**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/18/1855**

**Re: Flat 1/1, 29 Miller Street, Clydebank, G81 1UB ("the Property")**

**Parties:**

**Mr Mark McPeake, residing at 6 Cochno Gardens, Hardgate, Clydebank, G81 6BS ("the Applicant")**

**Hacking & Paterson, 1 Newton Terrace, Charing Cross, Glasgow, G3 7PL ("the Respondent")**

**Tribunal Members:**

**Mr E K Miller (Legal Member) and Mr M Links (Ordinary Member)**

**DECISION**

The Respondent had not refused to resolve, or unreasonably delayed in attempting to resolve the Applicant's concerns as required in terms of Section 17(3)(b) of the Act and accordingly the Tribunal did not have jurisdiction to determine the matter.

The decision was 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 2016 are referred to as "the Rules"

On 25 July 2018 the Applicant lodged an application with the Tribunal alleging that the Respondent had failed to comply with 2.1, 2.4, 2.5, 6.1, 6.3, 6.6, 6.7, 6.8 6.9 and 7.2 of the Code. The Applicant also alleged that the Respondent had failed in the management of the Common Parts of the Property and therefore failed to carry out their Property Factors duties correctly.

On 23 November 2018 a decision was made by a Convener of the Tribunal acting under delegated powers from the President of the Tribunal that there was no prospect of the dispute between the parties being resolved. A Notice of Referral and Hearing was issued to both parties on 4 December 2018.

## Hearing

A Hearing was held at Glasgow Tribunal Centre, 20 York Street, Glasgow on 18 January 2019. The Tribunal was comprised of Mr E K Miller, Chairman and Legal Member and Mr M Links, Ordinary Member. The Applicant was present and represented himself. The Respondent was neither present nor represented.

On 19 December 2018 the Respondent submitted requests seeking the Tribunal to issue two Directions to the Applicant. The first of these asked the Tribunal to request the Applicant to confirm which document within the application paperwork represented the Applicant's notification to the Respondent as to why the Applicant considered that the Respondent had failed to carry out the property factor's duties as defined in S14 of the Act ("Direction 1"). The Respondent's reason for seeking such a Direction was that they felt that the test contained in Section 17(3) of the Act had not been met with and therefore the Applicant was not entitled to submit a complaint to the Tribunal at this stage. The Respondent was of the view that the Tribunal did not have jurisdiction as a result.

The Respondent also lodged a second request for a Direction asking the Tribunal to have the Applicant set out all his complaints in a singular, coherent and logical format signposting documentation relating to the issues between them to the relevant section of the Code for each complaint ("Direction 2"). The Respondent's reason for seeking such a Direction was that they believed that the Applicant had failed to identify why and how they believed the failure had occurred in relation to both the Code of Conduct and property factors duties.

The Respondent then submitted on 11 January 2019 copies of numerous pieces of correspondence between the parties.

## Consideration of Direction 1

Although the Respondent has submitted a request for a Direction, the view of the Tribunal was that this was not a matter on which the Applicant should be directed to answer. Rather the Respondent had raised a more fundamental question regarding the jurisdiction of the Tribunal in this matter. It was appropriate for the Tribunal to consider this matter itself and determine whether the test in Section 17(3) of the Act had been met.

Section 17(3) of the Act specifies that in relation to applications to the Tribunal by an owner of a property that:-

"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 Factors 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 concerns."

If either of the tests in Section 17(3)(a) or (b) have not been met then it is not inappropriate for the Tribunal to continue to reach a determination on the matter.

The Tribunal considered the paperwork before it in relation to this point. The Tribunal was satisfied that the test in Section 17(3)(a) had been met. The Applicant had notified the Respondent in writing as to why the Applicant considered that the Respondent had failed to carry out their duties and/or comply with the Code of Conduct. The Applicant had made a formal complaint on 21 May 2018 via email. This made it clear that there was a formal notification of complaint. The Respondent responded by letter on 24 May 2018 setting out their response. The Applicant was dissatisfied with this and replied with points he wished answered on 29 May 2018. In addition and as per the Respondent's complaints procedure, he requested the Respondent's "Application for Formal Complaint Resolution" form. ("AFCR") The Applicant returned the AFCR on 11 July 2018. In the AFCR the Applicant highlighted the Sections of the Code that he believed had been breached and how he believed the Respondent had failed to manage the common parts of the Property. The Respondent replied in lengthy terms on 31 July 2018, in response to the AFCR.

Looking at the documentation in the round, the Tribunal was satisfied that the test in Section 17(3)(a) had been met. The Homeowner had emailed a formal letter of complaint on 21 May 2018, had followed this up with a response on 29 May 2018 (in response to the Respondent's response on 24 May 2018), he had, as requested, completed the returned the AFCR. He had set out the sections of the Code that he believed has been breached. The Tribunal did not see that the Respondent could have been unaware of what the issues in dispute were.

