**Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 19 of the Property Factors (Scotland) Act 2011**

**Chamber Ref: FTS/HPC/PF/19/1395**

**Re: Property at 22 Jerviston Court, Motherwell Lanarkshire ML1 4BS ("the Property")**

**Parties:**

**Miss Sophie Wells, residing at 22 Jerviston Court, aforesaid ("the homeowner")**

**and**

**Apex Property Factor Ltd, Company Number SC419173, 46 Eastside, Kirkintilloch, East Dunbartonshire G66 1QH ("the factors")**

**Tribunal Members:**

**David Preston (Legal Member) and Carol Jones, Surveyor (Ordinary Member).**

**Decision**

1. **The tribunal, having made such enquiries as it saw fit for the purpose of determining whether the factors had complied with the Code of Conduct for Property Factors ("the code") determined that the factors were in breach of: Section 1.a. E.o: Sections 2.1, 2.5, 3.3, 4.6 and 6.3 of the Code and with their duties under the Act.**

.

**The decision was unanimous.**

## Background

2. By application dated 7 May 2019 the homeowner applied to the First-tier Tribunal for Scotland (Housing & Property Chamber) ("the Tribunal") alleging a failure on the part of the factors to comply with: Section1.B.c, D.m and

E.o: Sections 2.1, 2.5, 3.3, 4.6 and 6.3 of the Code and with their duties under the Act.

3. By Notice of Acceptance dated 9 September 2019, a legal member of the tribunal with delegated powers so to do referred the application to this tribunal for determination. A Notice of Referral and Hearing was sent to the parties on 12 September 2019.

4. By emails of 3 October and 5 November 2019 the factors submitted a written response together with supporting documentation as per the Inventory submitted by them.

5. A hearing took place on Thursday 7 November 2019 at the Glasgow Tribunals Centre, 20 York Street, Glasgow. However, in view of the sufficiency and nature of the evidence available, the tribunal determined that the hearing should take the form of a Case Management Discussion (CMD), following which a Note and a Direction dated 8 November 2019 were issued to the parties.

6. Following the Note and Direction, the factors lodged further productions on 28 November and 4 December 2019. The homeowner lodged further productions on 3 January 2020.

**Hearing**

7. A hearing took place at the Glasgow Tribunal Centre on 16 January 2020 at 10.00 am. The homeowner attended along with her representative Ms Erica Young, Hamilton Citizens Advice Bureau. There was no appearance by or on behalf of the factors who had indicated that they did not intend to attend the hearing. Since the factors had voluntarily waived their right to be present or make further representations, the tribunal was content to proceed on the basis of the information gathered at the CMD, the written representations of the parties and the further oral evidence from the homeowner and her witness, Mr Iain Ward who attended to give his evidence.

8. At the outset the homeowner advised that she had received a letter to inform her that the factors had been de-registered. She wanted the hearing to go ahead as she maintained that the factors had been fraudulently imposing charges for work which had not been carried out by them and may wish to take matters further.

9. The tribunal indicated that it would be able to issue a finding if it was satisfied on the evidence that the factors had been in breach. However, enforcement of any Property Factor Enforcement Order (PFEO) would be a matter for the homeowner.

10. In the absence of the factors the tribunal had regard to the matters raised at the CMD as detailed in the Note dated 11 November 2019.

**Evidence**

11. The tribunal referred to the copy timesheets which had been produced by the factors. Some time was spent in examining the entries many of which related to "work carried out on flats", and entries relating to what was clearly the sale of flats. The homeowner asserted that these entries related to work carried out to the flats which had belonged to the factors which had been discussed at the Case Management Discussion.

12. The tribunal asked the homeowner to compare and cross refer the time-sheets with her own diary entries and identify any invoices which contained charges for work not related to the common parts. However no such information has been received and the tribunal has proceeded without it.

13. The tribunal noted that there were a number of entries on the spreadsheets relating to work in or on the two flats referred to as 'Christine's'. Other entries were described as 'litter picking', 'close cleaning', and 'landscaping'. She said that the majority of flats in the block were rented and the tenants were not involved although one neighbour, Mr Ward had helped her on a number of occasions with work. She said that the landlords did not seem interested

either and seldom, if ever, participated in meetings. They seemed only interested in getting their rents.

