

# Housing and Property Chamber

## First-tier Tribunal for Scotland



**First-tier tribunal for Scotland (Housing and Property Chamber)**

**Decision re. Section 44 of the Tribunals (Scotland) Act 2014:**

**Chamber Ref: FTS/HPC/PF/17/0023**

**1 Millcroft Road, Cumbernauld, Glasgow, G67 2QE  
("The Property")**

### **The Parties:-**

**IAN McNAUGHT, 1 Millcroft Road, Cumbernauld, Glasgow, G67 2QE  
("the Applicant")**

**APEX PROPERTY FACTOR LIMITED, 46 Eastside, Kirkintilloch, East Dumbartonshire, G66 1QH ("the Respondents")**

**Tribunal Members: Graham Harding ("Legal Member")  
Carolyn Hirst ("Ordinary Member")**

### **DECISION**

The Tribunal considered matters and following upon representations received from the Respondents and the Applicant and the submissions made at the Review Hearing on 7 November 2017, upheld its original decision dated 5 July 2017.

### **BACKGROUND**

On 5 July 2017 the Tribunal determined to propose to make a Property Factor Enforcement Order and this was sent to the parties on 7 July 2017. As a consequence of representations made by the Respondents the Tribunal considered matters and on 22 August 2017 decided to review its decision and that a hearing was necessary. Notice of Review was sent to the parties on 24 August 2017 and the hearing took place at Wellington House, Glasgow, on 7 November 2017. The hearing was attended by Mr Neil Cowan on behalf of the Respondents and by the Applicant and his representative, Mr Jim Melvin, of Coatbridge Citizens Advice Bureau.

As the Respondents original representations had not been received by the Tribunal prior to the original hearing, Mr Cowan was invited to put forward the Respondent's submissions first.

## **RESPONDENT'S SUBMISSIONS**

1. The central point was the status of the Respondent's as Property Factors. Mr Cowan explained that when the Respondents were approached by some homeowners there was no Factor in place. The titles were unusual in that it had been intended that a Factor be appointed who would then set up a Residents Association. When the Respondents were approached by some non-resident Landlords there was no Residents Association in existence so the terms of the Deed of Conditions relating to the appointment of a Factor could not be implemented.
2. The Respondents formed the view that given the large number of homeowners it would have been impractical to have held a meeting of all owners. The Respondents therefore wrote to all owners with mandates to complete and return. The Respondents were of the view that the correct way to deal with matters was to look at each block in the street and as according to the title deeds a quorum of 7 from the Residents Association would have been sufficient to call a meeting to appoint a Factor to divide the street into separate blocks. Thus the Applicant's block consisted of number 1-15 and 17a Millcroft Road and the Respondents concluded that if they received two signed Mandates from the owners in that block then that would be sufficient to give the Respondents authority to act as Property Factors for that block. The Respondents were of the view that this practice was a method used by Local Authorities. Mr Cowan said that the Respondents received Mandates from the owners at number 3 Millcroft Road dated 13 August 2015 and from the owner of number 11 dated 12 August 2015. The Respondents decided that as far as the Applicant's block were concerned they were then legitimately appointed as Factor and issued invoices to the owners from 2 September 2015.
3. Notwithstanding that the Respondents considered themselves to have been appointed as Factor, they continued to send out letters to the homeowners with Mandates seeking to be appointed as Factors. Mr Cowan explained that this was because the Respondents intended applying to the Local Authority for Grant funding to assist in the upgrading of the properties.
4. The Respondents did not think that the communications sent to the homeowners or to Coatbridge Citizens Advice Bureau were deliberately misleading.
5. Mr Cowan said that in general the charges levied by the Respondents were split between all the homeowners. He was of the view that if the Respondents were carrying out the work and some owners were paying for it, it was reasonable that all the owners should pay their share. The Respondents would not undertake any major works without the consent of the majority of owners. Even if some owners had not returned signed Mandates if they paid their share of the costs, that would be sufficient to assume that they accepted that the Respondents were the Property Factors. Mr Cowan had no

information to hand to confirm how many homeowners in the Applicant's block were making payments.

6. Mr Cowan submitted that he did not consider that the Respondents had acted in any way that could be described as abusive or intimidating and in breach of Section 2.2 of the Code of Conduct for Property Factors ("the Code"). The Respondents had threatened to raise Court proceedings against the Applicant but were entitled to do so as the Applicant had not paid the factoring charges.
7. With regards to there being a breach of Section 2.5 of the Code, Mr Cowan accepted that with the benefit of hindsight the Respondents could have responded to the Applicants and the Citizens Advice Bureaus complaints more promptly and fully.
8. Mr Cowan did not accept that the Respondents had been premature in raising Court proceedings. The Respondents were of the view that it appeared that the Applicant was ignoring requests for payment and they were confident that they were properly appointed as Factors. The Respondents believed that the only reason the Tribunal had found against them at the original Hearing was that the Respondents written representations had gone astray. The Respondents had subsequently looked at matters again and notwithstanding the pending Review Hearing had taken the decision to raise proceedings against the Applicant. The Respondents were therefore not in breach of Section 4.8 of the Code.
9. It was the Respondents' position that they had not breached Section 4.9 of the Code. The Respondents considered they were the Property Factors and were entitled to payment. The correspondence was not intimidating nor had they made any misrepresentations with regard to their authority.

