Housing and Property Chamber
First-tier Tribunal for Scotland

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

The Property: THE OLD SCHOOLHOUSE, SPRINGBANK GARDENS, DUNBLANE FK15 9JZ

Chamber Reference: FTS/HPC/PF/17/0055

THE PARTIES
Mr Allan Blackley, Bendameer, 40A Horncastle Road, Woodhall Spa, Lincolnshire LN10 6UZ ("the Homeowner")

Hacking and Paterson Management Services, registered under the Companies Acts (SC 73599)and having their Registered Offfice at 1 Newton Terrace, Glasgow G3 7PL ("the Property Factors")

Tribunal Members – George Clark (Legal Member) and Elizabeth Dickson (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 not failed to comply with their duties under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act") and have not failed to carry out the property factor's duties in terms of Section 17(5)(a) of the Act.

The Tribunal does not propose 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"; and the Housing and Property Chamber of the First-tier Tribunal for Scotland as "the Tribunal".

The property factors became a Registered Property Factor on 1 November 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 (1) the application by the homeowner received on 14 February 2017 with supporting documentation, namely a covering letter, a copy letter from the homeowner to the property factors dated 1 February 2017 intimating that the homeowner believed the property factors had failed to carry out their property factor duties as set out in Section 17(5) of the Act, copies of letters from the property factors to the homeowner dated 3 and 8 February 2017 and 24 May, 31 October and 23 November 2016, and a copy of the property factors' Terms of Service and Delivery Standards (2) letters from the homeowner to the Tribunal dated 20 February 2017 and 3 March 2017 and (3) copies of correspondence between the property factors and the homeowner's solicitors dated 2, 6 and 13 June 2016.

Summary of Written Representations

(1) By the Homeowner

The following is a summary of the content of the homeowner's application and written representations to the Tribunal. The homeowner and his wife owned a flat at 5 Mill Court, Dunblane, which included right in common to the Property, for about 7 years. They used it as a holiday flat. Mill Court was an old woollen mill, converted into 29 residential properties.

The homeowner and his wife decided to sell their flat in late 2015. The settlement date was agreed at 7 March 2016 and, in January 2016 the homeowner by telephone advised the property factors for The Old Schoolhouse of the pending sale. He telephoned them again in February to advise of the actual settlement date.

The sale settled as planned on 7 March 2016. In late May, the homeowner received a letter from the property factors to the effect that they had not received any notification of the sale from the homeowner's solicitors and that without such formal confirmation they could not proceed. The homeowner spoke to the solicitors and on 2 June they wrote to the property factors.

In late August 2016, the homeowners received a letter from their solicitors confirming they had received a final bill from the property factors and had sent them a cheque for £68.93 in settlement. The account included several common charges up to early June and an additional charge of £75 plus £15 VAT (£90 in total) for an Apportionment Charge. The homeowner had told his solicitors that the common charges were incorrect as they were calculated to June when the sale settled in March. The solicitors were also unable to tell the homeowner what the Apportionment Charge was and they cancelled the cheque. The property factors then adjusted the common charges to the correct date, but this left the issue of the Apportionment Charge unresolved. The property factors had sent the homeowner a cheque for £42, as they stated that the had put their initial charges on the wrong scale. The homeowner's case, essentially, was that the property factors had imposed an Apportionment Charge about which they had never given the homeowner any information during the 7 years in which he had been paying their common charges. When challenged by the homeowner, the property factors had said it was the charge they made for sending a letter to the homeowners's solicitors advising that they would be making an Apportionment Charge, but this letter had not been sent until the homeowner's solicitors advised of the sale on 2 June, so the property factors' explanation which implied that they had advised the solicitors in advance of making the charge was not possible.

In their latest letter (which the Tribunal have assumed to be a letter dated 10 February 2017), the property factors had stated that they had indeed told the homeowner's solicitors in advance of the Apportionment Charge and mentioned their Terms of Service. The homeowner had found a copy of their Terms dated 2012. There was no mention of an Apportionment Charge amongst their core services, There was a section relating to Additional Services where it was stated that "HPMS is able to offer...services at an additional cost to be agreed with homeowners prior to commencement". Item (v) was "liaising with solicitors at a change of ownership including apportioning common charges". In the homeowner's view, the Apportionment Charge was not included in the terms of service as a common charge, it was impossible for the property factors to advise the solicitors in advance of the legal completion of the sale and the property factors never contacted the homeowner and his wife to obtain their agreement "at an additional cost to be agreed with homeowners prior to commencement". Consequently, the property factors had acted in direct contravention of their own Terms.

