

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/18/1249

**5/5 98 Lancefield Quay, Glasgow G3 8JN
("the Property")**

The Parties:-

**Mr Neeraj Mahindru, 15 Ravenscliffe Drive, Giffnock G46 7QR
("the Homeowner")**

**Life Property Management Limited, Regent Court, 70 West Regent Street,
Glasgow G2 2QZ
("the Factor")**

**Tribunal Members:
Graham Harding (Legal Member)
Helen Barclay (Ordinary Member)**

DECISION

The Factor has not failed to carry out its property factor's duties.

The Factor has not failed to comply with its duties under section 14(5) of the 2011 Act and did comply with sections 2.4 and 4.3 of the Code

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 2017 are referred to as "the Rules"

The Factor became a Registered Property Factor on insert 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

1. By application dated 24 May 2018 the Homeowner complained to the Tribunal that the Factor had breached Sections 2.4 and 4.3 of the Code. In subsequent correspondence the Homeowner clarified that he was also of the view that the Factor had failed to properly carry out its property factors duties.
2. The Homeowner's complaint in terms of Section 4.3 of the Code was essentially that the administration fee of £55.00 plus VAT charged by the Factor upon the sale of the property was unreasonable and excessive.
3. The Homeowners complaint in terms of Section 2.4 of the Code was that the Factor required the Homeowner's solicitor to retain £100.00 from the proceeds of the sale of the property to cover any shortfall in factoring charges when there were already sufficient funds deposited with the Factor to meet any such charges.
4. The Tribunal understood that the Homeowner's complaint with regards to the Factor failing in its property factors duties was in respect of the same issues narrated above.
5. By Minute dated 10 July 2018 a Convenor with delegated powers considered the application and referred the complaint to a Tribunal.
6. A hearing of the Tribunal was fixed to take place on 11 September 2018 at Glasgow Tribunals Centre, 20 York Street, Glasgow.
7. Prior to the hearing the Factor submitted written representations to the Tribunal by correspondence dated 15 August 2018.
8. By email of 15 August 2018 the Homeowner advised the Tribunal that he did not wish to attend the hearing nor submit any further representations but wished to rely on the documents previously provided to the Tribunal.

Hearing

9. The hearing took place on 11 September 2018 at Glasgow Tribunals Centre, 20 York Street, Glasgow. The Factor was represented by its Head of Finance, Jacqueline Borthwick. The Homeowner was not present nor represented.
10. As a preliminary matter the Tribunal noted that although the application had been made in the name of Mr Mahindru alone it appeared from the papers lodged by the Factor that the property may in fact have been owned jointly by Mr Mahindru and Helen Tait. The Tribunal indicated it would have to consider how this might impact on any decision it might make in due course.

Summary of submissions

11. With regards to the administration fee charged by the Factor on the sale of the property Ms Borthwick said that whilst her company was always happy to listen to homeowners opinions they were of the view that the Factor's

management fees were among the lowest in the industry and they were able to keep the fees low because they separated out individual charges for additional procedures such as dealing with seller's solicitor on the sale of a property and apportioning charges up to the date of sale.

12. Ms Borthwick said that there was a clear level of transparency as to cost and income generated from each activity. If the administration costs for property sales were incorporated into the core management fee then this would result in everybody paying a higher charge even although they might never sell their property. It was fairer to charge the individual homeowner a fee when their property was sold.
13. Ms Borthwick explained that there was additional work involved in dealing with the sale of a homeowner's property including liaising with the solicitor, advising on any proposed retentions and apportioning the final account. The fee charged was in broad terms representative of the man hours spent although the rate had in fact been held for the past ten years.
14. With regards to the fee charged being a breach of Section 4.3 of the Code Ms Borthwick said that the administration fee was not a charge imposed for late payment. It was simply an administration fee for an additional service provided. She said that the Homeowner had not been charged any late payment fees.
15. The Tribunal queried whether the Factor's letter of 10 April 2018 addressed to the Homeowner's solicitor was clear in its terms and whether it properly answered the Homeowner's solicitor's letter of 13 March 2018. Ms Borthwick was of the view that the letter was in standard terms and as figures were liable to change it was difficult to be precise. The figures represented the Factor's best estimate of the charges to be apportioned. It would have been open to the Homeowner's solicitor to seek further information if required.
16. Ms Borthwick said that the retention of £100.00 had been requested as at that point the Homeowner still had two instalments of an agreed payment plan to pay. It was her duty to the other homeowners to act prudently to ensure that debt was cleared. It was much more difficult to pursue someone for payment once they had sold their property and the use of retentions was a system that was routinely in place with solicitors in the area.
17. Ms Borthwick said she did not know if there was any legal obligation on the solicitor to retain the sum requested. She thought that would be a matter for the solicitor to discuss with their client. The Factor did not ask the Homeowner to sign a mandate authorising the solicitor to retain the funds.
18. According to Ms Borthwick the Homeowner did not wish to clear the sums due on his factoring account from the sale proceeds of the property. The Homeowner had insisted on adhering to the payment plan previously agreed which meant there were two instalments still to be paid after the property had sold. The Factor would have preferred the debt to have been paid in full at the

point of sale but were agreeing to payment by instalments to help the Homeowner.

