

# Housing and Property Chamber

## First-tier Tribunal for Scotland



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

**STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended**

**Chamber Ref: FTS/HPC/PF/20/0399**

**1 Cleveden Drive, Kirklee, Glasgow, G12 0SB (“the House”)**

**The Parties:-**

**Mr David Kincaid, 1 Cleveden Drive, Kirklee, Glasgow, G12 0SB (“the Homeowner”)**

**Apex, 46 Eastside, Kirkintilloch, East Dunbartonshire G66 1QH (“the Factor”)**

### **Tribunal Members**

**Ms Helen Forbes (Legal Member)**

**Mr Ahsan Khan (Ordinary Member)**

### **Decision**

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) determined that the Factor has failed to comply with the Section 14 duty in terms of the Property Factors (Scotland) Act 2011 in respect of compliance with paragraphs 2.5, 3.1 and 3.2 of the Property Factor Code of Conduct (“the Code”) as required by section 14(5) of the Act.

The decision is unanimous.

### **Background**

1. By application dated 5<sup>th</sup> February 2020, the Homeowner applied to the Tribunal for a determination on whether the Factor had failed to comply with section 3 of the Code, and whether or not the Factor had failed in carrying out its property factor duties.

2. Details of the alleged failures were outlined in the Homeowner's application and associated documents including correspondence between the parties. The complaint concerns a delay in responding to correspondence, and a failure to refund monies due to the Homeowner following the termination of the relationship between the parties.
3. The Homeowner intimated his concerns to the Factor by emails sent over a period from August 2014 to January 2020.
4. By decision dated 7<sup>th</sup> February 2020, a Convenor on behalf of the President of the Tribunal (Housing and Property Chamber) decided to refer the application to a tribunal for a hearing.
5. Hearing notification letters were sent out to parties on 24<sup>th</sup> February 2020 notifying parties of a hearing scheduled for 8<sup>th</sup> April 2020. Due to measures taken in response to the Covid-19 pandemic, the hearing was adjourned and a further hearing was set down for 17<sup>th</sup> September 2020. Hearing notification letters were sent out to parties on 27<sup>th</sup> July 2020.
6. By direction dated 1<sup>st</sup> September 2020, the Tribunal requested further information from the parties as follows:

***The Homeowner is required to lodge the following information ... by 8<sup>th</sup> September 2020:***

*Section 7 of the Application Form (Complaint Details) refers to an alleged failure to comply with Part 3 of the Code; however, the specific sections within Part 3 have not been inserted. The Homeowner must give notice of the particular sections of Part 3 of the Code that he alleges have been breached, in order to provide fair notice to the Property Factor and the Tribunal.*

***The Factor is required to lodge their Written Statement of Services pertaining to the Property ... by 8<sup>th</sup> September 2020.***

7. The Homeowner responded by email dated 2<sup>nd</sup> September 2020, as follows:

*Section 3.1 3.2, Section 2.5 also Their communication was appalling and despite numerous emails and countless telephone calls to various members of Apex staff, I was ignored really. in the email from Neil Cowan 27/9/17, he said, thank you for your email which is being dealt with, I still have not received the refund of the deposit/float and balance due to me. I contacted Mr. Cowan again in January this year and once again was ignored.*

8. On or around 15<sup>th</sup> September 2020, the direction sent to the Factor was returned by Royal Mail marked 'addressee gone away'. Thereafter, it became clear that notification of the hearing had not been intimated to the Factor, and the hearing was adjourned.

9. Notification of a hearing set down for 16<sup>th</sup> November 2020 was made upon the Factor by Sheriff Officers depositing papers on 27<sup>th</sup> October 2020.

### **The Hearing**

10. The hearing was held on 16<sup>th</sup> November 2020 by telephone conference. The Homeowner was in attendance. The Factor was not in attendance.
11. The Tribunal considered the terms of Rule 29 of the Rules. The Tribunal determined that the Factor had been given reasonable notice of the time and date of the Hearing, together with details on joining the telephone conference, as Sheriff Officers had made service at the Factor's registered office. The Tribunal determined that the requirements of Rule 24(1) had been satisfied and that it was appropriate to proceed with the application in the absence of the Factor upon the representations of the Homeowner and the material before the Tribunal

### **Evidence of the Homeowner**

#### **Alleged breach of paragraph 2.5 of the Code**

12. 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.*
13. The Homeowner said he became dissatisfied with the Factor around 5 years ago, and he terminated the relationship between them. He then corresponded with the Factor by email, letter and telephone calls in an attempt to clarify whether there was money owed to him by the Factor. The Factor's Neil Cowan would promise to call him back, and would not do so. Letters and emails went unanswered. This went on over some years. Responding to questions from the Tribunal as to why the Homeowner had delayed in taking the matter to the Tribunal, he said he had not been aware of the existence of the Tribunal until recently.

