

# Housing and Property Chamber First-tier Tribunal for Scotland

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**Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 (“the Act”) and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016, in an application made to the Tribunal under Section 17 of the Act**

**Chamber reference: FTS/HPC/PF/18/1472**

**The Property: 2B Netherton Court, Ayr Road, Glasgow G77 6EN (“the property”)**

**The Parties:**

**Mrs Rosalind Sylvia Hallside, 2B Netherton Court, Ayr Road, Glasgow G77 6EN (“the homeowner”)**

**Macfie & Co Management Services Limited, incorporated in Scotland under the Companies Acts (SCO84796), having their Registered Office at 5 Cathkinview Road, Mount Florida, Glasgow G42 9EA (“the property factors”)**

**Tribunal Members - George Clark (Legal Member) and Helen Barclay (Ordinary Member)**

**Decision by the Housing and Property Chamber of the First-tier Tribunal for Scotland in an application under section 17 of the Property Factors (Scotland) Act 2011**

**The Tribunal has jurisdiction to deal with the application.**

**The property factors have failed to comply with their duties under Section 14 of the Property Factors (Scotland) Act 2011. The property factors have also failed to carry out the property factor’s duties, Accordingly, the Tribunal proposes making a Property Factor Enforcement Order.**

**The Decision is unanimous.**

## **Introduction**

In this decision, the Property Factors (Scotland) Act 2011 is referred to as “the Act”; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as “the Code of Conduct” or “the Code”; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as “the 2017 Regulations”; and the Housing and Property Chamber of the First-tier Tribunal for Scotland as “the Tribunal”. The owners of the block of which the Property forms part are referred to as “the owners”.

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

The Tribunal had available to it and gave consideration to: the application by the homeowner received by the Tribunal on 20 June 2018, with supporting documentation, namely various exchanges of e-mails between the Parties between September 2017 and March 2018, including e-mails from the property factors to the homeowner of 15 February and 15 March 2018 and from the homeowner to the property factors dated 22 February 2018, e-mails from the homeowner to the property factors dated 7 and 11 January 2018, the first requesting information and the second constituting a formal complaint; an e-mail dated 19 March 2018 in which the homeowner commented to the chair on the Minutes of a Meeting held on 18 March 2018; a Tender Report, relative to Render and Decoration Works, by RM Consulting Ltd dated 30 March 2017, a Description of Works by RM Consulting Ltd, dated 31 January 2017, with annotated amendments dated 30 September 2017, a letter from RM Consulting Ltd to AFS(Scotland) Ltd, dated 7 September 2017, confirming the appointment of AFS(Scotland) Ltd to undertake Render Works and a copy of a letter from the property factors to RM Consulting Ltd dated 6 September 2017; a copy of the property factors’ written Statement of Services (November 2017 version); and a letter from the property factors to the homeowner dated 22 December 2017.

The property factors did not make any written representations to the Tribunal.

## **Summary of Written Representations**

### **(a) By the homeowner**

The following is a summary of the content of the homeowner’s application to the Tribunal:-

In March 2018, a contract was in place for a full re-render of the block of which the Property forms part, but within three weeks, the contractor submitted an overmarked version of the original document, increasing the costs, with the result that the

contingency element was utilised before the work had even started. These changes had never been reported or notified to the owners, nor had they been approved by them. The property factors had been intimately involved in this process. The issue had only come to light when the owners were asked to pay a further sum of £495 each for the Tank House render. The property factors would not clarify the situation, nor did they read out at a site meeting a letter outlining the homeowner's concerns, which she had asked to be read out at the meeting. The property factors had been complicit and had released funds knowing that the figures had been changed and the contingency utilised before the contact started, but after the tender had been formally accepted on the basis of the original figures quoted.

The property factors had taken instructions from one owner, who had no mandate, instead of seeking approval from all the owners. Further, the tank house work had not been properly instructed. They had been requested to exhibit their mandate to take instructions from a single owner, but had failed to do so.

The property factors had withheld information from the homeowner. They had refused to answer her questions or to comply with her request to read out her letter at a site meeting. That letter would have alerted the surveyors to the fact that something was amiss.

The homeowner stated in the application, that the property factors had failed to comply with Section 1.1a.A and Sections 2.4, 2.5. 3 and 6.6 of the Code of Conduct and that the complaint also related to a failure to carry out the Property Factor's Duties.

#### **(b) By the property factors**

The property factors made no written representations to the Tribunal in advance of the Hearing.