19. In response to a query from the Tribunal Ms Borthwick confirmed that after receiving the two further instalments of £153.55 from the Homeowner on 23 April 2018 and 24 May 2018 and deducting the final invoice for charges up to the date of sale including the additional administration fee the Homeowner received a refund into his bank account of £343.55.
20. With regards to there being a breach of Section 2.4 of the Code Ms Borthwick said that the proposed retention of £100.00 was a request to the Homeowner's solicitor to cover a possible shortfall in funds owed to the Factor. It was not something that required written approval of the Homeowner.
21. Ms Borthwick was of the view that the Factor had done nothing wrong in the way it had treated the Homeowner. The administration fee charged on the sale of the property was clear and transparent in the Statement of Services. The Factor had recently taken over as Factor of the development and had presented to the Owners Association AGM. There was an active Owners Association who were fully aware of the Factor's terms and conditions and a majority of owners had agreed to appoint them as factors. She referred also to the financial Obligations section in the Statement of Services under the heading "Float" in which it was stated that a final invoice will be generated at the next billing period for the development and that a resale administration fee will be added to the account with the float then being refunded less any outstanding service charge monies.
22. Ms Borthwick confirmed that she had advised the Homeowner in an email dated 10 May 2018 that she could contact the Homeowner's solicitor to advise that the retention could be released. She also said in an email to the Homeowner of 16 May 2018 that the Homeowner could use that email to contact his solicitor direct to have the retention released.
23. The Tribunal then adjourned the hearing to fully consider the Homeowners written submissions before making its decision.

The Tribunal make the following findings in fact:

24. The Homeowner is a former owner of the property which was sold on 16 April 2018.
25. The Property is a flat within Lancefield Quay, Glasgow (hereinafter "the Development").
26. The Factor performed the role of the property factor of the Development.
27. The resale administration fee charged by the Factor was clearly stated in its Statement of Services. It is entirely reasonable that each owner who sells a

property should pay an administration fee for the additional work involved in corresponding with the seller's solicitor and apportioning any factoring charges between the seller and purchaser.

28. The administration fee charged by the Factor was not excessive.
29. The Factor did not levy any late payment charge on the Homeowner in terms of Section 4.3 of the Code.
30. The Factor's response in its letter of 10 April to the Homeowners solicitor's letter of 13 March 2018 was not entirely clear in its terms but it would have been open to the Homeowner's solicitor to seek clarification if they had wished.
31. The Factor could not insist on the Homeowner's solicitor retaining funds from the sale of the property without the consent of the Homeowner.
32. If the Homeowner's solicitor did retain funds without the Homeowner's consent that would be a matter between the Homeowner and his solicitor.
33. By requesting that the Homeowner's solicitor retain £100.00 from the sale proceeds of the property the Factor was not providing work or services that would incur charges or fees in addition to those relating to the core service. The Factor was not in breach of Section 2.4 of the Code.
34. At the date of sale of the property the Homeowner had in fact sufficient credit left in his float to meet any remaining factoring charges due to the Factor without paying the additional two instalments in April and May 2018.
35. Although the Factor's Statement of Services is quite clear on how a homeowner will be billed on the sale of their property and when the float will be repaid there can be a significant delay before an owner is reimbursed.

Reasons for Decision

36. The Tribunal was satisfied that the Factor was entitled to charge the Homeowner an administration fee for dealing with the sale of his property. The charge levied was not excessive and there would clearly be additional work involved in corresponding with the solicitor's queries including any additional queries that may have come about and in apportioning the factoring charges between the purchaser and the seller. The Statement of Services set out the charge for this service. It seemed to the Tribunal that it was fair that an individual owner should pay for this when they sold their property rather than the cost be absorbed by all the owners as part of the core service.
37. The Tribunal did not consider that the administration fee on sale of the property could in any way be considered to be a late payment charge in terms of Section 4.3 of the Code.

38. Although it may have appeared to the Homeowner that the Factor could insist on his solicitor retaining £100.00 from the sale proceeds the Tribunal was not convinced that in law this was correct. The Factor specifically called it a "request". As the Homeowner did not attend the hearing the Tribunal had to rely on the written submissions so did not know what discussions if any the Homeowner had with his solicitor over this issue. However in the Tribunal's view, in the absence of a mandate signed by the Homeowner a solicitor would not be obliged to retain the sum requested by the Factor without his client's consent.
39. The request by the Factor for a retention of £100.00 was not in respect of the Factor providing work or services that would incur additional fees or charges in addition to the core service. It was a claim to cover a possible shortfall in funds in the event of the Homeowner defaulting in his payment plan.
40. Whilst the tribunal accepted that the Factor had an obligation to the other homeowners in the development to try to minimise any bad debt as it transpired the retention was in fact unnecessary as there were sufficient funds in the float even without the subsequent two payments made by the Homeowner to meet the factoring charges up to the date of sale.
41. Whilst the Tribunal concluded that after taking everything into account the Factor had not failed to carry out its property factors duties it did feel that the Factor could consider improving its systems in dealing with owners on the sale of their properties. It seemed to the Tribunal that if the Factor wished a solicitor to keep back a retention from sale proceeds it should consider having the owner sign a mandate to that effect. It also seemed to the Tribunal that there could be an excessive delay between a property being sold and an owner receiving reimbursement of their float particularly if a property was sold shortly after a billing period. The Factor may therefore wish to consider these comments for the future although they do not impact on the Tribunal's decision in this case.
42. As was indicated above it appeared that there may have been joint owners of the property and this could have posed a problem had the Tribunal determined to make a Property Factors Enforcement Order. As no such order was made the Tribunal did not require to consider the matter further.

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.

G Harding

Legal Member and Chair

14 SEPTEMBER 2018

Date