



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 19(1)(a) of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/19/3559

Re: Property 286 Stonelaw Road, Burnside, Glasgow G73 3RP (“the Property”)

Parties:

Ardamaka Limited, c/o Fallside, Lochwinnoch, Renfrewshire, PA12 4DJ (“the Applicant”)

Apex Property Factor, 46 Eastside, Kirkintilloch, East Dunbartonshire, G66 1QH (“the Respondent”)

Tribunal Members:

Andrew Cowan (Legal Member); Robert Buchan (Surveyor Member)

Decision (in absence of the Respondent)

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 (‘the Code’), and with their duties as Property Factors, determined that the Respondent had failed to comply with the Code. It proposes to make a property factor enforcement order, in the following terms:

In terms of section 20(1) of the Property Factors (Scotland) Act 2011, the Respondent is required to make a payment of £100 to the Applicant, within 14 days of intimation of this order. Evidence of such payment should be provided to the Tribunal.

Background

1. By an application to the First-tier tribunal for Scotland (Housing and Property Chamber) (‘the Chamber’) received on 6 November 2019, the Applicant

sought a determination of whether the Factors had failed: (a) under section 14(5) of the Property Factors (Scotland) Act 2011 (“the Act”), to comply with the Code; and (b) to perform the property factor duties, as defined in section 17(5) of the Act, in respect of their factoring of the property. On 7th February 2020, a Convener having delegated powers under section 18A of the Act made a decision, under section 18(1)(a), to refer the application to a First-tier tribunal.

2. The Property is a shop owned by the Applicant and forms part of a tenement building with four shops and four flats in Stonelaw Road, Burnside, Glasgow. As the Property is a building which is used, to an extent, for residential purposes the Applicant is a Homeowner within the definition provided at s10 (5)(a) of the Act.
3. The Respondent was appointed as property factors of the building with effect from 8th August 2018. Their appointment was thereafter terminated with effect from 26th July 2019. On appointment the Respondent issued the Applicant with their Statement of Services, dated 6th August 2018. On 7th June 2018 the Applicant paid to the Respondent the sum of £100 as requested by the Respondent as a “Float”.
4. Following the termination of the Respondent’s appointment as property factor, the Applicant sought repayment of the Float. The Applicant sought repayment in terms of emails from the Applicant dated 23 September 2019, 4th October 2019, 8th October 2019 and during a phone call between the parties on 6th November 2019. On 6th November the Respondent emailed the Applicant and stated that the author of the email had “requested my accounts department to confirm when the float will be refunded”.
5. Along with the Application, the Applicant has provided *inter alia* copies of: (a) a statement of account from the Respondent dated 6th August 2019, showing the Float payment paid by the Applicant on 7th June 2019; (b) the series of emails from the Applicant to the Respondent referred to in paragraph 4 (above) and (c) the Respondent’s Statement of Services, dated 6th August 2018.
6. The Statement of Services, dated 6th August 2018 includes a section headed “Float”, which states: “A Float is payable. Subject as detailed below the float will be returned to you without interest when you sell your property.” The Statement goes on to confirm that part or all of the float will be withheld if there are any unpaid factoring charges due.
7. After receipt of the Application, and at the request of the Tribunal, the Applicant intimated a complaint, by email, to the Respondent, dated 3rd February 2020. That email states that “For the record, you and you’re (sic) firm have not complied with the Code of Conduct and property factor duties as you have not returned my float or the floats for all but one of the other owners.”

No response or any communication was received by the Applicant from the Respondent in relation to his complaint.

8. By letters dated 17th February 2020 the Chamber notified the parties that a hearing would take place in relation to the application on 7th April 2020. Due to restrictions imposed as a consequence of the COVID pandemic that hearing was not able to proceed.
9. By letters dated 22 July 2020, the Chamber notified the parties that a hearing would take place in relation to the application on 27th August 2020. The letter to the Respondent was returned to the Chamber marked "gone away". The Chamber thereafter instructed Sheriff Officers to effect service of the letter upon the Respondents. Sheriff Officers effected service of the letter of 22 July 2020 upon the Respondent on 12th August 2020. No written representations were submitted to the Chamber by the Respondent in advance of the hearing. Accordingly, neither the Applicant nor the Tribunal was aware of the Respondent's position in relation to the Applicant's complaint, as at the commencement of the hearing.

Hearing

10. A hearing took place in respect of the application on 27th August 2020. Due to the continuing disruption caused by the COVID-19 pandemic, the hearing took place using tele-conferencing facilities.
11. The Applicant was represented at the hearing by one of their Directors, Mr Martin Gudaitis. The Respondent did not attend, and was not represented.
12. The Tribunal noted that intimation of the hearing had been served upon the Respondent by Sheriff Officer. In the circumstances, the Tribunal was satisfied that, for the purposes of rule 24(1) of the schedule to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, that the Tribunal had given the Respondent reasonable notice of the date, time and place of the hearing. It was also satisfied, under rule 29, that it was appropriate to proceed with the hearing, in the absence of the Respondent.
13. Mr Gudaitis confirmed that he had made numerous requests by email and telephone on behalf of the Applicant for reimbursement of the float. Apart from the response form the Respondent dated 6th November (when the Respondent emailed the Applicant and stated that the author of the email had "requested my accounts department to confirm when the float will be refunded") he had never received any written response from them, indicating what action, if any, they were taking in relation to his request. They had also not responded to this Application.

Decision

14. In the view of the Tribunal, there has clearly been a breach of the Code.
15. Section 1 (C) of the Code confirms that the Respondent's Statement of Service should set out: *"any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service)"*

The Statement of Service issued by the Respondent fails to confirm how the float is to be repaid on termination of services. This is a breach of the Code

16. Section 2.5 of the Code states:

"You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers)".

The Respondent failed to respond to the complaints and requests for payment made by the Applicant in any substantive manner. This is a breach of the Code.

17. Section 3 of the code states:

"The overriding objectives of this section are:

Protection of homeowners' funds

Clarity and transparency in all accounting procedures

Ability to make a clear distinction between homeowners' funds and a property factor's funds

3.1 If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

3.2 Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor."

The Respondent has failed to provide any financial information in relation to the float and have failed to return the float to the Applicant. This is a breach of the Code.

18. These paragraphs of the Code have not been expressly cited in the Application or in the emails from the Applicant to the Respondent. The email from the Applicant to the Respondent does state that the Applicant believes the Respondent is in breach of the Code but does not make specific reference to the particular part of the Code which has allegedly been breached. However, the simple nature of the Applicant's request, and complaint, is very clearly expressed in the various emails that were sent to the Respondent. It would have been entirely apparent to the Respondent that the Applicant's request engaged these obligations in the code. Accordingly, the Tribunal is satisfied, for the purposes of section 17(3)(a) of the Act, that the Applicant has notified the Respondent in writing as to why he considers that the Respondent has failed to comply with section 3 of the Code.
19. In the circumstances, the Tribunal decided to order the Respondent to pay the sum of £100 to the Applicant in respect of the breaches of the Code. This sum is the sum sought by the Applicant in the Application and is the amount of the float which the Respondent has failed to reimburse.
20. The Tribunal's decision was unanimous.
21. The Tribunal has accordingly issued a separate Proposed Property Factor Enforcement Order, to which reference is made.
22. 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.
23. 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.

27TH August 2020

Legal Member/Chair

Date