

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Chamber Ref: FTS/HPC/PF/20/1368

**Ground Flat, 76 Clydesdale Road, Mossend, Bellshill, Lanarkshire ML4 2QL
("The Property")**

The Parties:-

**Mr Fergus Macleod, 76 Clydesdale Road, Mossend, Bellshill, Lanarkshire ML4 2QL
("the Homeowner" and "Applicant")**

**Apex Property Factor Limited, 46 Eastside, Kirkintilloch, East Dunbartonshire G66 1QH
("the Property Factor" and "Respondent")**

Tribunal Members:

**Martin J. McAllister, Solicitor, (Legal Member)
Mary Lyden, (Ordinary Member)
(the "tribunal")**

Introduction

In this Note the Property Factors (Scotland) Act 2011 is referred to as "the Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules," the First- tier Tribunal for Scotland (Housing and Property Chamber) is referred to as "the Tribunal" and Apex Property Factor Limited is referred to as Apex.

Decision (in absence of the Respondent)

The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the Tribunal'), having made such enquiries as it saw fit for the purposes of determining whether the Respondent had complied with the Code of Conduct for Property Factors ("the Code"), and with its duties as Property Factors, determined that the Respondent had failed to comply with the Code and with

its duties as Property Factors. It proposes to make a property factor enforcement order, in the following terms:

In terms of section 20(1) of the Property Factors (Scotland) Act 2011, the Respondent is required to make the following payments to the Applicant:

- (a) Seven Thousand One Hundred and Eighteen Pounds, twenty nine pence (£7,118.29);**
- (b) Two Hundred and Fifty Pounds (£250).**

Payments should be made within 14 days of intimation of the property factor enforcement order. Evidence of such payment should be provided to the Tribunal.

Background

1. By an application to the First-tier tribunal for Scotland (Housing and Property Chamber) ("the Chamber") dated 22nd May 2020, the Applicant sought a determination of whether the Factors had failed: (a) under section 14(5) of the Property Factors (Scotland) Act 2011 ("the Act"), to comply with the Code; and (b) to perform the property factor duties, as defined in section 17(5) of the Act, in respect of their factoring of the property. On 17th August 2020, a Convener having delegated powers under section 18A of the Act made a decision, under section 18(1)(a), to refer the application to a tribunal for determination.
2. The Property is a ground floor flat in a tenement at 76 and 78 Clydesdale Road and 1 Kirklea Road, Bellshill. As the Property is a building which is used, to an extent, for residential purposes the Applicant is a Homeowner within the definition provided at s10(5)(a) of the Act.
3. The Homeowner purchased the Property in 2015 and, at that time, the sum of £7,118.29 was paid to the Property Factor by the then seller of the Property in respect of works requiring to be carried out as common repairs to the tenement. The application states that the works have not been done and that the Property Factor has failed to respond to the Applicant's request for information and has failed to pay the said sum of money to the Applicant

4. The Property Factor was removed from the Property Factor Register under section 8(1) of the Act. The effective date of removal was 10th January 2020.
5. Along with the application, the Applicant has provided *inter alia* copies of the Title Sheet relating to the Property, the Property Factor's written statement of services and copies of letters to the Property Factor from the Applicant and his solicitor and a copy of a letter to the Applicant from the Property Factor dated 27th September 2017. The Applicant also submitted copies of the pro forma Property Factor Code of Conduct and Property Factor Duties Letter which he had sent to the Property Factor. No response was received by the Applicant from the Respondent in relation to the complaint outlined in the said letters.
6. By letters dated 1st September, the Chamber notified parties that a Hearing would take place in relation to the application on 13th October 2020. No written representations were submitted to the Chamber by the Respondent in advance of the Hearing.

Hearing

7. A Hearing took place in respect of the application on 13th October 2020. It was conducted by tele - conferencing because of the Covid-19 pandemic.
8. The Applicant was represented by Mr Neil Lancaster, solicitor. The Applicant was participated. The Respondent was not present and was not represented.
9. The tribunal noted that the Respondent had been given notice of the Hearing and was satisfied that it was appropriate to proceed with the Hearing, in the absence of the Respondent.
10. Mr Macleod said that he had purchased the Property in January 2015 and that, at the time of the purchase, a Notice of Potential Liability was in place relating to the previous owners share of the cost of repairs that were required to the building. He said that the Property Factor had indicated that estimates for the works had been obtained and that not all of the works related to common repairs and part of the works were internal to some of the flats. There had been issues with repairs which required to be done to the Property and the Factor had advised him that the contractor would not

issue a Guarantee for the works unless they were responsible for carrying out all of the works.

