

Housing and Property Chamber

First-tier Tribunal for Scotland



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

**Decision on homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: FTS/HPC/PF/18/0181

Flat 3/3 Oldmill Court, Clydebank, G81 6BE ("The Property.")

**Mrs Tanya Williams, Daleview, Roman Road, Clydebank, G81 6BT
("the Homeowner")**

**Hacking and Paterson Management Services, 1 Newton Terrace, Charing Cross,
Glasgow, G3 7PL
("the Property Factor")**

Members of the tribunal:

Martin J. McAllister, legal member and Elizabeth Dickson, ordinary member.

Background

This is an application by the Homeowner under Section 17 of the Property Factors (Scotland) Act 2011. The application is dated 22nd January 2018. The application alleges that the property factor had breached Sections 1, 2.1, 2.4, 3.1, 3.5 and 7.1 of the Code, and had failed to carry out its duties

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code" and the housing development at Oldmill Court, Clydebank is referred to as "the Development."

The Hearing

The Hearing was held in Glasgow Tribunals Centre, 20 York Street, Glasgow on 17th April 2018. The Homeowner was present. The Property Factor was represented by Colin Devon and Alistair Leitch, two of their directors.

Preliminary Matters

The tribunal noted that the Homeowner had received a communication from the tribunal office indicating that productions which she had lodged had not been submitted timeously. The members of the tribunal apologised for the error in the communication to her and assured her that the productions had been lodged in time. The Property Factor had indicated in correspondence that it considered that breach of section 3.1 of the Code should not be considered by the tribunal because it had not been included in the Homeowner's application. Mr Leitch indicated that the Property Factor would not be insisting on this point.

Parties had made written representations. Those of the Homeowner accompanied the application and those of the Property Factor were dated 20th March 2018. Both parties had lodged Productions.

Matters not in dispute

It is useful to set out matters on which parties are agreed.

Parties gave a useful background on the Development. It is a development consisting of twenty nine residential units some of which are occupied by owners and some of which are tenanted. The Homeowner described it as "a small community." The Homeowner had owned Flat 3/3 Oldmill Court since May 2017 and the Property has a tenant in it.

The Property Factor managed the Development on behalf of the owners. The Homeowner said that her tenant had handed her a letter which had been put through the door and that it was from Walker Sandford, a company of property factors giving notice of a meeting. The meeting was in connection with terminating the property factoring contract with Hacking and Paterson and appointing another property factor. A meeting was held on 1st August 2017 and fifteen homeowners were represented at the meeting.

The meeting took a decision to terminate the factoring arrangement with Hacking and Paterson.

The Property Factor did not accept the decision as binding on it and sought more information from the owners of the Development. The Homeowner was not involved in arrangements for the meeting which was arranged by Mr Stephen Mallarkey, one of the owners.

A second meeting of owners of properties in the Development was held on 30th October 2017. The decision of the meeting was that the factoring arrangement with Hacking and Paterson be terminated. This was intimated to the property factor and it ceased factoring the Development.

The title of the Development states in a Deed of Conditions by Turnberry Homes of 1994 that:

"....the Proprietors shall be obliged to join a Resident's Association to be formed for said purposes.....the proprietor shall be obliged to procure that Notice of all Meetings of such Residents' Association or other body shall be given to the Superiors, at least

14 days prior to any meetings taking place.....any two or more Proprietors shall be entitled to call a meeting of the Residents' Association, on at least 14 days' prior notice to other Proprietors, and at which meeting one vote shall count for each House; a quarter of all the Proprietors shall be a quorum; a simple majority voting at such meeting shall decide any issue..... the Residents' Association shall have the power to appoint professional property managers...."