In relation to Section 17(3)(b) the Tribunal then required to consider whether the Respondent had refused to resolve or had unreasonably delayed in attempting to resolve the Applicant's concern.

The Respondent's main point in this regard was that having returned the AFCR, the Applicant had not waited for a response. Instead on 25 July 2018 the Applicant lodged a complaint with the Tribunal.

The Tribunal enquired at the Hearing from the Applicant as to why he had submitted the application on 25 July 2018. The Applicant's submission was that the Respondent's prior responses to his complaint had not satisfied him and, in any event, the Respondent should have replied by 25 July 2018 to adhere to their own timescales within their complaints procedure. On that basis he felt he had been entitled to lodge the complaint.

The Tribunal considered the Respondent's complaint process (which was available on its website). The initial email complaint of 21 May and the response from the Respondent comprised Stage 1 of the complaints process. The email of 29 May 2019 and the lodging of the AFRC comprised Stage 2 of the Respondent's complaint process. In terms of the Respondent's complaints process, they were entitled to a

period of 14 working days in which to respond to the AFRC. The Applicant gave the Respondent 14 days to respond, rather than 14 working days.

The Applicant had lodged the AFRC by email late afternoon on 11July 2018. On the basis that the first proper working day for the Respondent to respond fell on 12 July then the Respondent had until 31 July to respond to the Applicant to comply with their complaints procedure. The Tribunal was satisfied that the Respondent had responded in time and had not breached their complaints procedure.

In their letter of 31 July 2018 the Respondent asked the Applicant to advise them if he remained dissatisfied. This was in line with their complaints procedure which had a final Stage 3 review of the complaint. The Applicant did not respond to confirm that he wished the complaint to go to Stage 3. Thereafter further correspondence took place between the parties regarding the underlying issue in dispute (the repair of a stairwell within the Property). Over the next few months the works required to fix the stairwell were carried out.

In light of the above, the Tribunal then considered whether the test contained in Section 17(3)(b) had been met. The Tribunal was of the view that it is not sufficient of itself that a property factor adheres to its own complaints procedure to ensure that it does not breach the terms of Section 17(3)(b). If, for example, the complaints procedure had 50 stages it would clearly be farcical and designed to delay complaints. It is generally accepted that a 2 stage complaints process is the ideal model. The Respondent, however, has a 3 stage process. The additional stage is a final review by a Director of the Respondent's firm. The additional stage and the requirement to request and complete the AFRC means the Respondent's process is more cumbersome and time consuming for applicants than average. Nonetheless, viewed in the round, the Tribunal was of the view that the Respondent's complaints process was reasonable overall.

T3he Applicant had completed and submitted the AFRC on 11 July 2018. The Respondent, in terms of the timings contained within their complaints procedure, had until 31 July to respond to it. They did so. They then asked the Applicant if he remained dissatisfied to confirm this to them. He did not do so. Accordingly, the Stage 3 process was not activated. Although the Applicant indicated to the Respondent that he was in correspondence with the Tribunal administration no correspondence would have been received by the Respondent from the Tribunal until 4 December 2018. In that intervening period the Applicant and the Respondent did engage and the works that were the issue in dispute were carried out.

Overall, therefore, the Tribunal was of the view that the Respondent had been compliant with their own complaints procedure and had not refused to resolve or unreasonably delay in attempting to resolve the Applicant's concerns. Simply put, the ball was in the Applicant's court. The application to the Tribunal was premature as the Respondent had been denied the opportunity to try and resolve the dispute at Stage 3 of the process.

In all likelihood, had the Applicant completed Stage 3 he may well still have been dissatisfied and the complaints process would have been exhausted and he would have been entitled to come to the Tribunal at that stage. Whether or not the final

stage would have resolved matters or not is, however, irrelevant. The Respondent was entitled to have that chance. The Applicant indicated at the hearing that he felt that the Respondent had not properly answered in their response of 31 July his email of 29 May – and that remained the case at the Hearing. Whilst that may or may not have been the case, the fact remained that the Respondent had asked the Applicant to advise them if he remained dissatisfied. He had not done so and therefore the complaints procedure had not been exhausted

The Tribunal was satisfied that the test in Section 17(3)(b) had not been met and therefore the Tribunal did not have jurisdiction to determine the substantive issues.

For the record, in relation to Direction 2 from the Respondent, the Tribunal did not agree with the Respondent. It was the Tribunal's view that the issues and complaint from the Applicant had been clearly established from the correspondence between the parties. There would have been no benefit in issuing a Direction in this regard.

