



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

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

Chamber Ref: FTS/HPC/PF/23/2549

Re: Property at 5 Elderbank, Bearsden G61 1ND ("the Property")

The Parties:

**Mr Grant McDougall, 2 Crookdyke Court, Gowan Brae, Caldercruix ML6 7FE
("the Home Owner")**

**Hacking and Paterson Management Services, 1 Newton Terrace, Glasgow G3
7PL ("the Property Factor")**

Tribunal Members:

Neil Kinnear (Legal Member) and Kingsley Bruce (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 OSP1, OSP2, OSP3, 1.2, 1.5 (C8, D13 and G19) and 3.1 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 1st August 2023 the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to carry out its property factor duties in terms of section 17(1) of the 2011 Act and had failed to comply with Sections OSP1, OSP2, OSP3, 1.2, 1.5 (C8, D13 and G19) and 3.1 of the Code.

On 2nd October 2023 a Convenor on behalf of the President accepted the application and referred it to a Tribunal for a Case Management Discussion. By letters dated 17th October 2023 both parties were notified that the application had been referred to a Tribunal and that a Case Management Discussion would take place by conference call at 10:00 on 14th December 2023.

A Case Management Discussion was held at 10:00 on 14th December 2023 by conference call. The Homeowner participated, and was not represented. The Property Factor's Mr Leitch participated, and was not represented. After hearing from the parties, the Tribunal set a Hearing.

Hearing

A Hearing was held at 10:00 on 14th March 2024 at Glasgow Tribunals Centre. The Homeowner attended accompanied by his wife, and was not represented. The Property Factor did not attend, advising that it was content to rely upon the written representations it had submitted in advance of the Hearing.

The Tribunal noted in particular that the Property Factor relied upon an earlier decision of the Tribunal of 17th April 2023 in application FTS/HPC/LM/22/4137. In that application, the Property Factor was the same as in this application. The factual circumstances were in all material respects identical to those in this application, and appeared to involve the same terms of the same written statement of services as in this application. The Tribunal concluded that there was no breach of the Property Factor's duties nor of the Code.

The Homeowner was candid in accepting that he thought that he had been provided with a copy of the Property Factor's written statement of services, but had not read it. He also accepted the terms of his solicitor's correspondence with the Property Factor in relation to his impending sale of the Property, and that he had only questioned the legitimacy of the charges he now complained about several weeks after the sale had completed. He had only become aware of the charges when he received a final account in respect of the sale from his solicitor.

The Homeowner also candidly accepted that he had prior to that point made no enquiry of the Property factor regarding the level of its charges, simply because until that point he did not realise that it might levy such charges.

The Property Factor in its written submissions referred to paragraphs 7.1 and 5.9 of their written statement of services. These made clear that a fee was applicable in terms of the Property Factor's schedule of fees if it was required to apportion charges in respect of a sale.

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 appeared to the Tribunal that the Homeowner's complaint regarding failure of the Property Factor to fulfil its property factor duties simply repeated the same alleged breaches of the Code, which the Homeowner accepted was the case. In those

circumstances, the Tribunal only required to consider the alleged breaches of the Code.

The Homeowner's complaint, which he readily accepted, entirely related to his assertion that the Property Factor was illegitimately and unreasonably charging for responding to a request by a homeowner's solicitor to apportion common charges where the homeowner is selling a property. The Homeowner felt this was unreasonable and that this service ought to have been provided as part of the duties of the Property Factor which he paid for.

The Homeowner also complained that the charge of £200.00 made where the request was made with less than 10 working days was excessive, albeit he conceded that the Property factor had waived this higher charge and restricted the charge to the standard charge of £100.00 as a goodwill gesture.

Paragraph 7.1 of the Property Factor's written statement of services provides that the Homeowner's solicitor is required to inform the Property factor in writing of an impending change of ownership of the Property at least 10 working days before the date of the change.

By letter from the Homeowner's solicitors dated 19th January 2023, the Homeowner's solicitor informed the Property Factor that the Homeowner was selling the Property with a date of completion of 27th January 2023. The solicitor in the letter asked the Property Factor to arrange apportionment of the factoring charges between buyer and seller; to confirm the amount due by the Property of total common expenditure in the last 12 months including fees; to provide before the date of entry an estimate of charges that may be due by the Homeowner to the date of entry; to confirm the sum for any float payment due; to advise whether the Property Factor holds any float which is to be returned to the Homeowner; to confirm details regarding block insurance; to provide details of any common repairs of which the Property Factor was aware; to confirm details of any common building defects and maintenance issues or pending matters of which it was aware; to advise of any cyclical maintenance obligations and obligations to pay into a sinking fund; to advice of any unpaid charges or debts which might be recoverable in terms of the title deeds; and to confirm any apportionment or other final fees.

The Property Factor responded to the Homeowner's solicitor by letter of 20th January 2023 answering all these enquiries. Further, at paragraph 11 of its letter, it stated that "Due to the late notification of the sale, express administrative resource is required, the fee for this being £200.00 plus VAT, charged to your client through their final account. We trust this is acceptable to you, acting on behalf of your client. This fee covers the work involved in liaising with your firm, including providing any required information and dealing with the apportionment of specific common charges items...".

The Homeowner did not dispute the terms of this correspondence. He also accepted that his solicitor did not indicate in response that what was stated in paragraph 11 of

the letter was not acceptable. The Homeowner first disputed the validity of the fee charged on receiving his solicitor's account in respect of the sale after the transaction had completed.

The Tribunal accepted that the Property Factor had carried out the work identified in paragraph 7.1 of its written statement of services. It had charged a fee as identified in that provision. The charging of a fee for such additional work at the request of a homeowner to facilitate the sale of a property did not seem unreasonable to the Tribunal.

In any event, if the Homeowner wished to dispute the proposed fee, his solicitor acting as agent on his behalf ought to have done so in response to the Property factor's letter of 20th January 2023. The solicitor did not do so and as a consequence the Property Factor was entitled to proceed upon the basis that the Homeowner acquiesced to the charge proposed.

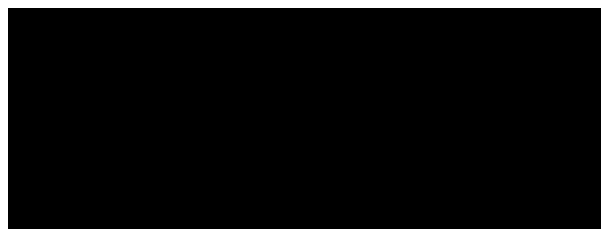
Paragraph 5.9 of the written statement of services provides that the Homeowner can access all information, documentation and policies/procedures relevant to the services provided by visiting the client portal or contacting the factoring team.

It is fair to note that the schedule of fees produced by the Property Factor disclosing the charge in respect of a change of ownership was not included with the written statement of services. However, the Homeowner could have enquired about the level of fee by contacting the factoring team. He did not do so because he was unaware as a result of not reading the written statement of services that a fee was chargeable. In any event, as earlier noted, the Property Factor in its letter to the Homeowner's solicitor of 20th January 2023 clearly explained the basis for charging the fee and that proposed fee was not disputed by the Homeowner's solicitor.

The Tribunal concluded that the Property Factor charged the fee in line with their written statement of services and schedule of fees. In those circumstances, 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 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 23/04/2024 _____
Date