

# 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/17/0023**

**1 Millcroft Road, Cumbernauld, Glasgow, G67 2QE  
("the property")**

**The Parties:-**

**Mr Ian McNaught, 1 Millcroft Road, Cumbernauld, Glasgow, G67 2QE  
("the Applicant")**

**Apex Property Factor Limited, 46 Eastside, Kirkintilloch, East  
Dumbartonshire, G66 1QH  
("the Respondent")**

**Tribunal Members:  
Graham Harding (Legal Member)  
Carolyn Hirst (Ordinary Member)  
("the tribunal")**

## **DECISION**

The Respondent has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with sections 2.2, 2.5, 4.8 and 4.9 of the Code.

The decision is unanimous.

## **Introduction**

In this decision we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 as "The Regulations"

The Respondent became a Registered Property Factor on 01 October 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

## Hearing

The tribunal heard oral evidence from the Applicant. There was no written representations or attendance at the hearing by the Respondent. The Respondent had received proper intimation by letter from the Housing and Property Chamber dated 26 April 2017.

## Summary of submissions

1. The Applicant explained that as far as he was aware, the resident's association referred to in the Deed of Conditions recorded General Register of Sasines (Dumbarton) on 09 February 1988 by Cumbernauld Development Corporation had not been operating for some time. The Applicant said that there had been factors previously appointed but that there had been a period of five or six years where no factor had been in place. The Applicant believed that the previous factors had struggled to obtain payment and had therefore resigned. The Applicant was unaware as to how the previous factors had been appointed.
2. The Applicant explained that he received a letter from the Respondents dated 03 August 2015. The letter stated that the Respondents had been appointed as factor in neighbouring blocks. The Respondents requested that the Applicant sign a mandate authorising the Respondents to act as factors.
3. The Applicant stated that he contacted the Respondents by telephone on 23 September 2015 and spoke to Mr Neil Cowan of the Respondents. The Applicant stated that he asked Mr Cowan what factoring duties they intended to carry out and for evidence that they had properly been appointed as factors.
4. The Applicant said that he subsequently received a letter from the Respondents dated 25 September 2015 enclosing a schedule of charges and a further mandate for the applicant to sign. The applicant did not sign the mandate.
5. The Applicant stated that he then received several letters from the Respondent demanding payment of a float fee and that because he had failed to make payment, a late payment charge had been added.
6. The Applicant stated that he then contacted Coatbridge Citizens Advice Bureau who wrote to the Respondent in December 2015, a copy of the Respondent's response dated 02 March 2016 was attached to the application. In the letter, the Respondent stated that it had been contacted by an owner on behalf of a collection of absentee landlords to provide a proposal for factoring the development. The letter stated that the Respondents had tried to arrange a meeting of all owners (331) but that this was impractical due to being unable to find a local venue capable of holding a large number of

people and that a large number of landlords lived outwith Scotland and were not prepared to attend such a meeting. The Respondent stated in their letter that it had sent out a proposal to all owners enclosing a mandate and giving the option of appointing the Respondent as factor. The letter went on to say that in accordance with the Title Deeds they had received the necessary number of votes to be appointed as factor. The Applicant said that he believed that it had taken the Respondents three months to reply to the Citizens Advice Bureau letter.

