

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier tribunal for Scotland (Housing and Property Chamber)
(“the tribunal”)

DECISION on homeowner’s application: Property Factors (Scotland) Act 2011
(“the 2011 Act”), Section 19(1)

Chamber Ref: FTS/HPC/PF/19/1400

Land at Oswald Court, Edinburgh, EH9 2HY
(“The Property”)

The Parties:-

Mr Douglas Forbes, 16 Oswald Court, Edinburgh, EH9 2HY
(“the Applicant”)

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD
(“the Respondent”)

Tribunal Members:
Susanne L M Tanner QC (Legal Member)
David Godfrey (Ordinary Member)

DECISION

- 1. The Respondent is not the “property factor” of the Property as defined in the 2011 Act, section 2; therefore the Respondent has not failed to carry out the property factor’s duties or to comply with the Code of Conduct.**
- 2. The decision of the tribunal is unanimous.**

STATEMENT OF REASONS

- 1. In this decision the tribunal refers to the Property Factors (Scotland) Act 2011 as “the 2011 Act”; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as “the 2017 Rules” and the Code of Conduct for Property Factors as “the Code of Conduct”.**

2. Procedural Background

- a. On 9 May 2019 the Applicant lodged an Application with the tribunal. The Applicant alleged failures of the Respondent to comply with the Code of Conduct Sections 1, 2.1, 2.3, 2.4, 2.5, 3.3., 3.6a, 4.1, 4.4, 5.1, 5.2, 5.3, 5.4, 5.7, 6.1, 6.2, 6.3, 6.4, 6.5, 6.6, 6.7, 6.8, 6.9 and 7. The Applicant also alleged a failure of the Respondent to carry out property factor's duties, stating that "*there is still no factoring contract in place*" in respect of the Property. The Applicant attached the following to the Application: a cover letter dated 4 May 2019; and a list of documents 1-24 with a corresponding bundle of numbered documents.
- b. On 12 May 2019, following acknowledgement of receipt of the application by the tribunal, the Applicant submitted further documents to the tribunal's administration, stating that they supported allegations of further breaches of Section 2 of the Code of Conduct.
- c. On 13 May 2019, the Applicant submitted a further email to the tribunal's administration.
- d. On 17 May 2019, the tribunal requested further information from the Applicant, namely a copy of the formal notification to the Respondent of the alleged breaches of the Code of Conduct. A pro forma form was attached for the Applicant's use.
- e. On 21 May 2019, the Applicant submitted further correspondence to the tribunal's administration, enclosing letters sent by him to the Respondent dated 22 March and 24 April 2019.
- f. On 29 May 2019, the tribunal requested further information from the Applicant, stating that the letters he had supplied did not meet the requirements for notification to the Respondent and again attached pro forma forms for him to complete to notify the Respondent.
- g. On 31 May 2019, the Applicant submitted further correspondence to the tribunal's administration, requesting further time to respond with the notification letter.
- h. On 11 June 2019, the Applicant submitted further correspondence to the tribunal's administration, attaching a copy of a letter to the Respondent dated 10 June 2019.

