the Code of Conduct. It was her position that the Property Factor had provided information which was false and misleading. She was asked to provide specific information and examples on this claim. The Tribunal spent nearly two hours at the hearing on 24 October asking the Homeowner to provide specific examples. She was unable to do so. She made constant reference to documents contained within the productions which had been lodged by the property factors without being able to specify what information was contained in any of the documents which was "misleading or false". She claimed they had behaved in a bullying, aggressive and threatening and intimidating fashion to her. Her position was that the Property Factors were bound by the debt payment programme. They had not objected to it. She did not accept their position that the debt had been properly apportioned in May of 2017 and thus was no longer owed to the Property Factor at the date the debt payment programme was approved. During extensive questioning of the Homeowner by the Tribunal reference was made to the letter of 18 May 2017 which had been sent to the various co-owners at Dalziel House by Mr John Bryson of the Property Factor. Within that letter he made reference to the inability of the Property Factor to secure payment of the debt owed by the Homeowner owing to a problem with "third party ownership". It was suggested this meant that the home owned by the Homeowner was subject to third

party ownership. Mr Bryson explained that the reference there was to a car and that at a subsequent meeting on 27 June 2017 he indicated to owners at that meeting that the reference in the letter was incorrect and it is not a suggestion that there was a third party owner of the flat occupied by Ms Doherty. The Tribunal asked whether the Property Factors would accept that the error in this letter amounted to a breach of the Code of Conduct and in particular section 2.1. Section 2.1 of the Code requires Property Factors not to provide information which is "misleading or false". It was accepted by the Property Factor that the information in the letter of 18 May was incorrect but they did not accept that it was deliberately false nor was it deliberately misleading and it had been corrected at a meeting at the very earliest opportunity.

13. No other examples were produced by the Homeowner of any false or misleading information contained within any correspondence provided by the Property Factor. Later in the day, during evidence in respect of other allegations it transpired that there was an error in an email from Chloe Morrison to the Scottish Fire Service. The email had been sent by Ms Morrison on 28 June 2018 to two members of the Fire Service. In that email she indicated that at a home visit on 26 June 2017 she was able to open all windows within Ms Doherty's private residence. She accepted that during that visit she was not able to open all windows but only seven of the windows. Again it was accepted that email contained an error but that email was dated 28 June 2018 which was almost one year after they had visited Ms Doherty's flat.
14. During the course of the hearing the Tribunal took a break at approximately 12.15pm for about 15 minutes and then resumed at 12.30pm. The hearing continued to about 1.20pm where a further break was taken for lunch.
15. The Tribunal reconvened at 2pm and asked the Homeowner to consider the other alleged breaches of the Code of Conduct. The Homeowner indicated that in the main she was now concerned with breaches of section 2, section 4 and section 6 of the Code despite having reference in her Application to breaches also of section 3 and section 7. The Homeowner was asked to address the allegations of breaches of section 4.6 of the Code. Section 4.6 of the Code relates to a requirement of Property Factors to keep Homeowners informed of any debt recovery problems of other Homeowners which could have implications for them (subject to the limitations of Data Protection Legislation). It was the Homeowner's position that the Property Factor had breached this section. In particular she made reference to another production which had been lodged by the Property Factor which was a letter of 30 March 2017 addressed to all the owners at Dalziel House. In that letter, the Property Factors had written to all the owners within the development indicating that there was now a defaulting proprietor and setting out the steps they had undertaken to recover that debt. In the letter they named the Homeowner and set out the balance owed by her and listed a number of steps which they had taken to try to recover her debt. In the letter they indicated that the