The homeowner was of the view that the Terms implied that the intention was that it was the homeowner and not their solicitors who must give agreement to any additional costs. The homeowner had never been consulted on an Apportionment Charge, far less asked to give agreement to any such cost. It also appeared that the property factors had altered their Terms without telling the homeowner, as, in their letter of 31 October 2016, referring to additional charges, they stated that "This fee is disclosed in advance of it being charged", whereas their Terms stated that additional charges

would be "at an additional cost to be agreed with homeowners prior to commencement".

The homeowner was of the view that the issue had been discussed by the property factors in 3 of their letters, but the penny had not yet dropped. They had been conducting a process which was unrelated to their Terms of Service. The homeowner had given the property factors 2 weeks to come to a resolution, but on the date of writing his covering letter to the application, he had received 2 letters from the property factors. They had also sent him a cheque for £48, the outstanding amount of the unwarranted Apportionment Charge, but without explanation as to why they had suddenly changed their minds. The homeowner also alleged that the property factors had tried to stop the homeowner approaching the Tribunal until he had gone through their complaints procedure, the first mention of it in the many months that he had been challenging them. It seemed rather a coincidence that within a few days of his advising them that he had approached the Tribunal about submitting his case, the property factors quite out of the blue sent him a cheque and at the same time sought to delay the submission by referring for the first time to their complaints procedure.

The homeowner concluded by asking the Tribunal, should it find in his favour, to impose a significant fine on the property factors for the enormous time, effort, research, work, concern and worry that they had imposed on him by levying the Apportionment Charge.

The homeowner sent 2 further letters to the Tribunal, dated 20 February and 3 March 2017. In the first of these letters, he addressed a preliminary question raised by the Tribunal of his not having been the owner of the property at the time that the alleged breach of the Code of Conduct occurred. He stated that ownership had changed hands on 7 March 2016, but it had not been until late August that the property factors had submitted their bill for the Apportionment Charge, although, admittedly, 3 months of this time resulted from the delay in his solicitors advising the property factors of the change of ownership. It could not represent natural justice for a homeowner to be unable to have a case considered by the Tribunal when he was no longer the owner, yet a property factor could seek to impose a charge months after ownership was transferred. This point was reiterated in the homeowner's letter of 3 March 2017.

The homeowner complained that the property factors had failed to comply with Sections 1.1a.B.d, 1.1a.C.g and 1.1a.C.h of the Code of Conduct.

Section 1.1a.B.d of the Code of Conduct, provides that the written statement of services should include the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges and how these fees and charges are calculated and notified.

Section 1.1a.C.g of the Code of Conduct states that the written statement of services should set out confirmation that the property factor has a debt recovery procedure which is available on request, and may also be available online.

Section 1.1a.C.h of the Code of Conduct stipulates that the written statement of services 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 services)

The homeowner also contended that there had been a failure to comply with the property factor's duties, in that, in relation to the sale of the Property on 7 March 2016, the property factors' Apportionment Charge was invalid as it directly countered the introduction to the "Additional Services" paragraph of the written Statement of Services. Specifically, a cost had not been agreed with the homeowner up to the point of sale and the homeowner had received no information prior to commencement. The property factors' process of refusing to take any action until after they had been advised of the sale had made it an impossibility that they could have done anything until after the sale had been completed. Further, the property factors had never agreed any cost with the homeowner for the Apportionment Charge and the homeowner had not been alerted to this charge until several months afterwards.

(2) by the Property Factors

The property factors made no written representations to the Tribual, but on 28 August 2017, they applied to the Tribunal to give 3 Directions in terms of Rule 20(1) of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 ("the Regulations"). The reason for requesting the Directions were, firstly, that Section 7 of the Application form was illegible, secondly, that they required to know which specific sections of the Code of Conduct the homeowner alleged they had breached and, thirdly, it was unclear from the application paperwork whether a breach of Property Factors duties was included in the application. The property factors asked that the homeowner be directed to provide the same in typed format and indicated that he had referenced sections of the Code of Conduct that did not exist. The Tribunal advised the property factors by e-mail on 9 October 2017 that the applications for Practice Directions would be considered at the hearing.