#### **Alleged Breach of Paragraphs 3.1 and 3.2 of the Code**

14. Paragraph 3.1 states: *If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in 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)*
15. Paragraph 3.2 states: *Unless the title deeds specify 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.*

16. The Homeowner said he asked the Factor for a statement of account following the termination of the relationship. He was aware that money was owed to him. There was no response from the Factor for around three months, then he received a letter stating that he owed the Factor a sum of around £70. He received a letter from the Factor dated 5<sup>th</sup> December 2016 stating that there was no outstanding balance on his account; however, the Factor enclosed a statement of account dated 6<sup>th</sup> November 2015 that showed there was a balance due to him of £69.91. Furthermore, he had paid a float of £120 to the Factor. This did not show up on the statement and he did not have anything to show the exact amount that he had paid by way of float, but he was certain it was £120. The Homeowner said his emails had been hacked and some documents had been deleted. He was unable to access many of the relevant documents.
17. The Homeowner said he thought there might also be sums due to him in respect of payments he had made to the Factor for work that had never been carried out. He had asked the Factor for clarification in this regard, including contractor quotes, but it had never been forthcoming. The Factor had claimed to be having problems with their accounting system. The Homeowner was unable to quantify any such sums due.

#### **Failure to carry out property factor duties**

18. The Homeowner had stated in his application that the Factor had failed to carry out his property factor duties as follows:

*I dismissed Apex because I found them hopeless and there was a bias in favour of the other owner of the property, and I have asked for the return of the float they hold and an overpayment balance. It has been going on for years and they completely ignore emails and never return calls and I was appalled at the conduct of Neil Cowan and his so called knowledge of law*

19. The Homeowner accepted that the matters complained of had been covered in the alleged breaches of the Code, therefore, the Tribunal would not be considering the alleged failure to carry out property factor duties.

#### **Findings in Fact**

20.
  - i. The Homeowner is the owner and occupier of the House, which is a flatted dwelling-house.
  - ii. The Factor registered as a Property Factor on 1<sup>st</sup> November 2012 under registration number PF000103.

- iii. The Factor was removed from the Register of Property Factors on 10<sup>th</sup> January 2020.
- iv. The Factor provided factoring services to the Homeowner from May 2013 to November 2015.
- v. At the start of the relationship between the parties, the Homeowner paid the sum of £120 to the Factor to be held as a float.
- vi. In or around November 2015, the Homeowner terminated the relationship with the Factor.
- vii. From 2015 to 2020, the Homeowner attempted to get information from the Factor concerning sums said to be due to the Homeowner.
- viii. By letter dated 5<sup>th</sup> December 2016, the Factor informed the Homeowner that there was no outstanding balance on his account.
- ix. A statement of account dated 6<sup>th</sup> November 2015 showed that the sum of £69.91 was due to the Homeowner.
- x. The Factor failed to answer queries concerning the amount of float held by the Factor and whether it was due to be repaid to the Homeowner.
- xi. The Factor consistently failed to respond timeously to requests for information from the Homeowner.
- xii. The Factor failed to make available to the Homeowner all financial information that relates to their account timeously following the termination of the relationship.
- xiii. The Factor failed to refund sums due to the Homeowner following the termination of the relationship.

### **Determination and Reasons for Decision**

21. The Tribunal took account of all the documentation provided and the written and oral submissions.

### **Failure to comply with paragraph 2.5 of the Code**

22. The Tribunal found that the Factor had failed to comply with this section of the Code, by failing to respond to enquiries and complaints within prompt timescales.

### **Failure to comply with paragraphs 3.1 and 3.2 of the Code**

23. The Tribunal found that the Factor had failed to comply with these paragraphs of the Code by failing to provide the Homeowner timeously with all financial

information relating to his account and failing to refund sums due to the Homeowner.

## **Observations**

24. The Tribunal did not find that the Factor had retained money in respect of works that were not carried out. The Tribunal considered there was inadequate evidence before it to make any such finding. The Tribunal considered it unfortunate that the Homeowner had not made an application to the Tribunal at an earlier date, when documentary evidence of this allegation may have been available.

## **Proposed Property Factor Enforcement Order (PFEO)**

25. Having determined that the Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO. The Tribunal decided to make a PFEO.
26. In considering the terms of the PFEO, the Tribunal took into account the distress, frustration and inconvenience caused to the Homeowner by the Factor's failure to comply with the Code.
27. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the Property Factor and allow parties an opportunity to make representations.
28. A proposed PFEO accompanies this decision. Comments may be made in respect of the proposed PFEO within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

## **Right of Appeal**

29. 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.

Legal Member and Chairperson

16<sup>th</sup> November 2020

