

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: FTS/HPC/PF/17/0236

Property: Subjects at Flat 8/1, Block A, 350 Argyle Street, Glasgow, G2 8ND

The Parties:-

Mr Vikas Tomar, residing at 148 Westgate Apartments, 14 Western Gateway, London, E16 1BN ("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. By application dated 19th June 2017 the Homeowner applied to the First-tier Tribunal for a determination that the Property Factor had failed to comply with various sections of the Code. In particular the Homeowner alleged that the Property Factor had breached sections 2.5, 4.6 and 4.7 of the Code.
2. The application was considered by the president of the Tribunal chamber and was accordingly referred to the Tribunal for determination
3. By letters dated 3rd August 2017, both the Homeowner and the Property Factor were advised that the Tribunal would convene on 18th September 2017 to consider the matter and a hearing was set to take place on that date in Wellington House in Glasgow.

Hearing

4. The hearing took place before the Tribunal on 18th September 2017 at Wellington House. 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 hearing in respect of this matter also proceeded along with hearings in respect of four other cases arising from complaints being made by another homeowner in respect of property within the same building. A separate decision will be issued in respect of those matters which were dealt with under Case Reference Nos: FTS/HPC/BF/17/0158, FTS/HPC/BF/17/0159, FTS/HPC/BF/17/0160 and FTS/HPC/BF/17/0202. The homeowner in respect of each of those applications is a Mr Vinodh Singh Soundararajan. Those cases relate to the flat at Flat 3/3 in Block A at 350 Argyle Street, Glasgow.

6. It was clear at the hearing that Mr Tomar had been assisted in making his application by Mr Soundararajan. Both the Homeowners were happy that the Tribunal considered their complaints effectively together. There were several similarities in the complaints which they had made. There was no objection by the Property Factor to the Tribunal proceeding in this manner.
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 reminded that meant 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. Both parties acknowledged this information from the Tribunal
8. The Tribunal then began to question the parties. They established that Mr Allan was a Director of the Property Factor's but that administration of the accounts was done via the offices of TLT Solicitors. There was a "Bridge Building Association" which had been set up to assist in the management of the particular block. MXM had been appointed as factors by the developers, Mellon (Argyle) Limited in 2008. The building itself had been built in 2002
9. During the course of the morning, the Tribunal concentrated mainly on the application made by Mr Tomar. The Tribunal were advised that the factoring bills for this particular block were levied on a monthly basis. The monthly charge was set after a budgeting exercise was carried out each year. The current figure appears to be £119.00 per month.
10. The Tribunal were advised that a financial report was provided to an Annual General Meeting of the owners in the block and that the last AGM had taken place in June 2016. MXM were now no longer the factors, having been removed from office in February 2017.
11. The complaints which had been raised in respect of this matter arose from the removal of MXM as the Property Factor. When MXM were removed as the Property Factor they issued final bills to

all the owners in the block. At that stage there were approximately £144,000.00 of debts which MXM had not been able to recover from other owners. On being removed from office, MXM took the decision that these debts required to be spread amongst the various homeowners and commercial owners within the development and accordingly each owner was sent a bill for approximately £995.00 as part of their final account.

12. Mr Tomar's complaint was that he had no knowledge whatsoever of the existence of any bad debts, or that there was any likelihood that he would ever be liable to make a payment of such sum. He indicated that he had only bought the flat in June 2016 and that was after the last AGM. Mr Tomar produced to the Tribunal copies of correspondence which he had obtained at the time of his purchase. One document was a letter from the Property Factors to Raeside & Chisholm who were solicitors acting for the seller. In the letter, the Property Factor indicates that the retention required by the seller for the property would be £92.74. They also inform the seller that the new purchaser will require to pay a building deposit float of £550.00 and that they should also be liable for the estimated portion of the common charges for June 2016 of £56.60. At no point in that letter is there any mention of any significant outstanding debt owed in respect of other owners. The Homeowner also produced various emails which had been sent to him by his solicitor at the time of purchase together with emails which he had sent in or around February and March 2017 when he had then become aware of the bill for the unrecovered debts. He had initially made arrangements to pay the amount requested to MXM at a monthly rate, but after making some payments had found that he was unable to maintain the payments and had been offering a lower payment. He indicated that he had now stopped making the payments towards this account and had advised the Property Factor of that. Mr Tomar indicated that he had been in correspondence with the Factor and had sent them various emails asking for further information on how the debt had been chased before he continued the payments to which he had received no response. In particular he produced copies of emails which he had sent to the Factor on 28th March 2017, 30th March 2017, 24th April 2017, 8th May 2017, 29th May 2017 and 12th June 2017. It was accepted by the Property Factor that Mr Tomar 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 April onwards was a breach of this section of the Code. They offered an apology to Mr Tomar 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 several times on a collective basis to owners and accordingly they did not think they continued to require to provide it.