apportioning of a defaulting proprietors debt was a last resort and warned proprietors that this may be taken in respect of Ms Doherty's debt. The letter concluded with an extract from the Deed of Conditions which gave the Property Factors power to apportion such debt. It was the Homeowner's position that the information contained in that letter was a breach of the Data Protection Act. The Homeowner was asked to address the Tribunal on the way in which this letter breached the Data Protection Act. The Homeowner was not able to refer properly to the relevant provisions of the Data Protection Act but had simply found certain information online. She referred to the eight principles of Data Protection which she had found online and indicated in her view that the Property Factor was not allowed to put in the details of the steps they had taken. On questioning by the Tribunal she accepted that the Property Factors were entitled to advise other owners of her name and her address and the amount owed but she simply refused to accept that they were entitled to set out in the letter the various steps which they had taken with regard to raising court actions, lodging notices of potential liability and taking other steps to attempt to recover the sums which she owed. She argued this was unfair and excessive. She agreed if any owner had written asking for these details that the Property Factor would have been entitled to provide it. The Homeowner was questioned by the Tribunal about whether the provision of this information actually fell within another part of the Code of Conduct namely section 4.7. That section requires a Property Factor to demonstrate they 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. It was suggested to Ms Doherty that the letter of 30 March 2017 was a step taken by the Property Factor to ensure they complied with section 4.7. A further letter had been sent to all Homeowners on 18 May 2017 indicating that they were now apportioning Ms Doherty's debts and indicating that an appropriate bill would be sent. Within the productions lodged by the Property Factor was an email from a case officer at the Information Commissioners Office. That email was addressed to Mr Bryson and indicated that there was an exemption from the provisions of the Data Protection Act where data was disclosed where data was required in terms of another enactment and the case officer at the Information Commissioners Office indicated that if disclosure of debtor and/or debt was required under the Property Factor Scotland Act 2011 then the exemption provided under section 35 of the Data Protection Act 1998 would mean that disclosure could be made without breaching the Act. The Homeowner seemed unwilling to accept that the Property Factors had accordingly sought confirmation from the that their actions in writing as they did in March and May were not a breach of the Data Protection Act. In light of the correspondence from the Information Commissioner Office, the Tribunal took the view that the correct assumption was that the property factor had complied with the relevant provisions of the data protection legislation. This tribunal is not a forum which has power to determine breaches of data protection law. The Homeowner was asked by the Tribunal whether she would be more appropriately advised to raise any complaint with regard to any alleged breach of data protection law with the Information Commissioners Office rather than this Tribunal. It was her position that the

letters were a breach of data protection but she was unable to provide any specific information showing any manner in which the property factor had breached that area of law .

16. The Tribunal then moved on to the Homeowners complaints regarding breach of section 6 of the Code. In her Application she had alleged breach of section 6.1. Section 6.1 requires Property Factors to have in place procedures to allow Homeowners to notify them of matters requiring repair, to inform Homeowners of the progress of works including timescales for completion. At this point the Homeowner again made reference to works which had been carried out prior to the introduction of the Property Factors Scotland Act 2011 and the introduction of the Code. It is clear that substantial works had been carried out to Dalziel House in 2010 and early 2011. Productions had been lodged by the Property Factor showing that approval had also been obtained from building insurance for significant internal works to be done to the Homeowner's own flat. These works to be done by A Hanlon Limited. The Homeowner complained that she had had outstanding works required to her property since before 2012. She complained that the kitchen, bathroom and bedroom of her property still required works to be done which emanated from the problems which had occurred in 2010. She complained that her windows had been painted shut when exterior painting works had been done at that time. She made reference to a meeting which took place at her property on 26 June 2017 where Mr McKie and Ms Morrison had attended to carry out an inspection. They had attended along with a Mr Macleod from Orr Fire Protection. The Homeowner at the meeting on 26 June said she had reported new works which were required to her property. She indicated she was suffering damp within her bedroom and her position was this had been caused by a problem with an external wall. The Property Factor's response was that the meeting in June had mainly been in connection with worries which had been raised by the Homeowner about the safety of the building in the event of a fire following upon the Grenfell Tower tragedy. She had been complaining that her windows had been painted closed in 2011. The Property Factors indicated that they had written to all Homeowners in January 2011 asking them to report snagging problems which had arisen from works carried out at that time which included painting of external windows. Their position was that the Homeowner had never raised any problems in this regard. Various photographs were produced by the Homeowner showing what she said were works still to be done within her property. The Homeowner could provide no information to the Tribunal to indicate when she had reported any repairs after October 2012 when the Code of Conduct was introduced. She was questioned with regard to the fire safety of the building. It was her position that the Scottish Fire Brigade had indicated to her that they had concerns with regard to the fire safety of the building. Reference was made to emails which had been produced by the Property Factor in June 2018 after a routine home fire safety visit. The email indicated that there were a number of windows within the Homeowner's property which were not freely operable and that they may cause a delay and increased risk to the public in an emergency situation. Beyond that there was no other matter raised which would be a significant fire risk. The email

