



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

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

Chamber Ref: FTS/HPC/PF/19/2184

Re: Property at Flat 2/1, 8 Whitehill Street, Glasgow G31 2LJ ("the Property")

The Parties:

Mr Kevin Brown, Flat 3/2, 6 Bowmont Gardens, Glasgow G12 9LR ("the Home Owner")

Apex Property Factor, 46 Eastside, Kirkintilloch, East Dunbartonshire G66 1QH ("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 2.1, 2.4, 2.5, 3.2 and 3.4 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 9th July 2019 the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with Sections 2.1, 2.4, 2.5, 3.2 and 3.4 of the Code.

On 5th September 2019 a Convenor on behalf of the President accepted the application and referred it to a Tribunal for a hearing. By letters dated 11th September 2019 both parties were notified that the application had been referred to a Tribunal and that a hearing would take place at 10am on 5th November 2019 at Glasgow Tribunals Centre, 20 York Street, Glasgow.

The Tribunal granted a postponement request from the Homeowner seeking a postponement of the Hearing upon the basis that the Homeowner was unavailable on the 5th November 2019, which request was not opposed by the Property Factor.

Thereafter, by letters e-mailed to the parties on 11th October 2019 both parties were notified that a hearing would take place at 10am on 9th December 2019 at Glasgow Tribunals Centre, 20 York Street, Glasgow.

A Hearing was held on 9th December 2019 at Glasgow Tribunals Centre, 20 York Street, Glasgow. The Homeowner appeared, and was not represented. The Property Factor did not appear, and was not represented. The Property Factor had previously advised the Tribunal that it intended to appear, and also submitted written representations.

Rule 29 (Hearing case in the absence of a party) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended provides that if a party or a party's representative does not appear at a hearing, the Tribunal may proceed with the application upon the representations of any party present and all the material before it, if it is satisfied that the requirements of Rule 24(1) regarding the giving of notice of a hearing have been duly complied with.

The date, time and location of the Hearing was intimated to the Property Factor, the Tribunal was satisfied that the requirements of Rule 24(1) have been complied with, and considered it was appropriate and in the interests of justice to proceed in the absence of the Property Factor.

The Tribunal confirmed with the Homeowner that, in essence, all of his complaints related to the retention of the sum of £350.00 by the Property Factor, which he alleged was wrongful upon the basis that the money was paid out to it in respect of work to the roof of the Property which was, in fact, not undertaken.

This amount had been “retained” at the time of his purchase of the Property in about February 2016 in respect of the work which it was anticipated would be carried out, and for which he understood the parties who sold the Property to him, Allan and Anne Reid, were liable.

He was unclear about the practical and legal mechanism used by his and the seller's respective solicitors, but was aware that the money had been paid to the Property Factor by the seller's solicitors, Frederick and Co, to cover the cost of the roof work.

It had, in fact, not been done, and accordingly the Property Factor agreed to return the money to Fredrick & Co by e-mail to him of 14th June 2019.

The Homeowner also indicated that he considered that he had removed the Property Factor from its role in respect of the Property in about February 2018, but he again was unclear about the legal mechanism and his legal entitlement to do that.

The Tribunal rose to consider the Homeowner's submissions, and then resumed the Hearing.

Rule 28 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended allows the Tribunal discretion on its own initiative or on an application by a party, to adjourn a Hearing.

The Tribunal considered it to be reasonable to adjourn the Hearing in the whole circumstances in terms of Rule 2 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

The Tribunal was persuaded that it was in the interest of justice, and consistent with its overriding objective of dealing with the proceedings justly, and ensuring, so far as practicable, that the parties are on equal footing procedurally and are able to participate fully in the proceedings in terms of Rule 2 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended, to adjourn the Hearing for the purpose of obtaining further information in light of the Homeowner's explanation.

It appeared to the Tribunal to be critical to its determination of this case to identify whether the Homeowner was entitled to unilaterally terminate the Property Factor's role as factor of the Property, and if he was, whether he had successfully done that.

For that reason, the Tribunal issued a direction to both parties directing the Homeowner to provide copies of his title to the Property and any deed of conditions in respect thereof, and directing the Property Factor to confirm whether or not it considered that it still acted as factor of the block of flats of which the Property forms part.