THE HEARING

A hearing took place at Victoria Hall, Stirling Road, Dunblane FK15 9EX on the morning of 10 October 2017. The homeowner was not present or represented at the hearing. The property factors were represented at the hearing by Mr David Doran, one of their partners. The Clerk to the Tribunal was Alan Kerr.

Summary of Oral Evidence

The chairman told the party present that he could assume that the Tribunal members had read and were completely familiar with all of the written submissions and the documents which accompanied them.

The property factors referred to their applications for Practice Directions. They had not been made aware of the complaint until they received confirmation on 28 August 2017 that an appeal had been made to the Upper Tribunal against a decision of the Tribunal to reject the application on the ground that the alleged breaches of the Code of Conduct had taken place after the homeowner had sold the property. The property factors had agreed with the decision of the Upper Tribunal, but questioned whether the homeowner had satisfied the test laid down by Section 17(3) of the Act, which requires that 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 (to comply with the Code of Conduct. The only letter that might be thought to meet the test was dated 1 February 2017 and it referred only to a breach of factor's duties. The property factors had also identified issues in relation to lack of clarity. The homeowner had not identified the relevant sections of the Code of Conduct to which he was referring and, accordingly, the property factors had sought Practice Directions. There had been no prior notification relating to breaches of the Code of Conduct, The prior notification was only in relation to factor's duties.

The Tribunal members advised the property factors that they would deal with these preliminary matters in their written Decision and the property factors then proceeded to give evidence on the merits of the application.

The property factors explained to the Tribunal that The Old Schoolhouse was a "community centre", where the co-owners could hold meetings and private functions. They also confirmed that the version of their Terms of Service and Delivery Standards document provided by the homeowner to the Tribunal and stated to be correct as at 21 November 2012 was the correct version. Their view was that the portion of that document headed "Additional Services" was not an obligation to provide these services. It was a list of services that, if asked, they could provide at an additional cost. The property factors were satisfied that they had met their obligations under the Code of Conduct. They had an obligation under Section 1.1a.B.d to set out the types of services which might be required in addition to the core service and which might, therefore, incur additional fees and charges and how these fees and charges are calculated and notified. They had not put fixed costs beside these items as the cost would vary from development to development. For example, they had several clients who chose not to have their common charges apportioned by the factor at the time of a sale, but preferred that the solicitors for the parties do it themselves and merely advise the factors of the change of ownership. Most property factors would charge a fee for apportioning common charges. The fee in this case was a specific charge for

doing the apportionment. For every sale, the apportionment would happen after the sale date, as the property factors would have to wait for invoices coming in in respect of work done prior to the sale date. For that reason, most solicitors would ask the property factors to do the apportionment work.

In relation to the complaint under Section 1.1a.C.g, the property factors stated that they did have a debt recovery procedure. It was referred to in their Terms of Service and Delivery Standards, which stated that it could be found on their website and that hard copy was available on request.

With regard to Section 1,1a.C.h of the Code of Conduct, the property factors told the Tribunal that the position regarding payment towards a floating fund was set out in their Terms of Service and Delivery Standards.

The view of the property factors was that, if there was a valid complaint in this case, it had to relate to a breach of factor's duties, not a breach of the Code of Conduct. They provided the Tribunal with a copy of the homeowner's solicitors' letter of 2 June 2016 which asked them to apportion the factoring charge due for the period from 29 February to 28 May. The property factors had responded on 6 June 2016 to say that they were happy to undertake the apportionment work and that their fee for doing so would be £75 plus VAT. They had confirmed that this work fell outwith the normal factoring fee and suggested to the solicitors retaining £100 from the sale proceeds. They had also confirmed that the apportioned account would be issued in August 2016. On 13 June 2016, the homeowner's solicitors had acknowledged the property factors' letter of 6 June and had asked the property factors to "apportion the recent account which you sent to our client of 28 May".