Evidence

The Meeting on 1st August 2017

Mrs Williams said that people in the Development communicated with each other and that it was a relatively small development which was like a small community. She said that her tenant passed her documentation which had been delivered to the flat and which was from Hacking and Paterson. She said that she had previously not known anything about the identity of the property factor or any factoring arrangements but on questioning she conceded that the information may have been included with what had been sent to her by her solicitor when she purchased the Property. She said that she telephoned the Property Factor and paid the factoring account and float by means of the portal on the Property Factor's website. Mrs Williams said that there was contact from the Property Factor about replacement of a carpet but that not enough owners responded to make the work possible. Mrs Williams said that it was at that point that she had her first contact with Alistair Buchanan, the property manager employed by the Property Factor to look after the Development. Mrs Williams said that she raised concerns with him about the possible danger to her tenant from the condition of the carpet and she said that she was disappointed by his response.

Mrs Williams said that her tenant told her that some of the owners in the Development wanted to terminate the factoring contract with the Property Factor and she understood from her tenant that a meeting of owners would be called. The tenant gave the Homeowner a letter from Walker Sandford which had been delivered to the Property. Mrs Williams said that Walker Sandford is a firm of property factors and that it was her understanding that owners had taken advice from them about terminating the existing arrangement with Hacking and Paterson and engaging them as new property factors. The letter invited owners to attend a meeting on 1st August 2017 or be represented. Mrs Williams attended and she said that there was a great turnout. She said that fifteen owners were present or were represented and she said that this was a majority of all owners. Mrs Williams said that if her tenant had not handed her the letter she would not have known about the meeting. Mrs Williams said that she knew that a number of owners did not reside in the Development and she said that one can find out ownership by checking the register of landlords and other means. She said that she was not involved in arrangements for the meeting and that it was Stephen Mallarkey, an owner, who had been and that this was in conjunction with Walker Sandford who she assumed gave professional advice on the matter. Mrs Williams said that, as far as she was concerned, the notice calling the meeting was effective as was evidenced by the number of people attending or being represented. Mrs Williams said that there was a very open discussion at the meeting about the issues and that a vote was taken to terminate the factoring services of Hacking and Paterson. She said that Walker

Sandford undertook to deliver an appropriate letter to the property factor indicating what the outcome of the meeting was.

Mrs Williams said that she then received a letter from the Property Factor dated 10th August 2017 which stated that it had not been provided with necessary evidence that the meeting complied with the terms of the title deeds. Mrs Williams said that she understood that all owners in the Development received a similar letter. Mrs Williams said that she spoke to Mr Mallarkey who said that Hacking and Paterson were "playing hardball" and that he was dealing with the matter.

Mrs Williams said that the letter which had been handed to her by her tenant had been properly addressed to her as the owner and she said that she assumed that due diligence had been done so that the proprietors were identified and that the letters were issued in the correct names. Mrs Williams said that it would be challenging the integrity of tenants to suggest that they would not pass on letters to their landlords.

Mrs Williams said that Mr Mallarkey was often away because of work commitments and that she then became more involved at this point because of this.

Mr Devon said that, on receiving the letter which followed upon the meeting of 1st August 2017, the Property Factor had a duty of due diligence to ensure that any termination of its factoring contract was compliant with the requirements of the title deeds. He said that the property factor received intimation of the termination from Walker Sandford on 4th August 2017.

He said that, at that stage, no evidence had been produced on whether or not the termination was compliant with the terms of the titles. He said that he considered that the Property Factor was entitled to have sight of such evidence such as signatures of owners who had attended or alternatively had been represented. He said that, on 10th August, the Property Factor wrote to owners indicating that it had received no evidence that the meeting had been called in line with the provisions of the titles. Mr Devon said that the evidence was not forthcoming and that on 11th September the Property Factor received copies of minutes from the meeting but that no information had been received as to how the meeting had been called. Mr Devon said that, in general terms, Hacking and Paterson did not want to stay where it was not wanted but that, in fairness to all owners, they had to be sure that all of them had got notice of the meeting because otherwise the Property Factor could have been in a situation where they had removed themselves from factoring a development where not all of the owners had had the opportunity of giving a view. Mr Devon said that this could have had repercussions and he said that, if the meeting had not been properly called, there could also have been consequences for the new property factor when it tried to invoice etc.