### **THE HEARING**

A hearing took place at Glasgow Tribunals Centre, 20 York Street, Glasgow on the morning of 1 October 2018. The homeowner was present at the hearing and was supported by Trevor Sehuster-Davis. The property factors were represented at the hearing by John Walker and Joanne Graham, both Directors of the company.

#### **Summary of Oral Evidence**

The chairman told the parties that they could assume that the Tribunal members had read and were completely familiar with all of the written submissions and the

documents which accompanied them. He then invited the homeowner to address the Tribunal with reference to the complaints under each Section of the Code of Conduct. The wording of the relevant portions of each Section of the Code included in the application is set out below, followed by a summary of the oral evidence given by the parties in respect of that Section.

**Section 1.1a.A provides that the written statement of services should set out “a statement of the basis of any authority you have to act on behalf of all the homeowners in the group”.**

The homeowner told the Tribunal that the main point of her complaint was that the property factors had taken instructions from one owner who had no mandate to act on behalf of all the owners in the block and, when asked, the property factors had failed to provide information relating to the basis of their authority to accept instructions from one owner. That owner's wife had been chairperson of the residents' committee and was the link to the property factors for small repairs works, but neither she nor her husband had a mandate to make any changes to the costings set out in the document of 30 March 2017 and accepted by all the owners on 7 September 2017. The property factors should have informed the owners and sought their approval for the use of the contingency fund.

The property factors had ignored the homeowner's concerns regarding the changing of the structure of the contract based on an overmarking of the original tender document, changing the price from £55,314.02 to to £58,889.02 excluding VAT. It was their letter of 20 December 2017, requesting funds for the water tank render that had alerted her to the fact that something was wrong. The property factors kept referring to a revised tender, but all the homeowner had seen was an overwritten version of the original tender.

The property factors told the Tribunal that they had been led to believe that the block had a residents' committee and that in relation to both Block A and Block B (of which the Property forms part), the arrangement was that they had always taken instructions from the Chair of that committee, who they understood to be Mr B. He had been the point of contact for many years, since at least 1999. That period had included the renewal of the roof of the block, which had been dealt with in exactly the same way. All owners would be invited to a meeting, decisions would be minuted and instructions would be given to the property factors via the Chair, Mr B.

The property factors had issued a letter of instruction and had attended a site meeting with the surveyor, at which Mr B had also been present. It had emerged that RM Consulting had not followed the instructions given to them when obtaining tenders. There had been two options considered - either to renew boss render or to take off all the render. The second option had been accepted by the property factors on behalf of the owners in terms of instructions given by Mr B following an owners' meeting. At the site visit it had become apparent that the contractors were not taking

off all the render. Mr B had then stated that the owners wanted all the existing render taken off. The contractors had said they could do that, but the costs would need to be adjusted as it would be more labour-intensive. Mr B had stated that the owners would not pay any more and had suggested that the contingency element be used to keep the price within the original quote, rather than having to go back to the owners. He had then e-mailed RM Consulting on 2 October 2017, to say that the revised figure was acceptable to the owners.

The homeowner then stated that there was now no residents' committee and that the Minutes taken of one of the residents' meetings were not a reflection of the proceedings. She had, therefore, requested that the Minutes be corrected.

**Section 2.4. "You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service".**

The homeowner told the Tribunal that she had been asking the property factors since December 2017 why they had taken the word of one owner. She accepted that Mr B had not acted out of malice and that he thought he was doing his best for the community, but the property factors had a duty to check with the owners before authorising the use of the contingency fund before the contract proceeded. If she had received a letter from the property factors stating that Mr B was acting on behalf of everyone, she would have asked the owners if they agreed.

The property factors repeated that they believed that Mr B would have informed the owners of the issues raised at the site meeting, as he was a very regular circular writer. They would have assumed he had notified his neighbours of the outcome.

The homeowner could not understand why the property factors, as governors of the owners' funds, did not write to all the owners to say that they would have to use the contingency fund and specify the reasons why that was the case. Had that happened, the owners might have looked at it differently.

**Section 2.5. "You must respond to enquiries and complaints received by letter or email within prompt timescales".**

The homeowner's complaint was that, on 7 January 2018, she had asked the property factors for a history of the usage of the contingency sum in the tender, but it was not until 15 February 2018 that the property factors had responded, saying that she should address the question to the project managers. The property factors' written statement of services stipulated a 21 day response deadline.

