



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

**Decision on Homeowner's application: Property Factors (Scotland) Act 2011
Sections 17(1)(a) and 17(1)(b)**

Chamber Ref: FTS/HPC/PF/21/3005

Re: Property at 65 Galbraith Crescent, Kinnaird Village, Larbert FK5 4GZ ("the Property")

The Parties:

Mr Alasdair Ross, 65 Galbraith Crescent, Kinnaird Village, Larbert FK5 4GZ ("the Home Owner")

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

Tribunal Members:

Neil Kinnear (Legal Member) and Elizabeth Dickson (Ordinary Member)

DECISION

The Tribunal determined that the Property Factor has not failed to carry out its property factor duties in terms of section 17(1) of the *Property Factors (Scotland) Act 2011* ("the 2011 Act") and has not failed to comply with Sections OSP2, 1.5(6), 3.1 and 3.2 of the Code of Conduct for Property Factors as required by Section 14(5) of the 2011 Act.

The Decision of the Tribunal is unanimous.

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 First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended are referred to as "the Rules".

The Property Factor was a Registered Property Factor and had a duty under section 14(5) of the 2011 Act to comply with the Code.

Background

By application dated 3rd December 2021 the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to carry out its property factor duties in terms of section 17(1) of the 2011 Act and had failed to comply with Sections OSP2, 1.5(6), 3.1 and 3.2 of the Code.

On 14th December 2021 a Convenor on behalf of the President accepted the application and referred it to a Tribunal for a Case Management Discussion. By letters dated 22nd December 2021 both parties were notified that the application had been referred to a Tribunal and that a Case Management Discussion would take place by conference call at 10:00 on 15th February 2022.

Case Management Discussion

A Case Management Discussion was held at 10:00 on 15th February 2022 by conference call. The Homeowner participated, and was not represented. The Property Factor's Mr Buchanan participated, and was not represented.

The Tribunal confirmed with the Homeowner that all of his complaints related to the annual management fee of £50.00 plus VAT as provided for in Clause 4.1 of the Property Factor's Terms of Service and Delivery Standards, which he had been issued with by the Property Factor. The Homeowner confirmed that he did not seek to dispute or challenge any of the maintenance costs which were charged to his account.

The Homeowner and the Property Factor were agreed that the Tribunal could decide the application on the papers provided to it and the parties' submissions. There was no evidence beyond that which the tribunal would require to hear.

The Homeowner's position was that he and the other homeowners on the estate of which the Property forms part were being overcharged by the Property Factor in relation to its fees. Those fees are set out in the Property Factor's Terms of Service and Delivery Standards at paragraph 4.1, which provides that the annual management fee is £50.00 plus VAT, which "covers all administration relative to the services provided at 3.1". The Homeowner noted that since his application was made to the Tribunal, the annual management fee had been increased to £53.00 plus VAT.

The Homeowner stated that he had costed the administrative duties involved in the Property Factor's work, and concluded that the annual management fee paid by him and the other homeowners was approximately five times the costs of the work done by the Property Factor.

The Homeowner submitted that the Property Factor was not honest, open, transparent and fair in its dealing with homeowners in terms of Section OSP2 of the Code, as it did not provide vouching and information to demonstrate the basis and costings used

in calculating the level of the annual management fee. He also submitted that the Property Factor had failed to set out the management fee charged by it, including any fee structure and also its policy for reviewing and decreasing the management fee in breach of Section 1.5(6) of the Code. The Homeowner also submitted that the Property Factor was in breach of Sections 3.1 and 3.2 of the Code as the annual management fee was not clear and transparent, and he did not know what he was being asked to pay for and how the charges were calculated.

In response, Mr Buchanan submitted that the Property Factor was not in breach of the Code. The annual management fee was clearly identified in clause 4.1 of the Property Factor's Terms of Service and Delivery Standards, which clearly identified that the fee related to the services set out in clause 3.1 of the Property Factor's Terms of Service and Delivery Standards.

The Tribunal does not repeat in this decision Clause 3.1 of the Property Factor's Terms of Service and Delivery Standards due to its length. Suffice is to say that clause 3 is headed "Services Provided", notes that the Property Factor offers the following core factoring services to the group of homeowners, and then sets out over the following two pages a list comprising twenty-nine bullet points setting out in detail all the services which the Property Factor provides.

Mr Buchanan submitted that the Property Factor provides a large number of "behind the scenes" services and administration, and it is in respect of those that the annual fee is charged. It is not incumbent on the Property Factor to provide the financial material to show how it calculated its fee for its work, as opposed to providing vouching and explanation relating to a Homeowner's share of the costs and charges invoiced to that homeowner.

Statement of Reasons

Section 17 of the 2011 Act provides:

"17 Application to the First-tier Tribunal

(1) A homeowner may apply to the First-tier Tribunal for determination of whether a property factor has failed—

(a) to carry out the property factor's duties,

(b) to ensure compliance with the property factor code of conduct as required by section 14(5) (the "section 14 duty").

(2) An application under subsection (1) must set out the homeowner's reasons for considering 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.

(3) No such application may be made unless—

- (a) the homeowner has notified the property factor in writing as to why the homeowner considers 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, and
- (b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern.

(4) References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard.

(5) In this Act, "*property factor's duties*" means, in relation to a homeowner—

- (a) duties in relation to the management of the common parts of land owned by the homeowner, or
- (b) duties in relation to the management or maintenance of land—
 - (i) adjoining or neighbouring residential property owned by the homeowner, and
 - (ii) available for use by the homeowner."

It appeared to the Tribunal that the Homeowner's complaint regarding failure of the Property Factor to fulfil its property factor duties simply repeated the same alleged breaches of the Code, which the Homeowner accepted was the case. In those circumstances, the Tribunal only required to consider the alleged breaches of the Code.

The Homeowner's complaint, which he readily accepted, entirely related to his assertion that the Property Factor was over-charging for the work it did, and that its annual management fee was much higher than it should be. He based his assertion upon his own estimate of how much time would be required by the Property Factor's staff to undertake its factoring work, and relied upon the absence of any calculation showing how the Property Factor calculated its annual management fee. All of the alleged breaches of the Code were based on this assertion.

The Tribunal, with respect, does not agree with the Homeowner's assertion. The Tribunal considers that there is a clear and important distinction to be drawn between the Property Factor's fees charged to homeowners for its work, and the accounts and invoices which it sends to homeowners seeking payment of each homeowner's share of the costs of work undertaken on their behalf by third party contractors engaged by the Property Factor.

The latter clearly require to be shown and vouched in invoices and accounts sent to a homeowner to explain the basis of the expense, a share of which they are being asked to pay. The former does not, as it is the contractual fee charged by the Property Factor for the services it provides, which services are fully and comprehensively listed in clause 3 of the Property Factor's Terms of Service and Delivery Standards.

The annual management fee a property factor seeks to charge is a commercial decision which it makes, and the imposition of which allows it to run its business and make a profit for itself.

If a group of homeowners consider that a property factor is charging too much for its services, then they are entitled to decide to seek quotes from alternative property factors, and may decide to engage one of those alternatives as property factor and remove the existing property factor if they so choose.

It is not incumbent on a property factor to provide all of its commercially sensitive internal management costings to homeowners to provide a full breakdown of the commercial basis upon which it sets its fees.

In those circumstances, the Tribunal determined that the Property Factor has not failed to carry out its property factor duties in terms of section 17(1) of the 2011 Act, and has not failed to comply with the Code.

Right of Appeal

In terms of Section 46 of the Tribunal (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.

**Neil Kinnear
Legal Member**

**22 February 2022
Date**