Mr Devon said that it was his view that owners should have been written to at their place of residence or at the contact address they had given. He said that he did not consider it appropriate that letters were just put through the doors of the Development in view of the fact that many of the houses were tenanted. Mrs Williams said that fifteen of the properties were tenanted. Mr Devon and Mr Leitch said that, as property factors, they owed a duty of care to all the owners. Mr Devon said that, at that stage, the Property Factor had no evidence that matters had been dealt with in an appropriate manner. He said that the Property Factor would have required sight of signatures of homeowners and minutes.

Mr Devon said that this was why the property factor took the decision to write to all owners on 10th August 2017

Events following the property factor's letter of 10th August 2017.

Mr Devon said that, on receipt of his letter of 10th August 2017, Mrs Williams responded to him and said that evidence of the correct process regarding the meeting of proprietors existed and would no doubt be made readily available in due course.

Mrs Williams said that she received the letter, spoke to Mr Mallarkey and that she then became involved in dealing with the Property Factor instead of Mr Mallarkey because his absences made it difficult for him to continue. Mrs Williams said that Mr Mallarkey had asked the Property Factor for its formal complaints resolution to be engaged and that, in response, Mr Buchanan responded by sending a copy of the complaints process. Mrs Williams communicated with the Property Factor and said that she considered that "we" were beyond Step 1 of the process and that it had been exhausted. Mrs Williams referred to her email of 1st October 2017 and to Mr Buchanan's response of 2nd October 2017. She said that, on 2nd October 2017 she issued Mr Buchanan with a formal complaint on behalf of the fifteen owners present or represented at the meeting. Mr Williams said that she considered that she had the mandate of these owners to do so because she was in regular communication with them. Mrs Williams said that she advised the Property Factor that it had received all the documents it had requested and asked them to acknowledge that their contract had been terminated and to give effect to it as soon as possible. Mrs Williams said that Mr Buchanan responded to her communication of 2nd October 2017 by stating that he would respond within ten working days. Mrs Williams said that the Property Factor's complaints procedure states that a response has to be given in seven working days and that she asked Mr Buchanan why there was a departure from this and that he responded that he needed to review a number of items of correspondence between different parties. Mrs Williams said that she asked Mr Buchanan to deal with matters by copying his response to her to all the individuals she had copied her original communication to him. She said that he refused to do so and told her that he would only be responding to her. Mrs Williams said that she considered this to be unreasonable since the termination of the contract had been a communal decision and not individual.

Mrs Williams said that, in her email communications with Mr Buchanan, she would always copy in the homeowners of the Development but that, in his replies to her, Mr Buchanan removed them. Mrs Williams said that she felt that, in Mr Buchanan not accepting that she had authority from others, he was effectively accusing her of lying. Mrs Williams said that she felt that the Property Factor, and Mr Buchanan in particular, should have dealt with that better.

Mrs Williams said that, on 3rd October 2011 when Mr Buchanan emailed her stating that he would respond in ten working days, he sent a letter to proprietors of the Development but that neither Mr Mallarkey nor she received such a letter. She said that another homeowner told her about it. Mrs Williams said that she could not believe that this was a coincidence. She said that the letter sent to homeowners by the Property Factor stated that it had received notification of a meeting of homeowners which they did not believe to be title deed compliant and that they had a duty of care to all proprietors in the Development. Mrs Williams said that the Title Deeds do not set out a mechanism for taking decisions and that there had been a show of hands at the meeting with she believed was an appropriate way of dealing with matters. Mrs

Williams said that the letter stated that the Property Factor had spoken with a number of homeowners who had been unaware of the meeting taking place.

Mrs Williams said that she believed that the Property Factor had all that was required- they had copies of letters issued to all residents, Minutes of the meeting, a record of attendance and proxy forms and mandates. She said that, taken together, this was evidence of a binding decision of homeowners.