from the Fire Service indicated that appropriate steps would be taken should any emergency situation arise. The Homeowner was asked whether there had been any significant problems with fires within Dalziel House during her occupation. She indicated that she had lived there for 14 years and during that time there had only been one incident where the Fire Brigade had required to attend. That had been an incident where she had failed to extinguish a coal fire within her own property which led to smoke spreading through the building. A neighbour had called the Fire Brigade who had broken down her front door. She was not injured but she was distressed. She also seemed to suggest that the Fire Brigade should not have broken down her door but should have rang the doorbell.

17. Again the Tribunal pressed the Homeowner to provide specific examples of any breach of the Code of Conduct in respect of section 6. It became clear that the Homeowner seemed to believe that the requirement of the Code of Conduct was that the Property Factors should carry out repairs reported to them and should be carrying out regular inspections to carry out repairs. Her position seemed to be that a property factor was a body to whom a repair would be reported and that the property factor would carry out the repair at the expense of the property factor whether relevant homeowners had put them in funds or not. It seemed to the tribunal that her view was that the factor should do repairs to any part of a building, whether owned in common or not. Her attitude seemed to be "that's why they are employed as factors". She seemed to be unable to differentiate between works which were the individual responsibility of an owner of an individual property and works which were common to an entire larger property and where responsibility was shared among common owners. The Property Factors position was that at the meeting in June 2017 no new repairs had been pointed out to them. They took that meeting as referring to the previous defects which had been in existence since 2010. The Homeowner then made reference to various repairs which had now been carried out by the new Property Factor in respect of the external turret and a passage way within the property. She seemed to think that the repairs to the passage way should have been noticed by Speirs Gumley at the meeting in June 2017 and that steps should have been taken by them to carry out these repairs. The Homeowner also seemed to think that the Property Factors were liable to carry out internal repairs to her property and not just common repairs.
18. The Homeowner could provide no indication at all of any breach of section 6 of the Code. Again the tribunal spent considerable time asking her to consider the terms of the Code and asking her to provide examples of it being breached. She was unable to do so.
19. The Homeowner then indicated that since Speirs Gumley had decided to apportion her debt that she had received numerous verbal attacks from other owners and that she had required to call the police on four occasions. She seemed to wish to blame these incidents on Speirs Gumley's decision to demit office as Factor. During the course of the Tribunal it was

explained to the Homeowner that there is significant legal authority including a House of Lords case indicating that the persons who are responsible for behaviour such as threats are those perpetrating it. In any event, she could not link these incidents to any breach of the Code itself.

20. At the conclusion of the hearing the Tribunal asked the Homeowner to indicate what orders should be made if the Tribunal were considering making a Property Factor Enforcement Order. The Homeowner indicated that she wished an Order to be made requiring the Property Factor to repay the apportioned debt to all the other owners and to thereafter accept payment of that debt via her debt payment programme. She also indicated that compensation should be paid to her for the manner in which the Property Factor had behaved. She alleged at various times during the hearing that they had behaved in a bullying, aggressive and threatening and intimidating fashion to her.
21. The Property Factors were then asked whether or not an Order should be made. It was their position that no Order should be made. It was their position that there had been no breaches of the Code. They had adhered to the Code of Conduct. They were obliged to follow the Code of Conduct and advise other owners of the outstanding debt. They were obliged to look after their own interests and not to act in a matter where the debt was out of control. They stated that the Homeowner did not like the decisions which they had taken and they understood that the decision to apportion her debt was not one which would meet her approval. They also understood that she would be frustrated other owners would be upset that they had become liable for her debt but they were not responsible for that. Their position was that no Property Factor Enforcement Order should be made.
22. As a final matter for discussion the outstanding amount of £362 was discussed. The Property Factor indicated they are happy to make payment of that to whoever is appropriate. They are happy to return it to the debt payment programme administrator for onward transmission to the various other owners.