7. The Applicant stated that he had discussed matters with Coatbridge Citizens Advice Bureau and had been advised that the Respondent had not gone through the correct procedure to be appointed as factor. The Applicant stated that he believed that the Respondent was appointing itself as factor.
8. The Applicant stated that the Respondent had regularly sent out invoices between September 2015 and the date of the hearing on 12 June 2017 but consistently failed to respond to the Applicant's request for evidence to show that the Respondents had received the appropriate authority to act as factors. The latest invoice from the Respondent dated 05 June 2017 was for the sum of £624.36.
9. The Applicant said that a meeting of residents, owners, councillors, MPs and MSPs took place on 28 September 2016. The Applicant said that the Respondents did attend that meeting and had been bombarded with complaints. The meeting had been quite heated and the Respondent had been asked to leave. The meeting had been called in an attempt to get all owners together to address the condition of the estate to which the applicant's property forms part. The Applicant believed that there was currently a consultation taking place between the local authority and landlords.
10. The Applicant stated that he had never seen any work being done on the instructions of the Respondents other than that the grass outside his property had been cut in September 2015. The Applicant said that the grass had not been cut in 2016 and was now totally overgrown. The applicant believed that the local Council had cut a verge of about three or four feet from the road but had left the remainder of the grassed area uncut.
11. The Applicant stated that the Respondents had failed to provide documentary evidence to show that it had been properly appointed as factor and was therefore in breach of the Code of Conduct.
12. The Applicant said that he felt that the bills and accompanying letters were in breach of 2.2 of the Code in that the letters were intimidating and had led to him being stressed.
13. The Applicant said that the Respondent was also in breach of Section 2.5 of the Code in that the Respondent failed to reply to the Applicant's request for

confirmation of the Respondent's authority to act. It failed to respond timeously to requests by Coatbridge Citizens Advice Bureau and failed to respond to the Applicant's formal complaint to the Respondent dated 23 February 2017.

14. The Applicant said that he thought that the Respondent was in breach of Section 4.7 of the Code in that it did not have the right to collect payment from the owners as they had not been properly appointed as factors.
15. The Applicant thought that although as far as he was aware, the Respondents had not commenced legal action against him, it had sent him correspondence purporting to be a Simple Procedure Claim form which would be lodged in the Sheriff Court. The Applicant believed that this was in breach of Section 4.8 by the Respondents failing to take reasonable steps to resolve the matter.
16. The Applicant believed that the Respondent was in breach of Section 4.9 of the Code because it had not provided the information requested with regards to its authority to act as factor. The Applicant said that he believed that the correspondence being sent by the Respondent was intended to be intimidating. The Applicant said that he wished the Respondent to stop demanding payment and to stop sending intimidating letters. The Applicant said that he would want an apology from the Respondent for the way in which he had been treated and the stress that this had caused over the previous two years.
17. The Applicant stated that if the Respondents were properly appointed as Factors then he would be willing to pay any sums that were properly due.

### **Findings in Fact**

- 1 The Applicant is the home owner of 1 Millcroft Road, Cumbernauld, Glasgow, G67 2QE ("the property")
- 2 The Deed of Conditions burdening the property by Cumbernauld Development Corporation and recorded in the General Register of Sasines for Dumbarton on 09 February 1988 specifies the number of properties affected by the Deed of Conditions. These consist of the properties known as 1 – 103 Millcroft Road and consist of 57 flatted dwelling houses. The Deed of Conditions provided for a factor to be appointed to supervise the common repairs to and maintenance of the property, the curtilage and the common parts.
- 3 The Resident's Association referred to in the said Deed of Conditions has not operated for some time.
- 4 The Respondents would require signed mandates from 29 of the proprietors of the flats forming numbers 1 – 103 Millcroft Road, Cumbernauld in order to have authority to act as property factor.

- 5 Despite repeated requests by the applicant, the Respondent has failed to provide documentary evidence to show that it has been properly appointed by the majority of owners of 1 – 103 Millcroft Road, Cumbernauld.
- 6 The Respondent has issued invoices to the Applicant demanding payment of sums amounting at the date of the Hearing to £624.36.
- 7 The Respondent has failed to respond timeously to the Applicant's enquiries and complaints.
- 8 The Applicant had found the Respondent's lack of response to enquiries and complaints together with the Respondent's demands for payment and threats of Court action to be intimidating and stressful.

### **Reasons for Decision**

The tribunal was disappointed that the Respondent had failed to make any written representations in respect of the application and had failed to attend the hearing. Having ascertained that the Respondents had been given proper intimation of its right to make written representations and to attend the Hearing, the tribunal decided to determine the application in the Respondent's absence in terms of Rule 28 of the Regulations.