Mrs Williams referred to a part of the letter of 3rd October which stated that the Property Factor was unaware of any adverse view other than the parties involved.

Mrs Williams said that, from her conversations with owners, this was inaccurate and a totally inappropriate thing to state. She said that the letter stated that the Property Factor considered that a meeting should be held at which consideration should be given to all owners and it suggested a date of 16th October 2018 and it gave a location and time. Mrs Williams stressed that Mr Mallarkey and she had not received the letter. She queried why the letter had been sent to only some proprietors. Mrs Williams said that, subsequently the Property Factor issued a letter to homeowners on 5th October 2017 stating that a small number of homeowners had not received the earlier letter and reissued the earlier letter. Mrs Williams said that the Property Factor did not apologise for its omission in not ensuring that all proprietors had received the earlier letter. Mrs Williams said that the letter gave the date of the meeting to be 16th October 2017. Mrs Williams said that the title deeds indicated that fourteen days' notice required to be given for any meeting and that she had asked Mr Buchanan to change the date of the meeting to 23rd October and she also queried who would be responsible for the cost of the meeting. She said that she was told that the meeting could not be changed. Mrs Williams said that she phoned the venue for the meeting and discovered that it had been changed. She said that a letter had been issued on 11th October which stated that the meeting would be held on 30th October.

Mrs Williams said she was told that the cost of the meeting venue would be £47 inclusive of VAT and that this would fall due to be paid by all the owners.

Mr Devon said that the evidence the Property Factor had been seeking regarding the calling of the meeting had not been forthcoming. He said that on 8th September 2017 he received a communication from Mr Mallarkey identifying those owners attending the meeting or submitting mandates. Mr Devon said that on 11th September 2017 the Property Factor was forwarded Minutes of the meeting but he said that they had still received no clarity as to how the meeting had been convened. Mr Devon said that his company genuinely did not want to stay anywhere it was not wanted and that was why it had taken the decision to write to all the proprietors in the Development. Mr Devon said that it received Walker Sandford's letter of 4th August 2017 and wrote to proprietors of the Development on 10th August 2017. Mr Devon said that the letter sent to owners on 3rd October 2017 did not give the requisite notice period for meetings because it had fixed such a meeting for 16th October 2017 and that the Property Factor accepted that it had made a mistake in this regard. Mr Devon said that, as far as he was concerned, Mr Mallarkey and Mrs Williams were sent the letter of 3rd October. He said that correspondence to homeowners is sent by post unless an owner has intimated an alternative means of communication. He said that, as far as he was concerned, the letters were sent to all homeowners. Mrs Williams again stated that she had received no letter.

Mr Devon said he considered the appropriate way to communicate with homeowners was to send by post or by their previously intimated means of

communication and that it was certainly not appropriate to merely put letters through doors of properties in the Development. He said that many of the properties in the Development were tenanted and that correspondence for owners had nothing to do with tenants.

Mr Devon said that, if the Property Factor had not exercised its duty of care, it was possible that a new property factor may not have had the required authority to manage the Development. He said that, for example, his company could have been faced with challenge from any one of the fourteen owners not voting at the Meeting of 1st August 2017. Mr Devon said that the Property Factor had to be sure that all the owners in the Development had been made aware of the meeting and the business to be discussed.

Mrs Williams said that the title deeds do not state that the Property Factor requires to have been provided with evidence of how the Meeting was called and that its written statement of services does not state that such evidence is required before its contract for management is terminated. She also said that the communication from the Property Factor did not state what evidence was required. Mrs Williams said that the title deeds provide that 25% of owners can make such a decision.

Mr Leitch agreed that in the response to the letter from Walker Sandford it would have been better if the Property Factor had been clearer about what exactly was being sought.

Mrs Williams said that Walker Sandford had been acting as agents of the owners of properties in the Development. She said that Walker Sandford were not subsequently appointed as property factors and she said that she would rather not disclose who now manages the Development.

Mrs Williams said that the letter intimating the meeting to be held on 30th October was dated 11th October and that on the same day she received that letter she received a response to her original complaint.