- i. On 17 June 2019, the Applicant submitted further correspondence to the tribunal's administration, attaching three additional documents which were said to support the allegations in the Application.
- j. On 20 June 2019, the tribunal wrote to the Applicant, stating that the tribunal has no jurisdiction in respect of breaches of Section 7 of the 2011 Act; and noting that the Applicant's letter to the Respondent does not include alleged breaches of Sections 3.6a, 4.1, 4.4, 5.1, 5.4 and 5.7 of the Code. The Applicant was asked to confirm whether he wished breaches of these Sections to be included in the Application and, if so, to provide evidence of notification of the Respondent; or alternatively to confirm that he does not wish breaches of those sections to be included in the Application.
- k. On 20 and 21 June 2019, the Applicant submitted further correspondence to the tribunal's administration in relation to alleged breach of Section 7 of the 2011 Act.
- l. On 1 and 2 July 2019, the Applicant submitted further correspondence to the tribunal's administration in relation to an alleged breach of Section 7 of the 2011 Act.
- m. On 2 July 2019, the tribunal wrote to the Applicant stating that it had already responded regarding its jurisdiction and repeating the request for further information in relation to notification of the Respondent regarding the alleged breaches of the Code of Conduct.
- n. On 8 July 2019, the Applicant submitted further correspondence to the tribunal's administration stating that he wished to include alleged breaches of 3.6a, 4.1, 4.4, 4.5, 5.1, 5.4 and 5.7 in his Application, making reference to a letter sent to the Respondent dated 8 July 2019. No proof of notification to the Respondent was provided.
- o. On 2 August 2019, the Applicant submitted further correspondence to the tribunal's administration, stating that he wished to lodge an "*additional complaint*" dated 27 July 2019, with reference to a letter sent to the Respondent dated 27 July 2019. Further documents were attached.
- p. On 12 August 2019, the Application was accepted for determination by a tribunal.
- q. On 21 August 2019, both parties were notified that a hearing would take place on 4 October 2019. Parties were advised that written

representations could be lodged by 11 September 2019 and that any documents must be lodged in accordance with Practice Direction number 3, which was enclosed.

- r. On 10 September 2019, the Applicant submitted written representations and documents.
- s. On 10 September 2019, Sarah Wilson from the Respondent wrote to the tribunal, stating that the Respondent wished to attend a hearing and to send written representations. A bundle of documents was attached. Ms Wilson also requested a postponement of the hearing on 4 October 2019, due to her unavailability on annual leave.
- t. On 24 and 26 September 2019, the tribunal received an email and a letter from the Applicant attaching further documentation.
- u. Having stated that it intended to submit written representations, the Respondent did not do so.
- v. The Respondent withdrew its request for a postponement of the hearing and it proceeded on 4 October 2019.

3. Hearing – 4 October 2019, 1000h, at George House, Edinburgh

- a. The Applicant attended the hearing.
- b. Karen Jenkins, Client Relationship and Business Manager from the Respondent attended the hearing. She explained the Sarah Wilson was on leave and that Lorna Rae was not attending because she was concerned with accounts matters rather than customer service issues.
- c. The tribunal identified that there was a preliminary issue, namely whether the Property Factor was a property factor in terms of Section 2 of the 2011 Act, and invited parties to make oral submissions in relation to that matter, as it was not clear to the tribunal from the Application, submissions and documents submitted by the Applicant whether his position was that Charles White Limited were or were not the property factor for the Property. There were a number of internally contradictory statements in his written submissions. The tribunal was not assisted by the fact that the Respondent had not submitted any written representations in advance of the hearing.
- d. Section 2 of the 2011 Act provides: *“Meaning of “property factor”*

(1) *In this Act, “property factor” means—*

(a) *a person who, in the course of that person's business, manages the common parts of land owned by two or more other persons and used to any extent for residential purposes, ...”*

e. Applicant's submissions

- i. The Applicant set out and maintained his position that the Respondent is not the property factor of the Property, stating that it had never been appointed as such.
- ii. The Applicant referred to the Deed of Conditions, paragraph 8, relating to appointment of a property factor which can be done by two means; and paragraph 9, on decision making by owners. The Applicant stated that a property factor had never been appointed under the Deed of Conditions, either by the developer or by the owners in terms of Clause 9. When the tribunal asked him several times if that was his position, he confirmed that it was.
- iii. The Applicant explained that when he purchased the property in 2016, his solicitor had told him that the Respondent was the property factor. He stated that he had seen the Scottish Government website which showed that the Respondent had included the Property on its list of managed properties. However, he stated that in all correspondence since 2016 (other than one letter of 6 May 2019) the Respondent had stated that they are not the property factor and the Applicant agrees with that position.
- iv. The Applicant stated that although the Respondent is not the property factor for the Property, they offer administrative support. He referred to a letter from Mr Backler of the Respondent dated 10 December 2018 in which it was stated the two options were that either the administrative arrangement continued or that the Respondent was appointed as property factor.
- v. The Applicant referred to the minutes of the AGM of the Oswald Court Proprietors Association (“OCPA”) meeting on 7 May 2019 (which the Homeowner did not attend), which record that those present debated whether to accept the Respondent’s terms of appointment as the property factor and agreed to obtain joint legal advice.
- vi. The Applicant repeated a number of times that he has complaints about the way the OCPA operates and enters into contracts with

third party providers of services notionally on behalf of all of the proprietors. The Applicant accepted that his complaints about the OCPA were nothing to do with the Respondent.