The Applicant's title deeds were quite clear in that the Deed of Conditions by Cumbernauld Development Corporation recorded in the General Register of Sasines for Dumbarton on 09 February 1988 burdening the Applicants property provided for a factor being appointed. The factor ought to have been appointed by a resident's association comprising of the owners of the 57 flats forming 1 – 103 Millcroft Road, Cumbernauld. According to Clause 9 (c) of the said Deed of Conditions, the proprietors of any 7 of the 57 dwellinghouses shall have the power to call a meeting of the resident's association to be held at such reasonably convenient time and place as the conveners of the said meeting may determine and which time and place of meeting at least seven days notice in writing shall be given by or on behalf of conveners of the said meeting to the other proprietors. Had such a meeting taken place it would have been possible for a resident's association to be reconstituted and for a resident's association to appoint a factor.

It is clear from the correspondence sent by the Respondent to Coatbridge Citizens Advice Bureau dated 02 March 2016 that the Respondent has incorrectly interpreted the Deed of Conditions. The Respondent indicate in its letter that it was impractical to hold a meeting as it required a venue capable of holding 331 owners. Furthermore the Respondent failed to provide confirmation of the numbers of owners who have agreed to the Respondent acting as property factors. In the absence of that information being provided either to Coatbridge Citizens Advice Bureau or to the Applicant or to the tribunal, it is reasonable to conclude that the Respondent do not have the authority of the majority of the owners of flats 1 – 103 Millcroft Road or a decision of the resident's association to act as property factors.

The tribunal found that by failing to respond to the Applicant's reasonable request for information regarding the Respondent's authority to act, the Respondents were in breach of Section 2.5 of the Code.

Whilst the correspondence sent to the applicant demanding payment and threatening Court action would not in the normal course of events be a breach of Section 2.2 of the Code, the tribunal were of the view that by failing to respond to the reasonable requests of the Applicant for confirmation of the Respondents' authority to act as factors this did result in the correspondence being threatening and intimidating.

Sending a Simple Procedure Application Form to the Applicant without taking reasonable steps to resolve matters, did in the tribunal's view amount to a breach of Section 4.8 of the Code. The tribunal also found that by either knowingly or carelessly misrepresenting its authority, the Respondent was in breach of Section 4.9 of the Code. The tribunal did not find that the Applicant had shown that the Respondents were in breach of Section 4.7 and the Applicant accepted that this was the case.

Although the Respondent has provided the Applicant with a written statement of services, the Respondent has failed to set out their authority in this statement.

By failing to follow its complaints procedure as set out in their statement of services, the Respondent was in breach of Section 7.1 and 7.2 of the Code.

### **Proposed Property Factor Enforcement Order**

The tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) Notice.

### **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

5 July 2017

Date

# Housing and Property Chamber First-tier Tribunal for Scotland



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

### **Proposal regarding the Making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)**

**Chamber Ref: FTS/HPC/PF/17/0023**

**1 Millcroft Road, Cumbernauld, Glasgow, G67 2QE  
("the property")**

#### **The Parties:-**

**Mr Ian McNaught, 1 Millcroft Road, Cumbernauld, Glasgow, G67 2QE  
("the Applicant")**

**Apex Property Factor Limited, 46 Eastside, Kirkintilloch, East  
Dumbartonshire, G66 1QH  
("the Respondent")**

#### **Tribunal Members:**

**Graham Harding (Legal Member)**

**Carolyn Hirst (Ordinary Member)**

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFE0"):

- (1) The Respondent must issue a credit note to the applicant in the sum of £624.36 within 28 days of the communication to the Respondent of the Property Factor Enforcement Order.

Section 19 of the 2011 Act provides as follows:

*"(2)In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—*

*(a)give notice of the proposal to the property factor, and*

*(b)allow the parties an opportunity to make representations to it.*

*(3)If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), 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, the First-tier Tribunal must make a property factor enforcement order."*

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO have serious consequences and may constitute an offence.  
G Harding

Legal Member

5 July 2017

Date