It was accepted by parties that the costs for the meeting were met by the Property Factor.

Meeting of 30th October

Mrs Williams said that there was a good attendance at the meeting and that twenty two owners were represented. She said that six owners attended, she held proxies for fourteen owners and Mr Mallarkey held proxies for two owners. She agreed that there was more involvement of owners than at the meeting in August 2017. Mrs Williams said that this was partly due to her involvement in encouraging owners to participate. She said that she and others did all possible to encourage owners to become involved. She spoke about checking the Land Register and letting agents so that she could make contact with as many owners as possible. Mrs Williams said that she was unable to comment on whether Walker Sandford took such steps in relation to the earlier meeting in August 2017.

Mrs Williams said that it was a unanimous decision that the appointment of the Property Factor be terminated.

The tribunal had sight of a copy of an email from Mrs Williams to the Property Factor dated 31st October 2017 indicating that the owners at the meeting on 30th October had

voted to terminate the factoring contract with Hacking and Paterson. The email referred to a written letter of termination which had been attached to the email and a copy of which was made available to the tribunal.

Mrs Williams said that it was decided to issue an official letter of termination to cover the owners' position. She said that an acknowledgement was received by Miss Murphy of the Property Factor on 8th November 2017 which stated that the Property Factor had issued a letter. Mrs Williams said that she had received no such letter and she telephoned Miss Murphy to be told that the letter had not gone out and that it would be issued that day. The letter was issued on 9th November 2017, which confirmed the termination date to be 28th November 2017.

Mrs Williams said that she expected to receive final invoices and that for the next factoring bill to be the final one. She said that on 13th November 2017 a common charges invoice was issued

Mrs Williams said that the invoice did not include all costs but did include insurance into 2018. She said that she had been told that invoices from contractors such as those dealing with cleaning and landscaping services came in arrears and that, as a consequence, she had to wait three months for the final invoice. Mrs Williams said that she contacted the contractors and was told that they did not invoice in arrears. She said that Scottish Power said that all that would have been required for them would have been meter readings to be taken and provide to them. Mrs Williams said that she considered that, by the end of November 2017, the Property Factor could have been in possession of all charges and been able to set against floats being held on behalf of all owners.

The tribunal had sight of an email of the Homeowner sent to the Property Factor on 15th November 2017 in which she refers to a termination date of 28th November 2017 and querying individual matters contained within the invoice.

Mrs Williams said that she did not understand why the Property Factor had to retain floats until February 2018. Mrs Williams said that, in terms of the Code, the Property Factor had three months to issue final accounts following its termination of its management contract.

Mrs Williams said that she felt she was getting nowhere and she asked the Property Factor to take her complaint to the next stage of its complaints process. She said that she did this on 23rd November 2017 and that she received a reply on 27th November 2017. She said that she received a complaints resolution form and collated all the emails and supporting documents and submitted them.

Mrs Williams said that she received reminders in respect of the unpaid invoices. On 21st December 2017 Mr Buchanan emailed the Homeowner and Mrs Williams replied on 21st December and stated that she looked forward to stage 3 of the complaints process being engaged. She said that she then received what she considered to be a stage 2 response. The Property Factor indicated that this was an error on its part and accepted responsibility for this.

Mrs Williams said that she finally got a response due in terms of the stage 3 process on 26th January 2018 and was told that the balance due to her in respect of repayment

of the float would be forthcoming within seven days. Mrs Williams said that this did not happen.

In its written representations the Property Factor states

" On reviewing the case notes in relation to the application, it is clear that the communication issued by our offices on 12th January and referring to the communication as a Stage 2 response was incorrect. Whilst the communication was sent in good faith in an attempt to resolve the complaint the reference to Stage 2 should not have been made. It is clear from reviewing the correspondence that the Applicant was at this stage expecting our Stage 3 final response. We can advise the Panel that we have at today's date communicated with the Applicant offering our apology for any distress that this may have caused."

