

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/23/0690

**Flat 2/2, 378 Perth Road, Dundee DD2 1EN
("the Property")**

The Parties:-

**Dr Hannah Naasan, 2 Kincarrathie Crescent, Perth PH2 7HH
("the Homeowner")**

Ross & Liddell Limited, Unit 19 City Quay, Camperdown Street, Dundee DD1 3JA ("the Factor")

Tribunal Member:

**Graham Harding (Legal Member)
Helen Barclay (Ordinary Member)**

DECISION

The Factor has not failed to comply with its duties under section 14(5) of the 2011 Act.

The decision 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 2016 are referred to as "the Rules"

The Factor became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By application dated 6 March 2023 the Homeowner's representative Dr Anas Naasan complained to the Tribunal that the Factor was in breach of Sections 2.1, 2.4 and 7.2 of the Code. The Homeowner's representative submitted written representations together with copies of correspondence between the parties and other documents in support of the complaint.
2. By notice of Acceptance dated 22 June 2023 a legal member of the Tribunal with delegated powers accepted the application and a Case Management Discussion ("CMD") was assigned.
3. By email dated 22 August 2023 the Factor's representatives, Raeside Chisholm Solicitors Limited, Glasgow, submitted written representations and an Inventory of Productions to the Tribunal.
4. By email dated 28 August the Tribunal received a Second Inventory of Productions from the Factor's representatives.
5. By email dated 12 September the Homeowner's representative submitted further documents that the Homeowner wished to rely on at the CMD.
6. A CMD was held by teleconference on 13 September 2023. The Applicant was represented by Dr Anas Naasan. Scott Quinn, Jennifer Johnston and Gavin Baird attended from the Factor and David Doig of Raeside Chisholm Ltd, Solicitors, Glasgow represented it.
7. At the CMD the Tribunal explained to Dr Naasan that the Tribunal's jurisdiction was restricted to complaints regarding the actings of property factors. If there were issues as regards the decision making of a scheme decision such as the decision to appoint a Factor then jurisdiction for any dispute between owners lay with the Sheriff Court. Dr Naasan insisted that his complaint was with the Factor as it had not provided evidence that it had been properly appointed. He said the Factor had repeatedly claimed it had mandates from a majority of owners but had not provided documentary evidence that this was the case. As the Factor's representative said that there were mandates from a majority of owners on file the Tribunal considered that the best way forward would be to adjourn the CMD to allow Mr Doig to lodge the redacted mandates and to fix a further CMD in due course.
8. By email dated 1 December 2023 the Factor's representatives submitted a further Inventory of Productions.

Case Management Discussion

9. A CMD was held by teleconference on 6 December 2023. The Homeowner did not attend but was represented by Dr Anas Naasan. Scott Quinn, Jennifer Johnston and Gavin Baird attended from the Factor who was represented by David Doig from the Factor's representatives.

