

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Decision issued under s19 of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/21/1957

The Property: 96 Hay Street, Perth, PH1 5HP (“The Property”)

The Parties:-

Angela Docherty, residing at 96 Hay Street, Perth, PH1 5HP (“the applicant”)

PLS Rural Ltd, a company incorporated under the Companies Acts and having their registered office at 8 Cornhill Way, Perth, Scotland, PH1 1LJ (“The Property Factor”)

The Tribunal, having made such enquiries as it saw fit for the purposes of determining whether the Property Factor has complied with the code of conduct as required by Section 14 of the 2011 Act, determined that the Property Factor has inadvertently breached the code of conduct for property factors but has not failed to carry out its duties in terms of s.17 of the Property Factors (Scotland) Act 2011.

A Property Factor Enforcement Order is not necessary

Committee Members

Paul Doyle	Legal Member
Elaine Munroe	Ordinary Member

Background

1 By application dated 13 August 2021, the applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination of her complaint that the Property Factor has breached the code of conduct imposed by Section 14 of the 2011 Act & that the Property Factor has failed to comply with the property factor’s duties.

2 The application stated that the applicant considered that the Property Factor failed to comply with Section1 - 1.1a/A and 1.1a/D, section 2.1 and section 7.1 of the code of conduct for property factors and breached the property factor’s duties.

3 By interlocutor dated 30 August 2021, the application was referred to this tribunal. The First-tier Tribunal for Scotland (Housing and Property

Chamber) served notice of referral on both parties, directing the parties to make any further written representations.

4 The applicant lodged further written representations on 28 & 30 September 2021 and 29 October 2021. The Property Factor provided written representations dated 13 and 29 September 2021.

5. A hearing was held by telephone conference on 5 November 2021. The applicant was present and unrepresented. Ms Patricia Sanderson, director of the Property Factor's Limited Company was present, represented by Ms Catriona Stewart of Clyde & Co (Scotland) LLP.

Findings in Fact

6 The tribunal finds the following facts to be established:

(a) The applicant is the proprietor of a flatted dwelling-house forming part of a larger development of three blocks containing 24 flatted dwelling-houses ("the larger property") known as 88 to 102 Hay Street, Perth. The applicant has owned her flatted dwelling-house since September 2018. The title deeds to the property provide for the appointment of a property factor to maintain and manage the common parts of the larger property.

(b) The appointment of the property factor to manage and maintain the common parts of the larger property is governed by the deed of declaration of conditions recorded GRS Perth on 15 April 1968 by A & J Stephen Ltd. Clause 10th of the deed of conditions provides that the property factor shall be appointed by the decision of a meeting of the proprietors of the several houses and garages of the larger property. To meet the requirements of the deed of conditions, Hay Street Flats Residents' Association was formed. Clause 11th of the deed of conditions provides that each household within the larger property has one vote at any meeting of homeowners.

(c) Clause 11th of the deed of conditions enables any two homeowners to call a meeting of all of the proprietors of the larger property. Clause 11th provides that the meeting will be quorate if there are at least seven homeowners provided that, amongst those seven homeowners, there is at least one homeowner from each of the three blocks. A quorate meeting can make majority decisions in relation to the necessary maintenance and management of the common parts of the larger property.

(d) At an annual general meeting of the residents Association on 27 September 2013, Bill Davison, a former committee member of the Residents' Association, was appointed as property factor. He served as property factor to the larger property until his retirement in 2020. Mr Davison died in October 2020.

(e) On 26 March 2020, Hay Street Flats Residents' Association, wrote to each proprietor of the larger property notifying each proprietor that the

property factor had retired and, because of the restrictions caused by the Covid-19 pandemic, it was not known when it would be possible to hold an AGM. That letter reported that the Property Factor's services had been recommended, and that the Property Factor had produced an acceptable tender for appointment as property factor to the larger property. The chairperson of the Residents' Association recommended accepting the Property Factor's tender. It was proposed that a postal vote would be used in place of an AGM.

(f) Patricia Sanderson is a chartered surveyor and is the company director of the Property Factor. The Property Factor is a company incorporated under the Companies Acts.

(g) Between 30 March 2020 and 9 April 2020 there was an email exchange between the applicant and the Property Factor in which the applicant and Property Factor discussed delaying the appointment of a property factor until it was possible to hold an AGM for the Residents' Association.

(h) By letter dated 8 April 2020 the chairperson of the Residents' Association wrote to each homeowner stating that the postal vote to appoint the property factor could not be held, but an AGM would be arranged as soon as possible. In the meantime, the Residents' Association was seeking further tenders from potential property factors, but still recommending the services of the Property Factor.

(i) On 22 September 2020 the Residents' Association, wrote to each homeowner advising that the Bill Davidson (the former property factor) was seriously unwell and had been hospitalised. He had been fulfilling the functions of property factor in an unofficial capacity since his retirement. The letter from the Residents' Association went on to say that the committee of the Residents Association have decided to approach the Property Factor to ask them to act as property factor on a temporary basis until an AGM could be arranged.