On 8 January 2018, the homeowner had e-mailed the property factors to say that she was led to believe that a site meeting was to be held that week and asked them to ensure they read out her e-mail of 7 January 2018 to that meeting. The property factors had deliberately chosen not to read it out. In their reply of 15 February 2018,

the property factors had not given the homeowner any information on what had happened to the contingency sum.

The property factors stated that they had acknowledged the homeowner's e-mail of 7 January 2018 and told her that they would get back to her as soon as they could. They accepted that they should have answered it more quickly, giving the homeowner the information they thought she was seeking.

**Section 3. "While transparency is important in the full range of your services, it is especially important in building trust in financial matters".**

The homeowner's comments related to the protection of homeowners' funds, She felt that, by failing to respond timeously to her e-mail of 7 January 2018, the property factors had, in effect "hidden" from her the issue which had arisen at the site meeting and the decision that had then been taken to utilise the contingency without referring back to the owners. This demonstrated a lack of transparency in financial dealings.

**Section 6.6. "If applicable, documentation relating to any tendering process (excluding commercially sensitive information) should be available for inspection by homeowners on request, free of charge."**

The homeowner did not offer at the Hearing any further evidence specific to this part of the application.

**Failure to comply with the factor's duties**

The homeowner's complaint related to her contention that the property factors had failed to respond timeously to her e-mail of 7 January 2018 and had withheld information from her. They had also failed to carry out her instruction to read out that e-mail at the site meeting.

**Closing Remarks**

Neither party made any closing remarks. The parties then left the hearing and the Tribunal members considered the evidence that they had heard, along with the written representations and other documentation before them.

The Tribunal makes the following findings of fact:

- The homeowner is the owner of the property.
- The property forms part of a block of flatted dwellinghouses.
- The property factors, in the course of their business, manage the common parts of the development (including the block) of which the Property forms part. The property factors, therefore, fall within the definition of "property

factor” set out in Section 2 (1)(a) of the Property Factors (Scotland) Act 2011 (“the Act”).

- The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- The date of Registration of the property factors was 23 November 2012.
- The homeowner has notified the property factors in writing as to why she considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
- The homeowner made an application to the Housing and Property Chamber of the First-tier Tribunal for Scotland (“the Tribunal”) dated 19 June 2018 and received on 21 June 2018 under Section 17(1) of the Act.
- The concerns set out in the application have not been addressed to the homeowner’s satisfaction.
- On 25 July 2018, the Housing and Property Chamber intimated to the parties a decision by the President of the Chamber to refer the application to a tribunal for determination.

## **Reasons for the Decision**

**The Tribunal did not uphold the homeowner’s complaint that the property factors had failed to comply with Section 1.1a.A of the Code of Conduct.** The Tribunal held that the written Statement of Services does include a statement of the basis of the authority they have to act on behalf of all the homeowners in the group. It states that authority derives from owners forming a quorum appointing the property factors to perform communal maintenance on their behalf and that, within the context of the law of agency, the property factors must adhere to the relevant title conditions governing the property, are bound by prevailing legislation relating to communal maintenance and, in providing any service, must comply with any legal aspects affecting the service provided.

**The Tribunal did not uphold the homeowner’s complaint that the property factors had failed to comply with Section 2.4 of the Code of Conduct.** The Tribunal was of the view that the property factors do have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. The written Statement of Services provides that if the anticipated cost of any item of repair or maintenance exceeds £600, it shall be instructed and carried out only when the work has been approved by a majority of the owners, after submission of an estimate or estimates by the property factors and the property factors having been placed in funds by the owners to the full amount of the estimated cost. The Code of Conduct requires that such a procedure is in place and the Tribunal is

satisfied that it is in place. The homeowner's complaint was that the property factors should not have instructed changes to the tender document and the costings without referring back to all the owners, but, on the balance of probabilities, the Tribunal accepted the evidence of the property factors that they had ostensible authority to instruct work if Mr B asked them to do so, as this had been the pattern in the past and had included not just minor work, but also instructions relating to another major item, namely the roof replacement. There was evidence presented to the Tribunal by way of an e-mail sent by Mr B to the property factors on 9 February 2018, in which he confirmed that the residents' association had agreed that he should be the link between them and the property factors, consultants and contractors in regard to all aspects of the tender contract, that he had copied the more important e-mail exchanges with the three companies to all residents, and that he had circulated all residents, including the homeowner, to keep them up to date with developments. That included resumes of all site meetings. The Tribunal recognised that this e-mail post-dated the homeowner's e-mail to the property factors of 9 January 2018, but held that it reinforced the view of the property factors that they were entitled to assume that Mr B was consulting as necessary with the other owners, as there had been no previous complaints to them in this regard. Further, Mr B had e-mailed the homeowner on 23 February 2018, referring to "many letters and circulars that I have copied to all our residents" and stating that he had kept all residents in the picture stage by stage and adopted a pragmatic approach which he believed was in the best interests of the residents. This had not been challenged by the homeowner and the Tribunal held, on the balance of probabilities, that the homeowner was aware that Mr B was the *de facto* appointee of the owners, which entitled the property factors to take their instructions from him.