10. In light of the mandates and other documents submitted by the Factor's representatives, the Tribunal asked Dr Naasan if he was now satisfied that the Factor did have a majority of owners in favour of their appointment as factor. Dr Naasan said that he was not satisfied as only four completed mandates had been returned and therefore that did not constitute a majority of owners.
11. After establishing that there were ten properties in the block and not nine as initially suggested by Mr Doig the Tribunal indicated that to be satisfied that a majority of homeowners were in favour of its appointment as factor the Factor would require a mandate from six owners.
12. For the Factor Mr Doig said that the mandate form was an internal document that was incidental to the appointment of the Factor and that what was important was the acquiescence of the individual homeowners and that the return of the mandate form was not an absolute prerequisite to the Factor taking office. Mr Doig went on to say that six separate owners had approved the appointment and furthermore all of the owners with the exception of Dr Naasan wholeheartedly approved the Factor's actions. He said that the Homeowner had benefited from the improvements to the block that had been carried out as a result of the Factor's involvement.
13. Mr Doig went on to say that in addition to sending out the mandate form to homeowners the Factor had asked for payment of a float of £150.00 and that seven floats had been paid by the end of September 2021. In response to a query from the Tribunal Ms Johnston said that the homeowners who had paid by the end of September had not been sent any reminder to pay. She said that a reminder had been sent to the three owners who had not paid by October and one owner had paid on 23 November 2021 and another on 27 December 2021. It was confirmed that only the Homeowner had not paid a float. For the Factor Mr Quinn said that he did not recall any homeowners other than Dr Naasan finding the payment of the float or their appointment contentious.
14. Dr Naasan submitted that the decision to appoint a Factor had been instigated by two individual owners and that other owners had been misled into paying the float and that it could not be said that a majority of owners were in agreement. Dr Naasan went on to say that in the circumstances the Factor should write to all homeowners and advise that there had been misleading information provided previously and ask them to return a further mandate as the whole process was not properly conducted previously.
15. For the Factor Mr Doig submitted that the Factor had met its management obligations and that the homeowners had fully embraced the services provided by the Factor. If there was an issue between owners as regards the initial appointment of the Factor then the Homeowner's remedy would be to obtain a Declarator from the Court.
16. Dr Naasan submitted that the Factor had repeatedly claimed that it had mandates from a majority of owners when it only had from five out of ten. As a result, the Factor should not have proceeded to take office.

17. Mr Quinn submitted that although not all the mandate forms had been returned owners had paid their floats without prompting.
18. In response to a query from the Tribunal Mr Baird confirmed that his involvement with two of the homeowners, Ms Isaacs and Mr Robertson, had been through a number of communications over some months prior to being appointed dealing with some queries over maintenance and services to be provided. It was confirmed to the Tribunal that prior to the appointment of the Factor the building had been self-managed.
19. The Tribunal clarified with Dr Naasan and Mr Doig that the parties were satisfied from the documents produced and the oral submissions that the Tribunal had sufficient information before it to make a decision and that a hearing was not required.

The Tribunal make the following findings in fact:

20. The Homeowner is the owner of Flat 2/2 378 Perth Road Dundee DD2 1EN ("the Property")
21. The Property is a flat within the tenement 374 to 382 Perth Road Dundee (hereinafter "the building").
22. The Factor performed the role of the property factor of the building.
23. By an email dated 8 August 2021 a homeowner in the building confirmed to the Factor that a majority of owners wished to appoint the Factor.
24. By correspondence dated 25 August 2021 the Factor wrote to the Homeowner and the other owners in the building advising of receipt of a letter of appointment and proposing a start date of 1 September 2021.
25. It was a strict condition of the Factor's appointment that owners paid a float of £150.00 in advance of the start date.
26. The Factor suggested in the correspondence of 25 August 2021 that homeowners returned a completed mandate form that was enclosed with the correspondence.
27. Four Homeowners returned completed mandate forms.
28. One homeowner sent an email to another homeowner confirming his approval of the appointment of the Factor.
29. An agent for one homeowner advised another homeowner that her client would vote with the majority.

30. Seven homeowners paid their £150.00 float by the end of September 2021 and a further two owners paid in November and December 2021.
31. The Homeowner's representative complained to the Factor by email dated 2 September 2022 that he was unaware of any arrangement to appoint the Factor and did not approve its appointment.
32. By email dated 9 September 2021 Mr Scott Quinn from the Factor acknowledged the Homeowner's representative's complaint and advised that as a majority of owners were in favour of the appointment the Factor's appointment had been ratified.
33. Following further email exchanges between the Homeowner's representative and the Factor between September 2021 and May 2022 the Homeowner's representative sought to further his complaint through the Factors complaint procedures.

