

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Decision: Property Factors (Scotland) 2011: Section 19(1) (a)

Chamber Ref: FTS/HPC/PF/17/0081 and FTS/HPC/PF/17/0082

Units 6 and 8, 270 Bath Street, Glasgow, G2 4JR ("The Properties")

The Parties:-

**Dr Rita Ahmad,
The Peppermint Group,
270 Bath Street, Glasgow,
G2 4JR
("the homeowner")**

**Redpath Bruce Property Management Limited,
103 West Regent Street,
Glasgow,
G2 2DQ
(the Property Factor")**

Members of the tribunal:

Martin J. McAllister, legal member and Andrew Murray, surveyor, ordinary member.

Background:

The homeowner made two applications. One is in respect of Unit 6, 200 Bath Street, Glasgow and the other is in respect of Unit 8, 200 Bath Street, Glasgow. The applications were received by the tribunal on 6th March 2017. The applications allege that the property factor has breached clauses 6.3, 6.6 and 6.9 of the Code of Conduct for Property Factors and has failed to carry out the property factor's duties.

On 28th March 2017, a legal member of the tribunal, acting as a Convener with delegated powers, referred the applications to the tribunal to determine.

The property factor intimated to the tribunal that it considers that the applications by Dr Ahmed to be flawed since she is not a homeowner as defined in the Property Factors (Scotland) Act 2011 (the 2011 Act).

On 5th May 2017 the tribunal made a Direction seeking representations from parties with regard to whether or not the applicant is a homeowner as defined in the 2011 Act. The Direction also sought certain documents to be lodged with the tribunal. In response to the Direction both parties made representations.

Hearing

A Hearing was held in Wellington House on 31st May 2017. Dr Ahmed was present and was represented by Mr John Catterson. She was also accompanied by her manager, Ms Donna MacLennan. Ms Margaret Reid of Redpath Bruce was present and gave evidence. The property factor was represented by Mr Michael Ritchie, solicitor. The tribunal determined that it would consider the competency matter raised by the property factor and defer consideration of the substantive matters raised in the applications.

Matters of Agreement between the parties

The units which are the subjects of the application are situated in a tenement at 268 and 270 Bath Street and 59 Elmbank Street, Glasgow. The ground floor unit is occupied by Dr Ahmed as a dental surgery and the first floor unit is owned by Dr Ahmed and occupied by a tenant who operates a fitness studio. The basement is occupied by offices and other units in the tenement are occupied by commercial and residential occupants. At the rear of the tenement there is a car park area which is used by residential and commercial occupants of the tenement. The property factor manages the tenement for the owners.

The issue to be determined by the tribunal is whether or not Dr Ahmed is a homeowner in terms of the 2011 Act. If she is not a homeowner then her applications are not competent.

Mr Ritchie referred to his written representations. Mr Catterson and Dr Ahmed referred to the written representations and also to a copy of a Lease by Dr Ahmed in favour of Ibrahim Allam in respect of the first floor premises (Unit 6) at 268 and 270 Bath Street, Glasgow.

Dr Ahmed in an undated letter received by the tribunal on 24th May 2017 stated that she had permitted her tenant to occasionally stay in the commercial unit and that she should therefore be afforded the status of resident when residing in the building. Mr Catterson drew the tribunal's attention to the terms of the Lease which stated that the premises are not to be used for any purpose other than "for the business of personal training except with the previous consent of the landlord acting reasonably." Dr Ahmed said that she had given consent for the premises to be occasionally used for residential purposes.

Mr Ritchie said that he did not accept that either of the premises owned by Dr Ahmed are used for residential purposes. He referred the tribunal to extracts of the Assessor's

records which show the units being commercial. Ms Reid said that the property factor manages the whole tenement including the car parking areas at the rear. She said that Dr Ahmed had not been sent a written statement of services in terms of the Code of Conduct for Property Factors because the properties she owned in the tenement are not residential.

