



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/19/1684

Re: Flat 0/1, 209 Busby Road, Clarkston, Glasgow, G76 8DR ("the Property")

The Parties:

**Mr Stuart Freeland, Flat 0/1, 209 Busby Road, Clarkston, Glasgow, G76 8DR
("the Homeowner")**

Ross & Liddell, 60 St Enoch Square, Glasgow, G1 4AW ("the Property Factor")

Tribunal Members:

Neil Kinnear (Legal Member)

Andrew McFarlane (Ordinary Member)

DECISION

The Tribunal determined that the Property Factor has not failed to carry out its property factor duties in terms of section 17(1) of the *Property Factors (Scotland) Act 2011* ("the 2011 Act") and has not failed to comply with Sections 2.1, 4.2 and 6.1 of the Code of Conduct for Property Factors as required by Section 14(5) of the 2011 Act.

The Decision of the Tribunal is 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 2017* as amended are referred to as "the Rules".

The Property Factor is a Registered Property Factor and has a duty under section 14(5) of the 2011 Act to comply with the Code.

Background

By application dated 29th May 2019 the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with Sections 2.1, 4.2 and 6.1 of the Code.

The Homeowner also sought a determination on whether the Property Factor had failed to carry out its property factor duties as required by Section 17(1) of the 2011 Act. Specifically, the Homeowner stated that the Property Factor had failed to provide the cost of all outstanding repairs to his solicitors before the conclusion of his purchase of the Property.

On 22nd July 2019 a Convenor on behalf of the President accepted the application and referred it to a Tribunal for a hearing. By letters dated 1st August 2019 both parties were notified that the application had been referred to a Tribunal and that a hearing would take place at 10am on 18th September 2019 at Glasgow Tribunals Centre, 20 York Street, Glasgow.

The Tribunal granted a postponement request from the Property Factor's agent seeking a postponement of the Hearing upon the basis that the members of staff familiar with the Property and the history of this matter were unavailable on the 18th September 2019.

Thereafter, by letters dated 4th September 2019 both parties were notified that a hearing would take place at 10am on 24th October 2019 at Glasgow Tribunals Centre, 20 York Street, Glasgow.

The Hearing

The hearing took place before the Tribunal at 10am on 24th October 2019 at Glasgow Tribunals Centre, 20 York Street, Glasgow. The Homeowner attended. The

Property Factor's Anne Marie Hardie and Jennifer Johnston attended, and the Property Factor was represented by Mr Ritchie, solicitor.

As a preliminary matter, the Tribunal noted that the Mr Ritchie had intimated in advance of the Hearing a preliminary argument that the Tribunal had no jurisdiction in respect of any complaint made in respect of actings by the Property Factor prior to 27th July 2018, which was the date when the Homeowner concluded the purchase of the Property and took entry to it.

The Tribunal confirmed with the Homeowner that almost all of his complaints in this application related to the actings of the Property Factor prior to the 27th July 2018. The Homeowner confirmed that only one complaint, that in respect of failure to comply with section 4.2 of the Code, related to the actings of the Property Factor after 27th July 2019.

The Tribunal then heard legal submissions from Mr Ritchie. He referred the Tribunal to the binding decision of the Upper Tribunal for Scotland in the case of *Lynas & Ferri v James Gibb Property Management Ltd* [2019] UT 22, and to sections 10 and 17 of the 2011 Act.

Mr Ritchie submitted that these authorities established that a party can only bring an application in respect of matters which occurred when they were a Homeowner, which term means a party who has completed the purchase of a property by paying the price, receiving a disposition in return for that price, and taking entry.

On that basis, any complaint in this application in relation to any actings prior to 27th July 2018, when the Homeowner concluded his purchase of the Property and took entry to it, could not be considered by the Tribunal.

The Tribunal took time to explain to the Homeowner, who has no legal training, the legal argument which Mr Ritchie presented, the provisions of the 2011 Act he referred to, and the meaning and effect of the decision of the Upper Tribunal for Scotland, and then asked him for his response to it.

The Homeowner indicated that he was not a lawyer, but accepted that if the legal position was as stated by Mr Ritchie, then the Tribunal could not consider any of his complaints except that under section 4.2 of the Code.

The Tribunal adjourned for a few minutes to consider parties' submissions. Upon resuming the Hearing, the Tribunal decided to uphold Mr Ritchie's submission for the reasons set out later in this Decision.