Reasons for Decision

34. This application raises a number of issues not least of which is where the Applicant's complaint might really lie. The Tribunal has jurisdiction to determine complaints by homeowners in respect of alleged breaches of the Code or in respect of the failure of a Factor to carry out its property factor's duties. The Tribunal does not have jurisdiction to adjudicate on disputes between homeowners. A fundamental part of the Homeowner's complaint is that she was not consulted and did not vote for the Factor to be appointed. The Tribunal has no role to play in that and if there were irregularities in the method of appointment of the Factor the Homeowner's remedy would lie in another jurisdiction.
35. The Factor in its written representations submitted that any pre-appointment correspondence with a homeowner interested in employing their services would not be relevant communications that would be the subject of recovery by the Homeowner under any provisions of the Code and the Tribunal agrees that would be correct. The Factor also suggested that it was the Homeowner's position that the Factor should adopt an investigative role when approached by, as in this case one or two owners in a building, and take steps to ensure that there is indeed a majority of owners in favour of agreeing to employ them. The Tribunal agrees with the Homeowner here in as much as it would be totally inappropriate for one or two owners to hold out that there was a majority decision if there was not. However, the Tribunal does not accept that the Factor need do more than accept the written authority of a homeowner that he or she has obtained a majority in favour. It is not at that stage for the Factor to do anything more than the Factor did on this occasion namely write to all the owners advising them of receipt of the correspondence advising that a majority was in favour of the appointment and requesting payment of £150.00 as a strict condition of the commencement of their employment. It would then be for the individual homeowners to ratify the Factor's appointment or not by paying the float. The Tribunal considers that it is significant that it was payment of the float that would commence the contract

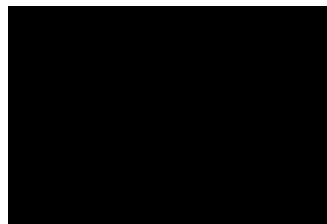
whereas completion of the mandate form was requested and deemed to be helpful but not essential. As was pointed out by Mr Doig seven of the floats were paid without further request from the Factor by the end of September and therefore the Tribunal agrees with the Factor that they were, following receipt of the correspondence confirming their appointment, then properly appointed.

36. The Homeowners representative has submitted that the Factor's letter of 25 August 2021 was false and misleading however the Tribunal does not accept this for the reasons given above. Although the number of mandates returned together with other correspondence received may not in numerical terms comprise a majority, the float payments voluntarily made did indicate to the Factor that they had a mandate and therefore although the Tribunal considers that this matter could have been handled with more clarity, it does not find that the Factor is in breach of Section 2.1 of the Code.
37. The Tribunal did not see any evidence that the Factor did not have a procedure to consult with homeowners and seek their approval before providing work or services that would incur charges in addition to those relating to core services. The Tribunal therefore finds that the Factor is not in breach of Section 2.4 of the Code.
38. It appeared to the Tribunal that the Homeowner's representative availed himself of the Factor's Stage one and Stage two complaints procedure before making a decision to take the Homeowner's complaint to the Tribunal. Although it appeared a further complaint stage was available the stage two complaint letter referred the Homeowner's representative to the availability of the Tribunal if he remained dissatisfied with the outcome of his complaint. The Tribunal is therefore satisfied that the Factor was not in breach of Section 7.2 of the Code.
39. The Tribunal as noted above indicated that there were a number of issues relating to this application. The Homeowner has submitted the application in respect of a complaint that the Factor was in breach of the 2012 Code which related to complaints arising from an alleged act or omission of a property factor before 16 August 2021. However, the Factor's appointment did not commence until 1 September 2021 at the earliest and the first communication with the Homeowner was on 25 August 2021. The Tribunal therefore has had some difficulty in considering that the application was in fact valid. The Tribunal did consider that it may be possible that some pre-contract discussions with the Homeowner would be relevant but as indicated above this would not extend to pre-contract discussions with other homeowners. Furthermore, any complaints instigated by the Homeowner's representative were clearly made after 16 August 2021 and therefore should have been made under the 2021 Code.
40. Taking everything into account the Tribunal is satisfied that the Homeowners complaint should not be upheld. If there was a failure to comply with regulations on reaching a scheme decision then any dispute between the Homeowner and other owners would require to be resolved in another

jurisdiction. The Tribunal was satisfied that the actings of the Factor were compliant with the Code.

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.



Legal Member and Chair

10 December 2023

Date