It also appeared to the Tribunal critical to its determination of this case for it to understand the legal basis, and factual background, relating to the retention of the sum of £350.00 at the time of the Homeowner's purchase of the Property in 2016 with regard to pending roof repairs.

The Tribunal accordingly issued Rule 21 letters to both the solicitors acting for the Homeowner, and those acting for the parties who sold the Property to him, Mr & Mrs Reid, requiring them to produce copies of the missives of sale, and to confirm, in so far as they had knowledge, of the arrangements and legal basis under which the sum of £350.00 was retained, and to further confirm the legal basis and details relating to the payment of that sum to the Property Factor, and the legal basis and details relating to the repayment of that sum by the Property Factor.

Once the Tribunal received the above information, which it stated was to be provided by 23rd December 2019, it would be in a position where it was fully aware of the circumstances relating to this matter, and could then hear parties and make a determination relating to this application.

For these reasons the Tribunal postponed the Hearing to a further date. After so doing, the Tribunal clerk identified a date with the Tribunal members, and with the Homeowner, of 30th January 2020, when all were available. In the absence of the Property Factor or any representative present on its behalf, it was not possible to confirm its availability.

The Continued Hearing

A continued Hearing was held on 30th January 2020 at Glasgow Tribunals Centre, 20 York Street, Glasgow. The Homeowner appeared, and was not represented. The Property Factor did not appear, and was not represented.

Rule 29 (Hearing case in the absence of a party) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended provides that if a party or a party's representative does not appear at a hearing, the Tribunal may proceed with the application upon the representations of any party present and all the material before it, if it is satisfied that the requirements of Rule 24(1) regarding the giving of notice of a hearing have been duly complied with.

The date, time and location of the Hearing was intimated to the Property Factor, the Tribunal was satisfied that the requirements of Rule 24(1) have been complied with, and considered it was appropriate and in the interests of justice to proceed in the absence of the Property Factor.

In the period between the Hearing and the continued Hearing, the Property Factor was removed from the Property Factor Register under section 8(1) of the 2011 Act. In those circumstances, the Tribunal observes that although this application remains competent, it cannot issue any Property Factor Enforcement Order in the event of any breach of the Code it might find established, save in respect of an order to pay compensation, against a party who is no longer registered as a Property Factor.

Both the solicitors earlier referred to provided the information sought by the Tribunal in the Rule 21 letters sent to them.

In particular, they provided copies of the missives of sale in relation to the Property between the Homeowner and Allan and Anne Reid, comprised of formal letters dated 9th and 15th December 2015, and 17th, 18th, and 22nd February 2016.

The letter of 17th February 2016, clause 4, appears to deal with the question of the retention in respect of roof works earlier mentioned. It provides that "...the Seller will be liable for the Property's share of the cost of repairs to the roof referred to in the letter from the factor dated 22nd January 2016".

The letter from the Property Factor dated 22nd January 2016 was also provided. This confirms that the Property Factor requested that the sum of £350.00 be retained in respect of the roof repairs.

In these circumstances, it appears that £350.00 of the purchase price paid by the Homeowner was to be retained in respect of the roof repair works in terms of the missives.

Thereafter, it appears that this retained amount was released and paid to the Property Factor, despite the fact that the repair work had not been carried out.

The Homeowner confirmed that the repair work was subsequently carried out by the Homeowner and his neighbours in the block of which the Property forms part, and that he (understandably) wishes to be paid the retained sum of £350.00 in respect of the cost of those works.

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 appears to the Tribunal that any claim to the retained amount by the Homeowner was a contractual one in terms of the missives against Allan and Anne Reid. The Property Factor has no liability in law to pay the Homeowner the retained amount.

It may well be that Allan and Anne Reid might have some form of claim for repetition of the money paid by them to the Property Factor in respect of the cost of works which it appears were not carried out. However, the Homeowner does not have any such claim.

The Homeowner indicated to the Tribunal that he had come to the same conclusion after reading the missives, and had nothing further to add.

As earlier noted, he accepted that all of his complaints in relation to the breach of the Code were predicated upon the Property Factor being in breach of an obligation to pay him the deposit, and that if there was no such obligation, then his complaints were ill-founded.

In those circumstances, the Tribunal did not require to consider any of the other issues raised at the Hearing of 9th December 2019, and 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.

Legal Member

Date