Mr Devon said that sorting out factoring accounts following upon termination of a factoring contract could take three months. He referred the tribunal to section 3.1 of the Code which states in relation to provision of information after termination of a factoring contract that

"This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services)."

He said that the Property Factor could have decided to take the full three months from the date of the meeting allowed for in the Code but elected to advance the date of termination and produce the accounting sooner. He said that the Property Factor did everything possible to advance this aspect of final accounting.

Mr Devon said that the homeowner's float of £400 should have been kept separate from other funds but that it was not. He stressed that the funds were kept separate from the Property Factor's own funds but that it was not kept separate from the day to day and week to week expenditure of the development and should not have appeared in the way it did on the homeowner's statements. He said that when the error was spotted it was corrected. He said that the Property Factor's website gave details of how payments of floats were to be made. He said that it detailed that it should be paid in a different way. Mrs Williams said that, prior to making the payment, she telephoned the Property Factor and was not directed to the fact a float should be paid in any particular manner.

Mr Devon said, that in relation to the complaints process, the Property Factor was not trying to be obstructive. He said that an error was made and that it recognised that, failing determination at the stage 2 process, the homeowner should have gone to stage 3 of the process for final determination. He said that Mr Buchanan had responded in the way he had because he thought the matter was still at stage 2 of the process rather than stage 3.

Parties addressed the particular sections of alleged breach of the Code, and the Property Factors duties:

1.1 Mrs Williams was clear that her position was that the written statement of services did not contain the information necessary to signpost her to how the factoring contract

could be terminated. Mr Devon said that he did not know what further information could have been provided in the written statement of service.

2.1 Mrs Williams said that the Property Factor had provided her with false and misleading information and she believed that, in their responses to her, they were obstructive and that they gave false information and sought to mislead her. She cited one example where the property factor said that it had not received copies of Minutes and signatures when it had done so.

2.4 Mrs Williams said that she considered that the second meeting of owners in the Development was unnecessary.

3.1 Mrs Williams said that matters could have been dealt with sooner and that, if they had been, the whole process would have come to an end sooner.

3.5a Mrs Williams said that she felt that, as a property owner, she had no control over the Development. She said that she felt imprisoned by the factoring contract with Hacking and Paterson.

7.1 Mrs Williams said that the Property Factor had not followed its complaints resolution procedures in that it had not followed the appropriate steps. The Property Factor accepted this.

Property Factor's duties

Mrs Williams considers that the Property Factor's failure in recognising the validity of the decision of the meeting of 1st August 2017 was a breach of its duties in terms of the 2011 Act.

Discussion

The members of the Tribunal considered that critical to the application of the Homeowner was the Property Factor's treatment of her when she and other owners tried to terminate the factoring contract with Hacking and Paterson. Her position was clear and that was that everything had been done properly in calling the meeting of 1st August 2017. The Property Factor's position was also clear and that was it had to be satisfied that the meeting had been called properly and that all owners in the Development had received the appropriate notice of the meeting. There were facts surrounding the meeting of 1st August 2017 which were not in dispute.

Mrs Williams received notification of the meeting by a letter which had been put through the letter box of the flat she owned and it had been handed to her by her tenant. It had not been sent to her residential address.

Fifteen owners of the twenty nine flats in the Development either attended the meeting or were represented.

Mrs Williams was not involved in the arrangements for calling the meeting of August 2017 but she was involved in encouraging the support of owners in the Development to attend the meeting of October 2017. At that meeting twenty two owners attended or were represented.

The members of the Tribunal had regard to the terms of the title of the Property. The 1994 deed of Conditions stated:

"any two or more Proprietors shall be entitled to call a meeting of the Residents' Association, on at least 14 days' prior notice to other Proprietors, and at which meeting one vote shall count for each House; a quarter of all the Proprietors shall be a quorum; a simple majority voting at such meeting shall decide any issue..."

