

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/17/0402

**278/1 London Road, Glasgow, G40 1PT
("the property")**

The Parties:-

**MR DALE HUGHES, 59 Braid Road, Edinburgh, EH10 6AR
("the Applicant")**

**JAMES GIBB PROPERTY MANAGEMENT LIMITED, 65 Greendykes Street, Glasgow, G1 5PX
("the Respondent ")**

**Tribunal Members:
GRAHAM HARDING (Legal Member)
MARY LYDEN (Ordinary Member)**

DECISION

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 as required by Section 14 of the Property Factors (Scotland) Act 2011 determined unanimously that in relation to the Applicant's Application the Respondents have not complied with Section 4.9 of the Code of Conduct for Property Factors.

In all the circumstances of the case the tribunal did not consider it necessary to make a Property Factors Enforcement Order.

INTRODUCTION

In this decision we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "the Regulations"

The Respondens 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. The Applicant made an application to the tribunal in terms of an application dated 25 October 2017.
2. Following requests for further information a decision was made on 19 February 2018 by a convenor with delegated powers under Section 18 (a) of the 2011 Act to refer the application to a tribunal.
3. Notices of Referral were sent to the parties on 13 March 2018.
4. The Application and supporting documents set out the Applicant's concerns regarding the Respondent's pursuit of an alleged debt incurred by the Applicant and said to be due to the Respondents in respect of repairs undertaken by the Respondent's predecessors as Factors, namely Grant & Wilson Property Management Limited. The Applicant also queried the Respondent's authority to act as Property Factors in terms of Section 1 of the Code.

THE HEARING

5. A Hearing took place at Glasgow Tribunal Centre, 20 York Street, Glasgow, on 23 April 2018. The Applicant appeared personally. The Respondents were represented by Deborah Rummens, Operations Director of the Respondents.
6. The parties made oral submissions and referred to the documents and written representations that were before the tribunal

SUMMARY OF SUBMISSIONS

7. The Applicant made reference to his previous complaint to the Homeowners Housing Panel ("HOHP") against Grant & Wilson Property Management Limited (reference HOHP/PF/13.0093). He explained that whilst he had not in that application challenged that Factor's authority to act he had subsequently queried with the Respondents the basis on which they had been appointed as Factors.
8. The Applicant stated that he was astonished and surprised that shortly after the Respondent assumed the role of Property Factors they began to pursue him for a debt which the Applicant said had been adjudged by the HOHP in their decision of 18 November 2015.
9. The Applicant made reference in particular to paragraph 26 of this decision in which the HOHP committee found that the Property Factors, Grant & Wilson Property Management Limited, had been in breach of Section 2.4 of the Code in that they had failed in respect of various duties including consulting with homeowners and obtaining approval before instructing works that would incur fees or charges.
10. The Applicant pointed out that there was a mechanism within the title deeds of the properties within the block of which the property formed part for approving common repairs that required a meeting of homeowners and a majority decision. According to the Applicant, without these procedures being following the Property Factors would not get beyond first base.

11. The Applicant submitted that he also questioned the whole way in which the Respondents had been appointed as Property Factors as there had been no meeting of homeowners called and no majority decision to vote the Respondents as Factors.
12. According to the Applicant when he raised this with the Respondents he was referred to look at paragraph 2.1 of their written statement of services. The Applicant found this to be unsatisfactory as it did not specify exactly the basis on which the Respondents were appointed.
13. The Applicant stated that in terms of Section 17 (5) of the 2011 Act there was a reasonable implied duty on the part of the Respondents to only collect a debt that they had the legal powers to do. The Respondents could not go to a member of the public and claim payment for a debt that did not legally exist.
14. The Applicant said his complaint was in two parts. Firstly that the debt had already been adjudged by the HOHP who had found that there had been a breach of Section 2.4 of the Code and secondly that the Respondents did not have the power to collect the debt as they were not the Factors as there had not been a majority decision to appoint them,
15. The Applicant submitted that the Respondents could not step into a contract that did not exist. They could not inherit a better title to act and to claim they could was arrogant and ludicrous and against the Rule of Law. In common law a party only has a duty to seek payment when they have the power to do so.
16. The Applicant says that he considered the addition of a late payment fee was inappropriate when the Respondent had no right to claim the original debt in the first place.
17. The Applicant thought that whilst the Respondent's pursuit of the debt and demand for payment was not threatening it was knowingly misrepresenting its authority to collect the debt and was therefore a breach of Section 4.9 of the Code or if not knowingly then it was carelessly by not making an effort to explain its authority to act in this way.
18. The Applicant further submitted that by seeming to assert that the HOHP decision of 18 November 2015 did not apply to it, the Respondents were close to committing a contempt and considered the Respondents' arrogance as breath-taking.
19. The Applicant was also of the view that as there was no majority vote for the appointment of the Respondents as Property Factors by the homeowners they could not assume the right to take on any debts due to the previous Factors. The Applicant did not accept that just because he had paid the Respondents for other parts of the costs associated with the maintenance of the common parts such as the gardens and the block insurance that they were properly constituted as Factors.
20. Miss Rummens for the Respondents explained that due to computer changes in the previous Factor's system the Respondents did not have records before March

2012. She explained that the business and assets of Grant & Wilson Property Management Limited were transferred by way of an asset sale and purchase to Grant & Wilson Residential Factors Limited and the shares of Grant & Wilson Residential Factors Limited were then purchased by the Respondents on 2 March 2015. Following the acquisition the Respondents Chief Executive issued a statement to all homeowners affected.