13. The Tribunal then asked parties to consider whether there had been a breach of section 4.6 and 4.7 of the Code. Section 4.6 requires Property Factors to "keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to limitations of data protection legislation)". Mr Tomar's position was that he had absolutely no knowledge of the existence of the extensive debts of other owners in this development. He had never been informed, far less had he been kept informed. The Property Factor's position was that the information was there and was available on the website which was available to all homeowners. Both Mr Tomar and Mr Soundararajan indicated the website was regularly broken and occasionally they could not access it to obtain documents. There was no evidence provided to the Tribunal that Mr Tomar had ever seen the accounts presented to the AGM of 2016, nor was there any evidence that he had ever been told of any outstanding significant debts. The letter which had been sent to the seller's solicitors and ultimately transmitted to Mr Tomar when he purchased his property indicated that there was an outstanding debt owed by the previous owner of his particular flat of £92.74 and that no warning was given in that letter of any potential difficulty with ongoing debt recovery problems.

14. The Tribunal then asked parties to consider whether section 4.7 of the Code had been breached. Section 4.7 requires Property Factors to demonstrate that they have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of those costs prior to charging remaining homeowners with those costs if they are jointly liable. Ms Harrington and Mr Allan both provided significant evidence to the Tribunal that the Factors had made extensive

attempts to recover these debts. They had obtained Decree against some of the owners. They explained that in particular a significant proportion of the outstanding debt related to one particular owner who was now living in Ireland. They even provided evidence to the Tribunal that they had been willing to instruct a recovery action in Ireland but had been prevented from doing so by a government body in Ireland, namely the National Asset Management Association which was set up after the financial crisis by the Irish Government to deal with debt recovery. Effectively this is a government body in Ireland which is pursuing people for debts and which can prevent other persons from pursuing the same people.

15. The hearing adjourned at approximately 12.25pm and reconvened at 1.30pm. On reconvening, the Tribunal was advised that parties had spent some of the adjournment trying to resolve matters but had been unable to agree a resolution. The Property Factor reiterated their apology to Mr Tomar in respect of the breach of section 2.5 and indicated they had tried to make an offer of some compensation in respect of that matter. The Property Factor's position had been that there was no breach of section 4.6 or 4.7 of the Code. The Homeowner's position was that section 4.6 had been breached.
16. Mr Tomar then left the hearing which then proceeded to consider matters relating to the applications lodged by Mr Soundararajan. As has been indicated, decisions in respect of those matters will be issued separately.

Decision

17. With respect to the complaint lodged by Mr Tomar, the Tribunal noted that the Property Factor agreed there had been a breach of section 2.5 of the Code. The Tribunal also agrees that the Property Factor's failure to respond to the various emails in March, April and May was a breach of section 2.5 of the Code.
18. With regard to section 4.6 of the Code, the Tribunal determined that the Property Factor had not kept Mr Tomar informed with regard to these debt recovery problems. Indeed the Tribunal took

the view that Mr Tomar had never been told of these problems. Accordingly, the Tribunal took the view that the Property Factor was in breach of section 4.6 of the Code in respect of the complaint lodged by Mr Tomar.

19. With regard to the allegation of the breach of section 4.7, the Tribunal accepted the evidence provided by the Property Factor and their legal representative that significant efforts had been made to recover these unpaid charges and that appropriate court action and legal steps to recover these debts had been attempted by the Property Factor. The Tribunal determined that section 4.7 of the Code had not been breached.

20. Having determined that there was a breach of section 2.5 and 4.6 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 a Property Factor Enforcement Order should be made and the terms of the proposed draft order are attached. The Tribunal regarded the breach of section 2.5 as a clear breach of the Code. The Tribunal also took the view that the breach of section 4.6 was also a clear breach of the Code and that information could have been provided to Mr Tomar when he purchased. The Tribunal noted that the Property Factor's position was that they would never have made any decision to spread this debt had they had not been removed as the Property Factor. However, the Tribunal did not regard that as an excuse for the failure to keep homeowners informed of these debt recovery problems. It was clear that this development had significant debt problems and the new homeowner should have been advised of these debt problems in terms of the Code. The proposed Property Factor Enforcement Order will require a payment of £400.00 to the Homeowner. This sum is designed to act as compensation in respect of both breaches determined by the Tribunal.

21. Accordingly, the Tribunal took the view 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.

22. 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.

23. 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.

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James Bauld, Chairperson

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Date

16 October 2017

Witness

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NONNA JONES
Full name

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SECRETARY
Designation