There seemed no doubt that proprietors had the power to call a meeting of owners in the Development and it is assumed that at least two members called for the meeting. The Property Factor did not challenge that. The members of the Tribunal had to examine what "calling a meeting" meant. It seemed not over simplistic to them to assume that a meeting could only be called if owners had notice of it. How was such notice to be given? Mrs Williams's position was that it would be sufficient notice if appropriate documentation was put through the letterboxes of each property in the Development. This did not seem to the members of the Tribunal to be sustainable. Mrs Williams said that fifteen of the twenty nine properties were tenanted so it did not seem to members of the Tribunal that there was certainty that appropriate notice to owners was given. The method used would have relied on any tenant informing his or her landlord of the existence of the letter and for it to be collected or forwarded.

The tribunal then had to consider the significance of the lack of notice and whether or not it entitled the Property Factor to disregard the request of it to cease its factoring duties in the Development and to seek further information.

The Property Factor's position was that it had a duty of care to ensure that the contractual arrangement it had in place with the owners had been properly terminated. Mr Devon was at pains to point out consequences for his company in the event that the termination was challenged by any owner and he also referred to the potential consequences for a property factor assuming responsibility and the fact that its authority to act may be challenged.

On balance the members of the tribunal accepted that it was reasonable for the Property Factor to ensure that the meeting had been properly called. What the Property Factor then did in trying to ensure that it could be satisfied that the meeting had been properly called was not straightforward. Mrs Williams' view was that, as an owner, it was not made clear to her what the Property Factor was looking for. It was not apparent to the members of the tribunal that the Property Factor had set out the kind of evidence it was seeking although it did clearly ask for Minutes and "signatures." This was accepted by Mr Leitch. The Property Factor did not ask for details of how the meeting had been called. Notwithstanding that, the members of the tribunal considered that the meeting had not been properly called and that it was essential that the Property Factor had to be sure that all owners in the Development had had the opportunity to attend and participate in the meeting.

The tribunal considered that it was necessary for there to be a second meeting of proprietors and that it was appropriate for the Property Factor to arrange this. It accepted Mrs Williams' evidence that she did not receive a letter in connection with this meeting and this did seem unusual. The Property Factor was certain that letters had been sent to all proprietors and the tribunal came to no view as to whether or not this was correct.

The arrangements for the second meeting were clumsy in that not sufficient notice was given but the meeting eventually did take place and the owners voted to discontinue the factoring contract with the Property Factor.

Mrs Williams' position was that the accounting arrangements with her post termination were defective. The Property Factor referred to the written statement of services which states that when

" the property factoring arrangement is terminated, HPMS will provide all financial information held by HPMS relating to the homeowners' accounts within 3 months of termination."

The final accounting was completed within the timescale set out in the written statement of services.

There was no dispute between parties with regard to the float of the homeowner which was £400. According to the Property Factor's internal procedures such a float should not have been held in the general factoring account in the homeowner's ledger but held in a separate account. The tribunal had sympathy with the homeowner's position in that the property factor's evidence was that their website gave information on what effectively was a code that homeowners had to use when making payment of a float to ensure that it was treated differently from other payments. It seemed to the tribunal that the Homeowner could not be blamed for not doing this since she telephoned about the payment to be made and was not advised of the procedure in this regard. The Property Factor's position was that, as soon as it was realised that the funds had not been treated appropriately, they were transferred. The fundamental matter for the tribunal was whether or not the float was ever in an account with the Property Factor's funds. It accepted that, at all times, the funds were in a separate account from those of the funds of the Property Factor.

The tribunal considered the evidence with regard to the handling of the Homeowner's complaint. There was clear evidence that the process was not complied with in accordance with the Property Factor's procedures and this was accepted by the Property Factor.