21. Miss Rummens explained that the Respondents acquired 503 buildings and developments and that she had joined the Company to assist with the handover but had not been party to the due diligence. The Respondents had acquired the assets of Grant & Wilson. The liabilities remained with that Company.
22. Miss Rummens went on to explain that since March 2015 the Respondents had continued to manage the Grant & Wilson properties. The Respondents had written to homeowners on 2 March 2015 and a newsletter setting out the transitional arrangements have been sent in about September 2015. Homeowners were advised that written statements of services were available online and would be posted out if requested.
23. Miss Rummens explained that the HOHP decision was issued after the Respondents had acquired the Grant & Wilson assets and at that time the alleged debt was in abeyance. Miss Rummens went on to say that whilst the Respondents had not sought advice from their own Solicitors in connection with the Applicant's complaint they had been advised by the Solicitor who had acted for Grant & Wilson that the debt was lawful and would have been passed to the Respondents to collect from the Applicant.
24. As a result of believing that the debt was due the Respondents had pursued the Applicant for the outstanding balance of £326 together with a late payment fee of £20 plus VAT. Beyond demanding payment no further action had been taken. Miss Rummens said that she was aware that the Applicant had been threatening to make an application to the Tribunal since 2016 and this had materialised in 2018.
25. Miss Rummens explained that the Applicant had paid his factoring accounts by direct debit but this had been cancelled on 20 June 2016 (this was disputed by the Applicant who said he had never paid by direct debit) and that thereafter payment of the factoring costs had been made by the Applicant by bank transfer with the core balance remaining outstanding at £330.
26. Miss Rummens accepted that the Respondents had never held a meeting with co-owners to confirm their appointment as Factors as it had been the Respondents understanding that they had continued as Factors following the asset transfer. Miss Rummens said that the Respondents had discussions with owners over various issues and in particular with regards to grant funding that was available through Glasgow City Council's regeneration scheme that could be available to all co-owners if they have a Factor. No co-owners with the exception of the Applicant had questioned the Factor's appointment.

27. Miss Rummens accepted that with regards to the original work carried out and to which the alleged debt referred, the Respondents did not have the original documents and therefore were not able to evidence the debt.
28. Miss Rummens said that having heard the Applicant's submissions she had formed the view that it would not be the Respondent's intention to pursue the Applicant any further for the debt said to have been acquired from Grant & Wilson and she undertook to issue written confirmation of that decision to the tribunal within 2 days.
29. Miss Rummens also pointed out to the tribunal that she believed that the Applicant had sold the property on 26 March 2018. This was confirmed by the Applicant.
30. The Applicant felt that given the time and effort that he had been put to in order to vindicate his position that the debt was not due he ought to be awarded compensation for his inconvenience.

FINDINGS IN FACT

31. The Applicant was until 26 March 2018 the owner of the property.
32. The property is a flat within a development at Weavers Court, London Road, Glasgow ("the development").
33. The Respondent performed the role of Property Factor of the development having acquired that right from the development's previous Factors, Grant & Wilson Property Management Limited on 2 March 2015.
34. The Applicant did not challenge the previous Factor's authority to act as Property Factor and paid the Respondents when requested for his share of the cost of maintenance of the common garden areas and block insurance.
35. Whilst the decision of the Homeowners Housing Panel of 18 November 2015 found that the Factors, Grant & Wilson Property Management Limited had breached Section 2.4 of the Code the committee did not specifically order the Factors to cancel any charges relating to the breach but it is possible to infer that this may have been the Committee's intention in that the then Factors would not have been entitled to instruct certain works without the specific approval of a majority of owners.
36. The Respondents failed to properly consider the complaint made by the Applicants with regards to the debt claimed prior to the Hearing.
37. The Respondents have decided that they will no longer seek to pursue the Applicant for payment of the debt.

REASONS FOR THE DECISION

38. Whilst the Tribunal acknowledged that the HOHP had previously adjudicated on the complaint by the applicant against the previous Factors, Grant & Wilson Property Management Limited and had found the Factors to have breached Section 2.4 of

the Code, it was not entirely clear from the committee's decision whether it had been intended that the Factor should not charge the Applicant for the repairs. There was however an inference that this was indeed the case.

39. Although this had not previously been accepted by the Respondents, it was during the course of the Hearing accepted by Miss Rummens that it would not be appropriate for the Respondents to continue to pursue the Applicant for payment of the debt and by e-mail letter dated 23 April 2018, the Respondents confirmed to the Tribunal that the debt of £328 would be cancelled.
40. The tribunal did not accept the Applicant's assertion that the Respondents were not properly appointed as Factors for the development. As the appointment of the previous Factors had not been challenged and as it appeared that the Respondents had acquired the business assets of Grant & Wilson Property Management Limited it seemed to the tribunal that the Respondents were the Factors in succession to Grant & Wilson and would continue in that capacity until their appointment was terminated in accordance with Clause (FOURTH) (Third) of the Feu Disposition by City of Glasgow District Council to Barratt Glasgow Limited recorded GRS (Glasgow) on 9 March 1982. The Tribunal were further fortified in its decision by the fact that the Applicant chose to accept the Respondents to act as Factors when it came to renewing the block insurance policy and arranging for garden maintenance.
41. Given that the Respondents had agreed to cancel the debt that they had believed had been due the tribunal considered it was not necessary in all the circumstances to make a PFEO. In so doing the tribunal considered the additional points made by both the Respondents in their e-mail letter of 23 April 2018 and the Applicant's response of 24 April 2018 and in particular the Applicant's request for compensation. The tribunal concluded that although it had taken some time to reach a satisfactory conclusion it would not in all the circumstances be appropriate to make any award of compensation in this case given the somewhat ambivalent terms of the original decision of the Homeowners Housing Panel.

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.

Graham Harding

Legal Member

8 May 2018

Date