The Tribunal also noted that Mr B had e-mailed the homeowner on 3 October 2017, confirming that the work was now a full tender replacement, with no increase in price. He did not go on to say that this had been achieved by utilising the contingency, but that was not an omission that could be attributed in any way to the property factors. Mr B had also on 2 October 2017, advised the homeowner that all the issues she had raised in an e-mail to him earlier that day were clearly covered in his circular to residents of 27 September 2017, which had been updated on 2 October 2017. The issues which the homeowner had raised followed on her receipt of that update and included asking who had changed the owners' instructions to go ahead with Option 2.

**The Tribunal upheld the homeowner's complaint that the property factors had failed to comply with Section 2.5 of the Code of Conduct.** There was clear evidence that the homeowner had requested, in an e-mail of 7 January 2018, certain information in relation to the property factors' mandate to act and the history of the usage of the contingency sums in relation to the current scheme of work. There could have been no doubting the fact that this was a complaint and that the



homeowner regarded this as a matter requiring the property factors' urgent attention, particularly as a site meeting was to be held very shortly.

The property factors had stated in evidence that they had acknowledged the e-mail and had said that they would get back to the homeowner as soon as they could, but the Tribunal did not see evidence of that acknowledgement. In any event, the property factors did not provide a substantive reply until 15 February 2018, some 39 days later. In their written Statement of Services, the property factors say that they will contact an owner in writing within 21 days of receiving an initial written summary of a complaint, to inform the owner of their understanding of the circumstances and invite a final written summary by way of confirmation that their interpretation of the complaint is accurate. Thereafter, the property factors will within a further 21 days, inform the owner of the outcome of their investigation into the complaint.

The Tribunal held that the property factors had failed to comply with its procedures, and had also failed to respond to the homeowner's enquiries and complaints of 7 January 2018 within prompt timescales. Accordingly, the property factors had failed to comply with Section 2.5 of the Code of Conduct.

**The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 3 of the Code of Conduct.** Section 3 of the Code of Conduct has as its overriding objectives the protection of homeowners' funds, clarity and transparency in all accounting procedures and the ability to make a clear distinction between homeowners' funds and a property factor's funds. It relates to property factors' overarching duties in handling clients' money. The homeowner's complaint did not establish that the property factors had failed to meet these overriding objectives and the Tribunal had already held that they had ostensible authority to accept the revised costings on behalf of the owners.

**The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 6.6 of the Code of Conduct.** In an e-mail of 29 December 2017, the homeowner asked three specific questions relating to the tender and the property factors answered these on 5 January 2018. This included advising the homeowner that they had been given instructions by the residents' association to accept the revised tender of 2 October 2017 and confirmation that, due to the revision/variation of the tender, the contingencies had been utilised. The homeowner had referred in written representations and at the Hearing to the fact that there was not a revised tender, but merely an overwritten version of the first one. The view of the Tribunal was that it was not a re-tender, but an agreed variation of the contract, so did not require to be resubmitted as a fresh document.

**The Tribunal upheld the homeowner's complaint that the property factors had failed to comply with the property factor's duties.** The Tribunal was satisfied that the delay in responding to the homeowner's e-mail of 7 January 2018 represented a

failure to carry out the factor's duties, as there was a clear procedure set out in their written Statement of Services and they did not follow it. The Tribunal did not consider that the failure to read out an e-mail at the site meeting was a failure to comply with the property factor's duties. It was for the property factors to consider whether it was appropriate to do so. They had read it out after the consultants and contractors had left the meeting and their choice not to consider it when everyone was present was a decision they were entitled to take.

**The Tribunal proposes to make a Property Factor Enforcement Order, as detailed in the accompanying Section 19(2)(a) Notice.**

### **Appeals**

**In terms of section 46 of the Tribunals (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.**

Signature of Legal Member/Chair  ..... Date: 15 October 2018