11. Mr Lancaster said that he had acted in the purchase and that he had been alerted to the issue of repairs because there were Notices of Potential Liability which had been put on the Property's title. He said that, at settlement of the purchase, the sum of £7,118.29 had been paid to the Property Factor by the Seller to deal with the outstanding common repairs. Mr Lancaster said that, at the time, he understood that the Property Factor was getting estimates for the work which required to be done and was investigating the availability of grant funding.
12. Mr Macleod said that no works were done to the tenement of which the Property forms part. He said that he had been charged a monthly fee and he said that this comprised a management charge for the Property Factor and he said that there was also a common insurance policy and that there was common lighting. He said that he refused to pay this monthly charge because, not only had the Property Factor not arranged for works to be done, it had also not provided him with information when he had requested it. He said that he was anxious to find out when the works were going to be done. Mr Macleod said that he had stopped paying the monthly charges in July 2018 and that the Factor had lodged a 'Simple Procedure' to recover these costs at Paisley Sheriff Court. Mr Lancaster clarified the issue with the action to recover costs and said that it appeared that the Property Factor had prepared the action and sent a draft to Mr Macleod. He said that the Property Factor had not progressed the Action.
13. Mr Macleod said that the works which required to be done to the Property were in respect of wet and dry rot and woodworm. He said that some work requires to be done to the chimney. He said that the Property had deteriorated as a result of the works not being done. He said that he also had no knowledge of the account the funds were being held in.
14. Mr Macleod said that the Property Factor had failed to advise him on the basis of its appointment. Mr Lancaster said that the Property Factor had stated that it had been appointed on the basis of a majority vote by proprietors of the tenement and that they held mandates from owners which they could not share because of data protection issues. He referred the tribunal to his letter to the Property Factor of 31st December 2019 in which he had referred to it having advised that it had mandates of four out of six owners but that it was not prepared to provide copies due to "data protection consideration." This letter also asks the Property Factor to provide evidence

of funds it had ingathered and to clarify the reasons for the extensive delays in works being carried out. Mr Lancaster said that he got no substantive response to that letter.

15. Mr Macleod said that he had sent numerous emails and letters to the Property Factor seeking clarification on when the works were going to be done. He said that he got no or inadequate responses from the Property Factor. He referred to a letter from Apex dated 27th November 2017 which the tribunal had sight of and which confirmed that the “payment of £7,118.29 is the share paid in respect of your property.” The letter states that the Property Factor is involved with recovering payments from all owners and that works will commence as soon as all monies have been contributed. Mr Macleod referred to the letter which he had sent to the Property Factor on 4th January 2018 and a copy of which was before the tribunal. It states that Mr Macleod is looking for detailed breakdown and accounts showing how the funds have been applied and what work has been done by Apex to the communal areas of the tenement. Mr Macleod said that he got no substantive reply to that letter and, in general terms, no reports of progress..

16. Mr Macleod said that the delay in works being done had affected him. He said that the Property had deteriorated over the previous five years and that he had spent a lot of time chasing the Property Factor for answers. He said that a new Property Factor had not been appointed.

Submissions

17. Mr Lancaster said that the matter was really focused on the sum of money which had been lodged with the Property Factor for repairs and which had not been expended. He said that there was the issue of the appointment of the Property Factor but that was somewhat of a moot point now because the Property Factor had been removed from the Scottish Property Factor Register with effect from 10th January 2020. He submitted that, from that date and whether or not it had been properly appointed, the Property Factor did not have a right to retain the sum of £7,118.29. Mr Lancaster said that this sum should be returned to the Applicant and he invited the tribunal to make a property factor enforcement order in that regard.

18. Findings in Fact

- 18.1 The Property Factor provided property factoring services in respect of the Property.
- 18.2 The Property Factor is holding the sum of £7,118.29 in respect of the amount due by the proprietor of the Property for common repairs.
- 18.3 The Property Factor has not demonstrated that the sum of £7,118.29 is being held in an appropriate account separate from its own funds.
- 18.4 The Property Factor has failed to provide information reasonably requested by the Applicant or his solicitor.