- vii. The Applicant stated that although the Respondent is not the property factor of the Property, the Respondent is a property factoring company. The Applicant stated that he thought that he could make the Application against the Respondent even if they were not property factor of the Property.
- viii. The Applicant maintained his position that the Respondent is not the property factor. However, during his evidence and submissions, the Applicant referred to documentation before the tribunal which he stated was capable of being interpreted as supporting the opposing view. He referred to a letter sent to him on 6 May 2019 by Lorna Rae, stating that it appeared to contradict the Respondent's previous statements about their administrative role. He said that the letter was unclear and misleading. However, it did not cause him to change his position that the Respondent was not the property factor of the Property. Each time the tribunal asked the Applicant if he was changing his position, he repeated that he was not and stated that the Respondent was not the property factor of the Property.

f. Respondent's submissions

- i. Ms Jenkins for the Respondent stated that she agreed with the Applicant that the Respondent is not and never has been the property factor of the Property. She stated that the Respondent provides administrative services in the form of collecting funds from owners but that it does not manage the Property.
- ii. She stated that all contracts for services are entered into directly by the OCPA with third party providers on behalf of the Proprietors.
- iii. Ms Jenkins explained that the Property was included on the return to the Scottish Government due to an administrative error and that it should not have been included because the Respondent only provides administrative services. A member of staff had thought that because the Respondent provided administrative services for the Property that it should be included on their return.

- iv. Ms Jenkins stated that the Respondent had recently offered to change from providing an administrative service to providing a property factoring service. Her understanding is that the matter has been put to the owners for a vote. Ms Jenkins stated that there have also been discussions about a draft Written Statement of Services which has been circulated to the owners.
- v. Ms Jenkins accepted that the letter of 6 May 2019 to which the Applicant had referred was unclear and misleading and stated that it should not have been sent by Ms Rae because she has an accounting role rather than a client role. Ms Jenkins apologised to the Applicant during the hearing for the letter and stated that she would speak to the management team about issuing a written apology.
- vi. She reiterated that she agrees with the Applicant that the Respondent is not the property factor of the Property.

4. Tribunal's determination regarding Section 2 of the 2011 Act

- a. Having heard both parties' submissions, the tribunal adjourned to consider the preliminary matter of whether the Respondent is the property factor of the Property, in terms of Section 2 of the 2011 Act.
- b. The tribunal accepted both parties' submissions with reference to the supporting documents spoken to by the parties. As the Respondent stated and as the Applicant agreed, the Respondent provides only an administrative service to the proprietors of the Property. The OCPA enters into contracts with third parties on behalf of the proprietors. The Respondent does not in the course of its business, manage the Property. The Property was included on the Respondent's annual return to the Scottish Government in error by a member of staff who thought that it should be included because administrative services were provided.
- c. The tribunal therefore decided that the Respondent is not the property factor of the Property, as defined in Section 2 of the 2011 Act.
- d. Because the tribunal decided that the Respondent is not the property factor of the Property within the meaning of Section 2 of the 2011 Act, it did not go on to consider the complaints made by the Applicant against the Respondent as property factor that it had breached the Code of Conduct and its property factor's duties. For that reason the tribunal

determined that the Respondent has not failed to carry out the property factor's duties or, to comply with the Code of Conduct.

- e. The tribunal observed that the Applicant has a number of complaints which relate to the OCPA, which are not the subject of the present Application which was brought against the Respondent and are therefore irrelevant to this decision.

5. 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.

Susanne L. M. Tanner Q.C.
Legal Member and Chair

7 January 2020