(j) On 5 October 2020, the Property Factor wrote to each homeowner to introduce their limited company. The first paragraph of the letter says

following on from the recent review of the factoring of the Hay Street Flats, I would like to take this opportunity to thank you for your instruction to look after the management requirements of your property.

(k) On 22 October 2020, there was an email exchange between the applicant and the Property Factor. The Property Factor wrote

there is no sign of the paperwork for my appointment at the moment, hence why everything is temporary, but, at the committee's request, I am prepared to help out until such time as a meeting of the owners can be held and either another factor appointed or my appointment is made permanent.

(l) The Property Factor assumed the role of property factor in October 2020. In March 2021, the Property Factor provided a property factor's report to the

Residents' Association. That report indicates that the Property Factor dealt with the Residents' Association accounts and had access to the bank account reserved for maintenance costs. The Property Factor managed communal insurance for the larger property and dealt with repairs and maintenance for the larger property

(m) The Property Factor's report dated March 2021 talks of the prospect of appointment in the future ("once appointed, I would like to investigate the possibility of taking out a block policy, which would cover the whole building"), but concludes with the words

it has been an unconventional start to my factoring role at Hay Street, but I am hoping that over time I will become more familiar with the property and look forward to meeting as many of you as possible in the near future.

(n) On 26 July 2021. The chairperson of the residents Association, wrote to each homeowner saying that the respondent had been

helping with the day-to-day management of the Hay Street Flats

since the unexpected death of Bill Davison. The author of the letter bemoaned the inability to hold an AGM, but expressed hope that it would be possible to hold an AGM on 31 August 2021.

(o) On 31 August 2021, the Residents' Association held an EGM and appointed the Property Factor as property factor to the larger property. On 14 September 2021, the Property Factor sent each homeowner a written statement of services. That written statement of services records that the Property Factor was appointed by a majority vote at a quorate EGM held on 31 August 2021. A revised version of the written statement of services has since been issued.

(p) Since October 2020 the Property Factor's primary point of contact has been with the Residents' Association. After appointment on 31 August 2021, the Property Factor invoiced the homeowners for factoring service provided from November 2020 to August 2021.

Reasons for decision

7 (a) In the most recent representations made by the applicant, the applicant explains that the Property Factor issued a written statement of services in September 2021. The applicant wants to raise arguments about the content of the written statement of services by reference to the amended code of conduct for property factors, which came into force on 16 August 2021. It was explained to the applicant that we could not listen to evidence and submissions about the content of the written statement of services because the amended code of conduct for property factors is not retrospective and because the requirements of section 17(3) of the Property Factors (Scotland) Act 2011 were not met. The applicant graciously accepted that our jurisdiction is limited to the application as framed on 13 August 2021.

- (b) The agreed facts in this case are that the Property Factor's predecessor died during the Covid-19 pandemic. Between at least 1 November 2020 and 31 August 2021 the Property Factor provided property factoring services to the Hay Street Flats Residents' Association. The Property Factor did not issue a written statement of services until 14 September 2021. The Property Factor was appointed at an EGM of Hay Street Flats Residents' Association on 31 August 2021.
- (c) It is beyond dispute that the Property Factor (still) believes that until 31 August 2021 they were not the property factor, but were either temporary property factors or simply offering assistance to Hay Street Flats Residents' Association in their time of need.
- (d) It is also beyond dispute that Scotland has been in the grips of a Covid-19 pandemic since March 2020. Between September 2020 and 31 August 2021, there have been various restrictions on gatherings, which at times has made meeting such as an EGM impossible; at times it has made meetings such as EGMs difficult to organise and manage.
- (e) The first question for us to answer is whether or not the Property Factor was, in fact, a property factor for the larger property between September 2020 and 31 August 2021. The applicant says that the Property Factor was the property factor. The Property Factor says that they were not.
- (f) What is not disputed is that the Property Factor provided factoring services from at least 1 November 2020. The Property Factor's appointment had not been made at an AGM, so that Miss Sanderson, as office bearer of the Property Factor, believed that her company was either providing assistance during a time of need, or, alternatively, a temporary property factor. The Property Factor's position is that the code of conduct and the property factors' duties did not apply until they were formally appointed.
- (g) If it were not for the Covid-19 pandemic, it would be realistic to expect that the Property Factor would have been formally appointed in the middle of 2020. The Covid pandemic prevented an AGM from being held, but that did not prevent the Residents' Association from accepting the services of the Property Factor.
- (h) The undisputed facts in this case tell us that the Property Factor arranged communal insurance, instructed repairs and maintenance work, and, after being formally appointed, charged for the work carried out between November 2020 and August 2021. The Property Factor described itself as a *temporary property factor*. Even if the Property Factor was just a property factor ad interim, that is still appointment as property factor.
- (i) The only realistic conclusion we can draw is that the Property Factor provided factoring services. Despite the informality of their appointment, they were property factors obliged to operate within the terms of the code of conduct for property factors and the 2011 act. The Property Factor acted with

the best of intentions, but good intentions do not absolve the Property Factor from the duty to adhere to statutory law and the code of conduct.