Mr Ritchie's written representations state:

" Residential is defined in the English Oxford Living Dictionary as being subjects designed for people to live in. The tenant does not live at the subjects 1/2, 268 Bath Street, Glasgow."

Mr Ritchie's written representations refer to Section 10(5) of the 2011 Act and his submission that, for an application to be competent, the Applicant has to be the owner of land used to any extent for residential purposes and that neither of the properties owned by Dr Ahmed in the tenement are used to any extent for residential purposes. They go on to state that if the tribunal was to be satisfied with the Applicant's representations that the tenant can sleep overnight in the property it does not mean that the property is used for residential purposes and that, in any event, the tenant is not an individual.

In oral submissions Mr Catterson and Dr Ahmed relied heavily on the fact that a tenant sometimes stays in one of the units and that, accordingly, the applications are competent.

Mr Ritchie submitted that the test to be determined by the tribunal is whether or not Dr Ahmed is an owner of land used to any extent for residential purposes in terms of Section 10(5) of the 2011 Act. It was his submission that the test was not met and that the fact that neighbouring properties in the tenement are residential is irrelevant.

Deliberations

The Tribunal considered the relevant statutory provisions.

Section 17 of the 2011 Act, as amended, states:

"(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')."

Section 10(5) of the 2011 Act states:

"In this Act, "homeowner" means-

(a) an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor, or

(b) an owner of residential property adjoining or neighbouring land which is-

- (i) managed or maintained by a property factor, and
- (ii) available for use by the owner.

Schedule 1 of The Interpretation and Legislative Reform (Scotland) Act 2010 states:

“ ‘land’ includes buildings and other structures, land covered with water, and any right or interest in or over land.”

The two units are commercial and parties did not suggest otherwise although Dr Ahmed’s position was that the fact she permitted her tenant to sometime stay in the premises made that unit residential and that, consequentially, she was and is a homeowner in terms of the 2011 Act.

The tribunal considered it appropriate to consider first whether the tenanted Unit 6 has a different status from Unit 8 because of the occasional residential use. Mr Ritchie’s position was that the tenant was a limited company and that this was therefore not a relevant consideration. Dr Ahmed, in evidence, stated that the tenant Ibrahim Allam is an individual. The lease produced did not really support either position. In it the tenant is designed as “Ibrahim Allam, incorporated under the Companies Acts” The tribunal also noted that the lease prima facie may not be valid. Although signed there are no signing details- no date or place of signing. The lease has also been signed by a D. MacLennan who is not a party to the lease. The lease is considered by the tribunal to be irrelevant to the matter before it. The simple question to be addressed is whether an individual occasionally sleeping in a commercial unit somehow converted it to be residential. Whilst each situation would depend on its own facts and circumstances, the tribunal did not consider that, in this case, there was any difference in status between the two units which are the subject matter of the applications. It would be unreasonable for a property factor to be brought within the obligations of the 2011 Act simply because someone occasionally slept in a commercial unit.

The tribunal then considered the question of whether or not Dr Ahmed is a homeowner in terms of the 2011 Act. Section 17 state that an application can only be made by a homeowner. Section 10(5) of the 2011 Act defines a homeowner as “an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor.”

In this case the property factor manages the common parts of the tenement. The title sheets relevant to both properties states that Dr Ahmed owns a right of property in common to parts of the tenement including solum, back court, walls, close, roof etc. The copies of accounts for factoring which were before the tribunal reflect various repairs and items of maintenance relating to the common parts or areas of the tenement.

The tribunal determined that the property factor managed the common parts. The statutory definition of land includes buildings. Dr Ahmed is a co proprietor of the tenement and therefore the common parts of the building including such parts as the close, roof, back court (car parking area). The common parts of the tenement are used

to some extent by the residential owners of the tenement and are therefore used for residential purposes.

The tribunal determined that Dr Ahmed is a homeowner in terms of Section 10(5) of the Property Factors (Scotland) Act 2011 and that it is therefore appropriate for it to consider her applications.

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.

Martin J. McAllister, Legal member
7th June 2017