Finding in Fact and Law

19. The Property Factor has not complied with the Code and has not complied with the property factor's duties in terms of the Act.

Reasons

20. The tribunal unanimously determined that the Property Factor had not complied with the Code and had not complied with the property factor's duties. In coming to its decision, the tribunal considered each section of the Code which the Applicant contends had not been complied with.
21. Section 1 of the Code sets out certain requirements in relation to what is required to be in the written statement of services. The application states that it is considered that the Property Factor has not complied with Section 1A and 1B. 1A states that the written statement of services should contain a statement of the basis of any authority a property factor has for acting on behalf of all homeowners. The written statement of services before the tribunal states "Apex Property Factor Ltd have been appointed Factors in accordance with the provisions of the 'Title Deeds' for the Development." Whilst the Applicant clearly considers that the Property Factor does not have authority to act, the written statement of services complies with the Code. Whether that authority actually exists is another matter and not one which the tribunal could consider. 1B states that the written statement should state the core services that a property factor will provide. The written statement of services before the tribunal details the core services provided. Whether or not those core services were provided is another matter.

The tribunal considered that, in respect of Sections 1A and 1B, the Property Factor has complied with the Code.

22. Section 2.5 of the Code states:

“You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement.”

The tribunal noted that the written statement of services indicates that the response time is stated to be fourteen days. It accepted the evidence of Mr Macleod that he had not had adequate response to the requests he had made for information on the repairs. It also noted that the letter from Mr Lancaster and which was dated 31st December 2019 had not had a substantive response.

The tribunal found that the Property Factor had not complied with this section of the Code.

23. Section 3.2 of the Code states:

“Unless the title deeds state otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor.”

The tribunal accepted Mr Lancaster’s submission that the Property Factor had no authority to retain funds after 10th January 2020. At the very least, it should have communicated with the Applicant seeking information as to whether or not the funds were to be passed to another property factor. The property factor had had the opportunity to make representations to the tribunal as to whether or not there are any debts to set against the sum it is holding for repairs and the tribunal therefore found that the whole sum of £7,118.29 should be paid to the Applicant. The tribunal found that the Property Factor had not complied with this section of the Code.

24. 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 considered that the sum of £7,118.29 being held by the Property Factor could be considered floating funds. They were funds paid in

advance for works to be done and were not in the nature of what might be described as revenue funds which were payments which came in and out of the Property Factor's account on a regular basis. The tribunal had regard to the overall objective of Section 3 of the Code which is stated to be protection of homeowners' funds, clarity and transparency in all accounting procedures and the ability to make a clear distinction between homeowners' funds and a property factor's funds. Although the tribunal heard no evidence other than the fact that the Applicant got no information on the funds, it considered that the Property Factor had been put on notice that the tribunal would be considering this section of the Code and had decided to make no representations on the matter. The tribunal found that the Property Factor had not complied with this section of the Code.

25. Section 6.1 of the Code states:

"You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required."

Prior to the Applicant's ownership, the Property Factor had put Notices of Potential Liability on the Title and the tribunal found this to be evidence that certain work required to be done in 2015 and that a sum of money was identified for this work and was paid. The tribunal had no difficulty in determining that the Applicant was not kept advised of the progress of this work and that the Property Factor had not complied with this section of the Code.

26. Work had not been progressed for five years and the Tribunal found that the Property Factor's failure in this regard or advising the Applicant of the difficulties in doing this and suggesting possible solutions was demonstrative of its failure to carry out the property factor's duties.

Disposal

27. The tribunal determined that, in terms of Section 19 (2) of the Act, a proposed property factor enforcement order should be made and its terms are contained in a document of the same date. Parties will have the opportunity to make representations on the proposed property factor enforcement order. The tribunal considered that the sum of £7,118.29 which is held by the Property Factor should be paid to the Applicant which will allow him hopefully to progress the work which are required. The tribunal accepted the concerns expressed by the Applicant and considered that he should be compensated for this. It considered that the sum of £250 would be appropriate in this regard.

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.

Martin J. McAllister,
Legal Member of the
First-tier Tribunal for Scotland
15th October 2020