Thereafter, the Tribunal invited the Homeowner to set out his complaint in respect of breach of section 4.2 of the Code.

The Homeowner referred to a "Notice Prior to Court Proceedings" dated 14th January 2019, which he had received from John Campbell Financial Recovery Services

demanding payment of an outstanding debt of £539.56 said to be owed to the Property Factor and warning that if he did not pay, then court action for recovery of that sum might be commenced.

The Homeowner confirmed that he had no other evidence in support of this complaint in this application, albeit that he suggested that there was other material he might be able to produce if he decided to pursue another application.

Mr Ritchie, in response, submitted that Section 4.2 of the Code provided that a Property Factor must not apply any interest or late payment charges in respect of disputed items after the Tribunal has accepted an application for investigation and referred it to a Tribunal, and while it is considering the application.

Mr Ritchie submitted that as this application was accepted by the Tribunal on 22nd July 2019, the Notice Prior to Court Proceedings dated 14th January 2019 clearly preceded acceptance by the Tribunal, and accordingly there could be no breach of section 4.2 of the Code in respect of it.

The Tribunal again took time to explain to the Homeowner, who has no legal training, the legal argument which Mr Ritchie presented, with reference to the terms of section 4.2 of the Code.

The Homeowner again indicated that he was not a lawyer, but accepted that if the legal position was as stated by Mr Ritchie, then he could produce no evidence in this application to support his complaint in respect of section 4.2 of the Code.

Statement of Reasons

Section 17 of the 2011 Act provides:

“17 Application to the First-tier Tribunal

(1) A homeowner may apply to the First-tier Tribunal for determination of whether a property factor has failed—

(a) to carry out the property factor's duties,

(b) to ensure compliance with the property factor code of conduct as required by section 14(5) (the “section 14 duty”).

(2) An application under subsection (1) must set out the homeowner's reasons for considering 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.

(3) 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 factor's 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 concern.

(4) References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard.

(5) In this Act, "*property factor's duties*" means, in relation to a homeowner—

(a) duties in relation to the management of the common parts of land owned by the homeowner, or

(b) duties in relation to the management or maintenance of land—

(i) adjoining or neighbouring residential property owned by the homeowner, and

(ii) available for use by the homeowner."

Section 17(1) creates two separate grounds of complaint, being failure to carry out the property factor's duties and failure to ensure compliance with the Code. A person applying to the Tribunal must in terms of section 17(1) be a homeowner.

Section 10(5) of the 2011 Act defines the term "homeowner" as follows:

"(5) In this Act, "*homeowner*" means—

(a) an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor, or

(b) an owner of residential property adjoining or neighbouring land which is—

(i) managed or maintained by a property factor, and

(ii) available for use by the owner."

The Homeowner here was undoubtedly a homeowner when he brought this application. However, he required to be a homeowner when the alleged breaches occurred for the reasons fully set out and explained by Sheriff Deutsch in the case of *Lynas & Ferri v James Gibb Property Management Ltd* earlier referred to and relied upon by the Property Factor.

That decision is binding upon this Tribunal, and accordingly the Tribunal decided that it has no jurisdiction to consider the complaint relating to any alleged breaches which are alleged to have occurred prior to 27th July 2018 when the Homeowner took entry to the Property.

That being the case, the Homeowner accepted that the only complaint left for the Tribunal to consider was that of breach of section 4.2 of the Code.

The Homeowner accepted that the only evidence he provided to the Tribunal and relied upon in that regard was the Notice Prior to Court Proceedings dated 14th January 2019, which he also accepted clearly preceded the acceptance by the Tribunal of this application.

Section 4.2 of the Code provides:

“4.2 If a case relating to a disputed debt is accepted for investigation by the homeowner housing panel and referred to a homeowner housing committee, you must not apply any interest or late payment charges in respect of the disputed items during the period that the committee is considering the case.”

The Tribunal has taken over the jurisdiction of the homeowner housing panel and the homeowner housing committee for the purposes of the Code.

As the Homeowner’s complaint in relation to section 4.2 concerns a letter sent prior to the Tribunal’s acceptance of this application, that complaint clearly cannot fall under the terms of section 4.2 of the Code, and accordingly the Tribunal concludes that the Property Factor has not failed to comply with section 4.2 of the Code.

Right of Appeal

In terms of Section 46 of the Tribunal (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.

04 November 2019

Legal Member/Chair

Date