(j) Section 1.1.a/A of the code of conduct says

The written statement should set out:

A. Authority to Act

- a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group;
- b. where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation;

(k) Section 1.1a/D of the code of conduct says

D. Communication Arrangements

- i. your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied following completion of your inhouse complaints handling procedure (see Section 7: Complaints resolution);
- m. the timescales within which you will respond to enquiries and complaints received by letter or e-mail;
- n. your procedures and timescales for response when dealing with telephone enquiries;

(l) The Property Factor breached sections 1.1 A of the code of conduct, because, for the 10 months until the end of August 2021, whilst acting as property factor ad interim, the Property Factor did not produce a written statement of services.

(m) section 2.1 of the code of conduct for property factors, says

2.1 You must not provide information which is misleading or false.

(n) The applicant's complaint in this regard focuses on a letter from the Property Factor dated 5 October 2020, from which we quote at paragraph 6(j), above.

(o) "*Misleading or false information*" implies, at least, disingenuity. That is far too harsh an interpretation to place on the words of the Property Factor's letter of 5 October 2020. On the facts as we find them to be, the Property Factor's actions were driven by confusion and naivete, not dishonesty. The letter of 5 October 2020 is a letter of introduction, in which the Property Factor explains who they are, what they do, and their belief that their appointment is an informal, temporary, arrangement. On a fair reading, there is nothing either false or misleading about the contents of the letter.

(p) Section 7.1 of the code of conduct says

- 7.1 You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.

(q) We have already found that the Property Factor did not have a written statement of services between September 2020 and 14 September 2021. We have also found that the written statement of services should have been in place not later than November 2020. We find a breach of section 1.1 of the code of conduct for property factors. By analogy, we must find a breach of section 7.1 of the code of conduct, because until 14. September 2021 there was no clear written complaints resolution procedure.

(r) The applicant says that the Property Factor breaches the property factors' duties. The applicant is critical of the Property Factor for failure to notify her about works instructed. The applicant is fearful that the Property Factor wants to govern by committee, and that, so far, the Property Factor's point of contact has been the Residents' Association, rather than each individual homeowner.

(s) Section 17(1), (4) and (5) of the Property Factors (Scotland) Act 2011 say

(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").

(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.

(t) For the Property Factor, Miss Sanderson eloquently explained that the Property Factor instructs regular maintenance work required by the changing seasons of the year. She described the Property Factor's method of ensuring that the fabric of the larger property is preserved as "*good property maintenance*".

(u) The applicant's specific complaint is that there have recently been inspections of the roof and the drains of the property, and investigation work has been carried out into the source of flooding in a basement. All of that work took place without prior notice and without consulting the applicant.

(v) It is to the applicant's credit that she is so concerned about the maintenance of the property, but, in reality, she has no need to be fearful of the work of a diligent property factor. One of the main purposes of instructing a property factor is to remove the burden of inspection and maintenance of common parts from the homeowner. That is exactly what the Property Factor has done in this case. There is no breach of the property factors' duties.

(w) On the facts as we find them to be, the Property Factor breached sections 1.1 and 7.1 of the code of conduct. We have no doubt that Miss Sanderson will be sorely disappointed by our decision, but the harsh reality is that even temporary property factors are bound by the terms of the Property Factors (Scotland) Act 2011.

(x) Between the date of application and today's date things have moved on and circumstances have changed. The event that the Property Factor was waiting for was the EGM on 31 August 2021. It was then that the Property Factor thought the requirements of the Property Factors (Scotland) Act 2011 were engaged, and immediately took steps to adhere to the 2011 Act and to the code of conduct for property factors.

(y) A written statement of services was issued on 14 September 2021, and an amended version is now in circulation. The breaches of sections 1.1 and 7.1 of the code of conduct are not only historical, they have already been remedied.

(z) The applicant's complaint as framed on 13 August 2021 was justified, but no action is required to resolve matters because the combination of the EGM on 31 August 2021 and the Property Factor's actions since formally receiving a mandate to act have already purified the breaches of the code of conduct. There is therefore no need for a property factor enforcement order.

Decision

8. The Property Factor inadvertently breached the Code of Conduct but has already taken sufficient steps to remedy the breaches of the code of conduct. There has been no breach of the property factors duties.

9. A Property Factor Enforcement Order is not necessary and would serve no meaningful purpose.

Right of Appeal

10. 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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

Signed

8 November 2021

Legal Member