The property factors had accepted that the amount of the Apportionment Fee was incorrect and had refunded the sum of £42 when they became aware of their error. Their decision to return the balance of the money (£48) to the homeowners was a gesture of goodwill in an attempt to settle the complaint. The cost of preparing for and attending the hearing greatly outweighed the amount of money involved and it was also, therefore, a pragmatic commercial decision. It was not, as the homeowner had suggested, an admission of "guilt".

The Tribunal makes the following findings of fact:

- The homeowner is a former co-owner of the Property.
- The Property forms a building comprising one of the common parts of a development of a former mill, now converted into 29 flatted dwellinghouses.

- The property factors, in the course of their business, manage the Property. 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' duties arise from a Terms of Service and Delivery Standards document, a copy of which has been provided to the Tribunal.
- The date from which the property factors' duties arose is 1 November 2012, the date on which the Act came into force.
- 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 1 November 2012.
- The homeowner has notified the property factors in writing as to why he considers that the property factors have failed to carry out their duties arising under Sections 14 and 17 of the Act.
- The homeowner made an application to The Tribunal on 10 February (received on 14 February) 2017 under Section 17(1) of the Act.
- The concerns set out in the application have not been addressed to the homeowner's satisfaction.
- On 10 July 2017, a Convener of the Housing and Property Chamber with delegated powers under Section 18A of the Act intimated to the parties a decision to refer the application to a tribunal for determination.

Reasons for the Decision

The Tribunal considered firstly the preliminary matters that had been raised by the property factors and their request for Directions to be issued by the Tribunal. The Tribunal accepted that the handwritten portions of the application were not easy to read, but they were not illegible and they were, in any event, repeated and expanded upon in the typed supporting document provided by the homeowner with the application. The Sections of the Code of Conduct under which the homeowner was complaining were clear on the application form. As regards the complaint that the property factors had failed to carry out their property factor duties as set out in Section 17(5) of the Act, the homeowner had added a note in which he said that he realised his handwritten note was untidy, so attached a typed copy for clarity.

In relation to the question of whether the homeowner had satisfied the requirement of Section 17(3) of the Act that the homeowner must have 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 dutes or, as the case may be, to comply with the Section 14 duty, the Tribunal considered the terms of correspondence that had passed between the parties. The homeowner had informed the property factors on 1 February 2017 that he considered they had failed to carry out their property factor duties and had set out the reasons for his believing that to be the case. This letter had been

acknowledged by the property factors on 3 February and they had enclosed a cheque refunding the balance of £48, which they trusted would resolve the homeowner's concern in the matter. The Tribunal was of the view that the homeowner was entitled to assume that the letter of 3 February was the final response of the property factors to his complaint in respect of factor duties under Section 17(5) of the Act.

As regards complaints in relation to the Code of Conduct, the Tribunal accepted that the property factors did not formally know of the Sections of the Code which were relevant to the complaint until 28 August 2017, but the Tribunal had before it a copy of the property factors' letter to the homeowner dated 31 October 2016, which was sent in response to a recent letter from the homeowner. The date of that letter is uncertain, but it had clearly been received by the property factors, so they were well aware of the alleged complaint by the homeowner. Further, the property factors wrote again to the homeowner on 23 November 2016, and referred to a letter from the homeowner dated 11 November and the fact that he remained "unhappy in this matter". The property factors had not, in that letter, offered to escalate the complaint in accordance with their complaints procedure, but in the view of the Tribunal they can have been in no doubt that they were dealing with a complaint from the homeowner.

Accordingly, the Tribunal rejected the applications by the property factors to the Tribunal to give Directions in terms of Rule 20(1) of the Regulations.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 1.1a.B.d of the Code of Conduct, which provides that the written statement of services should include the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges and how these fees and charges are calculated and notified. The Tribunal accepted the evidence provided by the property factors that there had been an exchange of letters between the property factors and the homeowner's solicitors and that had not been disputed by the homeowner in his written representations. In a letter of 2 June 2016, the solicitors, Messrs Bell & Craig, Stirling, advised the property factors of the sale date and asked the property factors to apportion the common charges account for the period from 29 February 2016 to 28 May 2016. The property factors replied on 6 June, stating that their fee for the apportionment work would be £75 plus VAT and that the apportioned account would be issued in August 2016. On 13 June 2016, the homeowner's solicitors responded to the letter of 6 June and asked the property factors to "apportion the recent account that you sent to our client".