### **THE APPLICANT'S SUBMISSIONS**

10. The Applicant relied on the previous submissions he had made to the Tribunal at the original Hearing. He had contacted the Respondents following receipt of their original correspondence and had challenged the basis of their appointment. The Respondents' response was to keep on sending him mandates asking to be appointed as Property Factors.
11. The Applicant said that he had not up until the date of the Review Hearing been advised by the Respondents that they had seen their appointment as being ratified if 2 owners in the block of 10 flats had signed mandates. He had received no correspondence to that effect from the Respondents.
12. The Applicant was of the view that the Respondents' frequent threats to take him to Court and ultimately taking him to Court had caused him considerable worry and the frequency of the letters from the Respondents amounted to abusive behaviour.
13. The Applicant thought that by continuing to threaten Court Action despite the decision of the Tribunal and then taking him to Court that this was quite

intimidating. He had found it stressful and harassing. The Applicant submitted that there was no legal basis for the Respondent raising proceedings against him and that the whole Court process was frightening. The procedure had been continued by the Court to await the outcome of the Review Hearing.

14. The Applicant's representative, Mr Melvin, said that the Respondents had recklessly and knowingly misrepresented the position to the Applicant and had cynically misinterpreted the title deeds in their own interests.
15. Mr Melvin advised the Tribunal that the Local Authority intended to go ahead with a Compulsory Purchase Scheme.
16. The Applicant disputed that any cleaning and landscaping work was being done at his block. He produced photographs to show that the block was not being cleaned and that there were weeds growing in the areas around the block.
17. The Applicant advised the Tribunal that the Respondents were still bombarding him with correspondence. They had taken him to Court and had accused him of defamation. As a result whilst he had previously not wished to claim compensation he now wished to do so. The amount that the Applicants were seeking as at the date of the Review Hearing was £1,345.94 with a further invoice due to be issued the following week.

#### **RESPONDENTS FURTHER SUBMISSIONS**

18. Mr Cowan denied that the Respondents had been acting in their own interests. They had been trying to improve the development and had hoped to obtain Grant funding for that purpose.
19. Mr Cowan had been aware of the potential Compulsory Purchase Scheme affecting the property in Millcroft Road but did not know if it was going ahead or not.
20. Mr Cowan said that the Respondents tended to split maintenance into two areas, namely the core service such as cleaning and landscaping which was carried out fortnightly and identifying major issues and obtaining quotes with the major projects being put to the owners for approval. The main barrier to undertaking major repairs was obtaining payment from the homeowners.
21. Mr Cowan was not sure if any work had been done on the block that included the Applicant's flat but believed that routine maintenance was carried out, including changing light bulbs.

#### **DELIBERATIONS & REASONS**

22. Mr Cowan accepted in response to questions from the Tribunal that the majority of owners in the properties forming 1-103 Millcroft Road had not signed Mandates. He felt that Respondents were however justified in adopting the procedures they had given the number of owners who were living outwith

the area. Mr Cowan was of the view that the Deed of Conditions requirements for holding a meeting of the Residents Association and appointing a Factor in this way was impractical. He maintained that as there was no Residents Association the title deeds had to be interpreted in another way.

23. The Tribunal was of the view that the Respondent's method of having themselves appointed as Property Factors was hopelessly flawed. The title deeds made it clear at Clause 8 (1) of the Deed of Conditions burdening the property that the Residents Association had the power to renew or terminate a Factor's appointment. All the owners of the properties forming 1-103 Millcroft Road were entitled to be members of the Residents Association. Just because the Association had fallen into abeyance there was nothing to stop it being reconstituted by taking steps to convene a meeting in terms of Clause 9 (2) of the Deed of Conditions with a quorum being not less than 7 proprietors. In the Tribunals view there was absolutely no reason why such a meeting could not have been called by the Respondents on behalf of a minimum of 7 owners. By failing to do so, the Respondents could not be ratified as Factors and therefore had no authority to act as such.
24. The method applied by the Respondents of treating each block in the street separately and holding that if two out of ten owners wish to sign a mandate appointing them as Factors had no basis in law nor did it in any way reflect the terms of the Deed of Conditions. The Tribunal therefore concluded that that Respondents were entirely wrong to adopt this course of action.
25. The method being used by the Respondents at 24 *supra* to have themselves appointed as Factors was never intimated to the Applicant prior to the Review Hearing and as the Tribunal Hearing found in its original decision the explanation provided previously by the Respondents to the Coatbridge Citizens advice Bureau misinterpreted the terms of the Deed of Conditions.
26. For the reasons given in the Tribunal's Decision dated 5 July 2017 and notwithstanding the submissions made by the Respondents at the Review Hearing, the Tribunal was satisfied that the Respondents were in breach of Sections 2.2, 2.5, 4.8 and 5.9 of the Code as well as Section 7.1 and 7.2 of the Code although these did not form part of the Application.
27. Since the Tribunal's Decision was issued, the Respondents have continued to issue invoices to the Applicant and have raised Court proceedings for payment against him. This has caused the Applicant considerable worry, distress and inconvenience. Accordingly the Tribunal propose to vary the proposed PFEO issued on 5 July 2017 to take account of the increased sums being claimed by the Respondents and to compensate the Applicant for the worry, distress and inconvenience he has suffered. The terms of the proposed PFEO are set out in the attached Section 19 (2) Notice.

## APPEALS

A homeowner or Property Factor 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 Teir Tribunal. That party must seeks permission to appeal within 30 days of the date the decision was sent to them.

Graham Harding

Signed ....

Graham Harding, Legal Member

Date ..... 22 November 2017 .....