The tribunal examined each alleged breach of the Code, and whether the Property Factor had failed to carry out its duties:

Written Statement of Services

Section 1.1a

The Code sets out what is expected of property factors with regard to the content of written statements of services. The written statement of services of the Property Factor complies with the requirements of the Code and the Homeowner led no evidence to the contrary. Mrs Williams' position was that the Homeowner did not comply with the terms of the written statement of services. The tribunal considered that this was quite different from the content of the document. Mrs Williams did state that it was not clear that the written statement of services contained sufficient provision for termination of the factoring contract but the tribunal considered that it did and, whilst it did not specify the mechanics of calling a meeting, it did not require to. That is a matter governed by the titles and the fact that, for a meeting to be valid parties need to have notice of it.

Communication and Consultation

Section 2.1

The Code states

"You must not provide information which is misleading or false."

In the view of members of the tribunal "to mislead" implies intention. They were not satisfied from the evidence that the Property Factor intended to mislead the Homeowner. The tribunal also considered whether or not the Property Factor had provided false information. To do so also suggests intention. There seemed no doubt to the tribunal that the Property Factor could have been clearer in stating precisely what information was required to satisfy it with regard to the calling of the meeting in August 2017 and in other communications it might have made errors but that any deficiencies fell short of providing false or misleading information.

Section 2.4

The Code states

"You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies)."

The members of the tribunal considered that it had no evidence of breach of this section of the Code other than in relation to the calling of the second meeting of owners. Mrs Williams' position was that the October 2017 meeting was unnecessary and that owners should not have to pay the costs of such a meeting. The tribunal considered that, because of the defects in calling the August 2017 meeting, a second meeting was necessary and, in any event, the Property Factor had decided to relieve owners of the costs of such a meeting.

Financial Obligations

Section 3.1

The Code states

"If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services)."

Mrs Williams considered that the final accounting could have been completed sooner. She was told that the property factor had to wait for contractors' accounts before the final accounting could be done but she made enquiries of contractors and was told that their accounts could have been produced sooner than indicated by the Property Factor. The tribunal also had regard to the written statement of services which stated that information would be provided within three months.

A final accounting was produced within this timescale and the members of the tribunal considered that the Property Factor complied with this section of the Code.

Section 3.5a of the Code states:

"Homeowners' floating funds must be held in a separate account from your own funds. This can either be one account for all your homeowner clients or separate accounts for each homeowner or group of homeowners."

The tribunal accepted that the Property Factor may have contravened its internal requirements but it accepted that the float was held in an account separate from the Property Factor's own funds and therefore considered that the Property Factor had not breached this section of the Code.

Complaints Resolution

Section 7.1 of the Code states:

"You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors."

The Property Factor had a written complaints resolution procedure. It is not a matter of dispute that the Property Factor did not follow its complaints resolution procedure in responding to the complaint made by the Homeowner who was entitled to have it dealt with appropriately. The tribunal found that the Property Factor had breached this section of the Code.

Property Factor's duties

Mrs Williams considers that the Property Factor's failure in recognising the validity of the decision of the meeting of 1st August 2017 was a breach of its duties in terms of the 2011 Act. The tribunal considered that it was appropriate for a second meeting of owners to be convened because of the deficiencies in calling the August meeting and therefore found no breach of the Property Factor's duties.

Decision

The tribunal considered it important that property factors follow their complaints procedure. In this case, the Property Factor accepted that it had not and the tribunal found that it had failed to comply with the Code in this regard. The tribunal considered that the Homeowner was put to inconvenience as a result of this and that it would be appropriate for the Property Factor to pay her compensation of £200.

The tribunal proposed that a Property Factor Enforcement Order be made requiring that the Property Factor pay compensation of £200 to the Homeowner within fourteen days of the Property Factor Order being made.

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 them.

(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 tribunal must make a property factor enforcement order..."

Intimation of the tribunal's Decision and this notice of proposal to make a PFEO to the parties should be taken as notice for the purposes of section 19(2) (a) of the 2011 Act and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2) (b) of the Act reach the tribunal's office by no later than twenty one days after the date that the Decision and this notice 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 ("PFEO") 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.

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-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

M J McAllister

Martin J. McAllister
Legal Member and Chair
17th May 2018