The Tribunal held that, throughout this course of correspondence, the property factors were dealing with the solicitors as agents for a disclosed principal, namely the homeowner and his wife and that they were entitled so to do. It would be normal for a solicitor to instigate the correspondence by advising the property factors of the sale. It was extremely unfortunate, from the homeowner's perspective, that his solicitors did not seek his authority before agreeing on his behalf to the apportionment which they

knew would give rise to a fee of £75 plus VAT, but the view of the Tribunal was that the property factors were entitled to render a fee, as they had advised the homeowner's agents in advance of carrying out the apportionment work and had been given authority by the homeowner's agents to go ahead. They were entitled to rely on there being a relationship of agent and principal between the homeowner and his solicitors without making enquiry directly of the homeowner.

The property factors had had no knowledge of the sale until they sent the homeowner the next factoring invoice some 2 months after the sale went through. The homeowner had then contacted them by letter and they had responded on 24 May 2016 to say they were unable to do anything as the homeowner's solicitors had not advised them of the sale. The homeowner then contacted his solicitors who took up the matter on his behalf by writing to the property factors on 2 June.

Accordingly, the Tribunal did not uphold the homeowner's complaint under this Section of the Code of Conduct.

The Tribunal noted that, had it not found that the issue was determined by the law of agency, which made examination of the further evidence unnecessary, it would have held that, in the Terms of Service and Delivery Standards document, the words "prior to commencement" in relation to the provision of "Additional Services" required the property factors to agree their costs with the homeowner prior to the commencement of the additional services work, not prior to the commencement of the factoring service itself. The nature of the Additional Services was such that it would not have been possible for property factors to accurately anticipate at the outset of a factoring arrangement the costs which would be involved. Consequently, the only reasonable interpretation of the words "prior to commencement" was that they referred to commencement of any additional services work.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 1.1a.C.g of the Code of Conduct, which states that the written statement of services should set out confirmation that the property factor has a debt recovery procedure which is available on request, and may also be available online.The Tribunal considered the property factors' Terms of Service and Delivery Standards document. It states, halfway down page 3, that "HPMS has a clear procedure for debt recovery and this can be found at" their website "and is available upon request by hard copy. This procedure outlines a series of steps which HPMS will take on behalf of homeowners." In the view of the Tribunal, this clause complied with the requirements of this Section of the Code of Conduct.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 1.1a.C.h of the Code of Conduct, which stipulates that the written statement of services 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 services). The property factors'

Terms of Service and Delivery Standards document provides that the core service includes collecting and administering homeowners' advance funds and sinking/reserve funds where appropriate, and the Notes on Service, on page 2 of the document state that "The float is refunded by HPMS following sale of a house or flat, or termination of the factoring service, at the point of settlement of the final apportioned common charges account, less any outstanding charges due at that time. The float will be held in an account, separate from HPMS funds." The Tribunal held that these statements in the document complied with the requirements of this Section of the Code of Conduct.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply the property factor's duties. The homeowner's complaint in this regard was that the Apportionment Charge had been invalid as it directly countered the introduction to the property factors' "Additional Services" paragraph in the Terms of Service and Delivery Standards document, that the property factors' process of refusing to take any action until after the sale had ~~n~~been legally advised to them made it an impossibility that they could have done anything until after the sale had been completed and that they had never agreed any cost with him for the Apportionment Charge. TheTribunal had already determined that the property factors had acted correctly in relying on the doctrine of agency in accepting instructions from ~~form~~ the homeowner's solicitors to apportion the charges (and, therefore charge a fee of £75 plus VAT, as they had already advised the solicitors would be the cost of doing the apportionment work). The homeowner's solicitors had, by giving these instructions, agreed the cost on his behalf. The Tribunal also held that it would not have been possible for the property factors to finalise the homeowner's account until some time they had been advised that the sale had been completed, as there might be invoices not yet rendered for work carried out to the Property prior to the sale date. There is protection in Section 3.1 of the Code of Conduct against unacceptable lengthy delay in finalising accounts on the sale of a property. Accordingly, the Tribunal found that the property factors had not failed to comply with the property factor's duties.

Property Factor Enforcement Order

The Tribunal does not propose to make a Property Factor Enforcement Order.

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.

G Clark

Signature of Legal Chair .. Date 10 October 2017