**General Commentary and background on the basis of the dispute**

Although not required to make a decision on the substantive dispute between the parties, nonetheless the Tribunal had read both parties papers in advance and had some comments on the substantive issue, which the parties may care to note.

The background here was that the Applicant's property was a relatively modern property. Issues had arisen in 2008 regarding a stairwell leading to the first floor. This had "dropped" and required repair. The Code of Conduct did not take effect until 1 October 2012 and so the Tribunal had no jurisdiction over events prior to that date. However the Tribunal did note that the issues with the stairwell had been raised by the Respondent with NHBC at that time, to ascertain whether they would make good the repairs. The cost of making good the repairs fell below the de minimis level of claim with NHBC and therefore there was nothing further that could be done in that regard by the Respondent.

Matters seemed to fall into abeyance for a few years but from 2015 on there seemed to be a renewed effort to have the repairs carried out. The Respondent had previously obtained quotes from a building company, Hugh Scott Limited, to carry out the works. Over the course of 2016 they had tried to ingather the necessary funds to allow the repair works to be carried out. Unfortunately a minority of owners within the larger tenement (of which the Property formed part) paid the necessary funds.

The Respondent wrote numerous times to all the owners to ask them to make payment in order that the works could be done. After a considerable period of time the appropriate funds were obtained. This was not achieved by all the owners contributing however, but rather by one proprietor (not the Applicant) offering to make up the shortfall in order that the works could be done. The necessary funds were ingathered in 2017. The Respondent then went back to Hugh Scott Limited to put the works in motion. At that point, however, Hugh Scott Limited indicated that they were now not sure that the works could be done for the price originally quoted or that the manner in which the works had originally been contemplated could now

be carried out. This was an unfortunate turn of events but was not the fault of the Respondent.

In the first instance the action of the Respondent was to try and persuade Hugh Scott Limited to take matters forward as originally agreed. There efforts in this regard took a few months and were, ultimately, unsuccessful. Nonetheless the Tribunal viewed this as one of a reasonable range of options in which the Respondent could have proceeded.

The Respondent then required to go to a structural engineer to ascertain the best way to proceed. Once this was done they then ingathered quotes for the works. This whole process took some time. From the correspondence submitted by the Respondent it was apparent that the Respondent did keep matters moving forward in order to bring works to a conclusion. The Respondent, in their letter of 31 July 2018, did indicate that they acknowledged that, on occasion, they could have progressed matters more quickly. As a result the Respondent has absorbed some costs that had been incurred on behalf of proprietors.

The Respondent had also gone back out to NHBC to try and see again if they could be persuaded to carry out the works. NHBC, not surprisingly, indicated that they were not prepared to assist and in any event the policy period had lapsed. The Respondent also approached the buildings insurer to see if cover was available. Buildings cover is generally available to cover external events such as fire, floor or storm damage. It would not generally be expected to cover a want of repair such as the defective stairwell. Whilst contacting NHBC and the insurer had perhaps given false hope to owners that someone else might pay, it appeared to the Tribunal that the Respondent had been thorough in exploring all avenues to avoid costs being incurred by the owners.

During 2018 the Homeowner had been trying to sell the Property. Two potential purchasers had walked away from the Property because of the issues with the stairwell. The stairwell was propped up with jacks as an interim measure and the Tribunal could well believe that this would prove off-putting to potential purchasers. The Tribunal well understood the Applicant's frustration and had a considerable degree of sympathy for the position he found himself in.

However, the Tribunal was of the view from the paperwork before it that the Applicant's frustration should have been directed at the other homeowners who had delayed in making payment. Had all the owners made payment timeously then the works could have been carried out at a point when Hugh Scott Limited were still prepared to do so. Even if they had refused then, the Respondents would then have been able to find an alternative contractor sooner and the works could have been carried out before the Applicant wished to sell. The fact that Hugh Scott subsequently changed their mind was unfortunate but was not the fault of the Respondent. The failure of the owners to make payment created the time gap which allowed Hugh Scott Limited to change their minds in relation to how best to carry out the works.

For a factoring relationship between factor and owners to work successfully, not only does the factor require to carry out works and liaise with owners on an efficient and

regular basis, it also is a bilateral process that requires owners to put their hands in their pockets when required. In this case a majority of owners had not done so sufficiently swiftly and that was the root cause of the dispute in this matter. Whilst the Respondent could perhaps have progressed matters a little more efficiently on occasion, nonetheless, from the paperwork before it, the Tribunal, struggled to see where the Respondent was at material fault. The Tribunal did have sympathy for the position the Applicant had found himself in and was grateful for the time spent in preparing his submissions.

In summary, the Tribunal was of the view that the test in Section 17(3)(b) had not been met. Accordingly the Tribunal did not have jurisdiction to determine the application.

**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.**

E Miller

Legal Member and Chair

23/1/19

Date