Decision

1. This is a case in which the Tribunal heard evidence from parties during two different hearings over a period of almost eight hours. The Tribunal sat for over two hours on the first day and nearly six hours on the second day. It is impossible to narrate in this decision the entirety of the "evidence" led during those hearings. The homeowner continually claimed there had been breaches of the Code. She was clearly unhappy that the property factor had taken a decision to apportion her debt. During the entirety of that evidence the Tribunal gave the Homeowner every opportunity to produce specific examples and evidence of breaches of the Code of Conduct. The Tribunal attempted to explain the Code of Conduct to the Homeowner and explain the limitations of the Code of Conduct. The Tribunal carefully explained to the

Homeowner that they could take no steps against a Property Factor for any acting which predated 1 October 2012.

2. During the entirety of the hearing, the Homeowner indicated her extreme displeasure at the manner in which the Property Factor had acted. She was very unhappy that they had apportioned her debt and made other owners in her development liable for it. However she was unable to demonstrate that the Property Factor had acted in any way outwith their powers in that manner.
3. Her assertions that there had been breaches of the Code were made without any supporting evidence. She continually indicated during the hearing that she believed that Speirs Gumley had been unprofessional, that they had been aggressive, that they had bullied her and that they had intimidated her. She was unable to provide a single incident where any of this had occurred. Indeed there were several examples of emails from the homeowner to the property factor which were intemperate and angry and could have much more easily been construed as examples of aggression
4. With regard to the alleged breaches of the Code of Conduct, during eight hours of evidence, it became apparent that there were two pieces of correspondence which contained information which was incorrect. The Code of Conduct indicates that Property Factors must not provide information which is "misleading or false". It is clear that in the two pieces of correspondence there was information which was incorrect. If something is incorrect then it is arguably "false".
5. The Tribunal however require to determine whether or not the Code of Conduct is breached when incorrect information is provided inadvertently by a Property Factor. The question which the Tribunal requires to determine is whether the requirement of the Code not to provide information which is "misleading or false" requires some element of culpability or deliberate conduct by the Property Factor. The Tribunal takes the view that the requirement not to provide information which is misleading or false does require to be done in a manner which has a degree of culpability or deliberateness. Accordingly the Tribunal does not find that the two minor errors in one letter and one email contained within over 100 documents lodged by the Property Factor indicate that they have breached the Code by providing information which is "misleading or false".
6. The Tribunal further indicates that if they are wrong in the belief that the requirement to be "misleading or false" requires some element of culpability, then the Tribunal in this case would take the view that if the incorrect information is a breach of the Code that it is so insignificant it should lead to no Order being made in respect of the relevant section of the Act.

7. With regard to the other alleged breaches of the Code, the Tribunal have no hesitation in finding that no evidence was produced by the Homeowner to show that the Property Factor had breached any relevant section of the Code. With regard to the alleged breach of section 4.6 the Tribunal does not find the Property Factor failed in respect of their duties. Indeed the Tribunal takes the view that the Property Factor acted in full accordance with the Code and in particular sections 4.6 and 4.7 in advising other owners within the development of the difficulties with the significant debts which had been accrued by this Homeowner. The Tribunal notes that an email from the Information Commissioners Office indicated to the Property Factor that they were entitled to disclose information in terms of the Data Protection Act. The Tribunal indicate that should the Homeowner believe that there has been a failure to follow the Data Protection Legislation then any complaint she has should be addressed to the Information Commissioners Office.
8. The Tribunal finds no evidence at all that the Property Factor has failed in respect of any part of section 6 of the Code.
9. During the hearings the Tribunal were not addressed at any length by the Homeowner with regard to alleged breaches of sections 3 and 7. However the Tribunal have no hesitation in finding that having perused all the papers lodged by the Homeowner and having listened to the evidence led by the Homeowner on the two days of the hearings that there was nothing within the papers nor the evidence led from the Homeowner which would suggest any breach of any part of those sections of the Code.
10. Accordingly the Tribunal find that there is no breach of the Code of Conduct by the Property Factor and accordingly dismisses this Application. The tribunal indicates that this Application by the Homeowner was entirely misconceived. The application seemed to be raised by the Homeowner based on her entirely incorrect misapprehension of the requirements of the Code and the duties of Property Factors.

Right of Appeal

1. 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. The party must seek permission to appeal within 30 days of the date the decision was sent to them.

J Bauld

James Bauld, Chairperson

16 November 2018

Date