14. The homeowner referred to her letters to the factors of 18 March and 2 May 2019 in particular to which she had not received a satisfactory response. She said that the regular landscaping and maintenance of the common areas had been carried out, or if it had, then only in a cursory and unsatisfactory fashion. This had resulted in her carrying out work, both internally by painting and maintenance in the common close and stairwell, and externally by grass cutting and path maintenance, all at her own expense including her own labour.

15. In response to the Direction issued the factors submitted a list of works completed at the property between 2014 and 2018. The tribunal noted that although the list was comparatively long in 2014 it had become much shorter since 2015 resulting, in 2018 in "Removal of Graffiti, cleaned out gutters at main entrance, weedkilled and site visit".

16. The homeowner referred to the issues raised by North Lanarkshire Council (NLC) and which have gone unresolved since 2016. The factors had failed to deal adequately with these issues. NLC produced an action list detailing the essential work required. The factors had costed these works, without applying any prioritisation and had asked each owner to contribute a global sum of £6500 towards the works before any work would be instructed. Not all of the work on the action list would attract grant funding. The homeowner had repeatedly told the factors that it was unrealistic to expect owners to be able to make such a payment and suggested that the work should be broken down to make it more affordable and ensure that the most essential works were done. In the absence of any work being carried out NLC had raised the issue again in September 2018. The factors had consistently failed to address this issue despite correspondence and meetings to that effect with the result that none of the work had been attended to.

17. The homeowner referred the tribunal to the photographs lodged by her which showed the condition of the property and the common areas. They

also showed areas of work carried out by her to maintain and repair the access paths which she maintained should have been carried out by the factors as part of the ground maintenance which she said would have been included in the landscaping charges as shown on her invoices. She said that this was an example of the work charged for but not carried out.

18. Mr Iain Ward, a tenant in a neighbouring flat for over six years gave evidence. He referred to his attendance at a meeting with the factors in 2015 where promises had been made about intended work, but nothing ever happened. His name did not appear on any of the notes of meetings, but the tribunal accepted that this would have been due to the fact that he was not an owner. He particularly recalled a meeting which he had attended with the homeowner when nobody else had turned up. He confirmed the lack of maintenance to the block as well as the homeowner's efforts in cleaning the close and carrying out landscaping work including grass cutting and repair/maintenance of the access paths due to the poor standards of any work done by the factors' operatives. He said that the factors' people had cut the grass four times in 2019 and that the homeowner cut it weekly. He said that he had never seen litter being cleared by the factors' people and any work they did was half hearted. He referred to having assisted the homeowner to repair leaking downpipes and replace lead flashing. He acknowledged that his landlord did not appear to be interested in having any work done or in putting pressure on to the factors. He referred to damage to fire doors which had been caused by youths and neds who used the close for various purposes. The fire doors had been repaired with non-fire retardant Perspex and the entry locks were always damaged. Mr Ward said he replaced 3 fire doors and external doors himself and felt that the factors should have been more active in fixing these problems.

19. The homeowner advised that since 2016 at least the factors had failed to provide her with information regarding debt recovery problems with other homeowners. Her letters of 31 January 2017 and 30 September 2018 refer to her request for this to which she has never had any satisfactory response. She said that this was in breach of Section 4.6 of the Code.

**Findings in Fact**

20. The factors had failed to comply with the Code in respect of: Section 1.1a. E.o; Sections 2.1 and 2.5; Section 3.3; Section 4.6; and Section 6.3. It did not find failures in respect of: Section 1.1a.Bc or D.m.

21. Sections 1.1a. B.c and D.m:

> "The written statement should set out:
>
> *"The core services that you will provide. this will include the target times for taking action in response to requests for both routine and emergency repairs and the frequency of property inspections (if part of the core service).*
>
> *"The timescales within which you will respond to enquiries and complaints received by letter or e-mail."*

As explained at the CMD, the effect of Section 1 of the Code relates to the contents of the factors' Written Statement of Services (WSS). We were satisfied that these matters were included in the factors' WSS.

22. Section 1.1a.E.o

> *"The written statement should set out:*
>
> *a declaration of any financial or other interests (for example, as a homeowner or lettings agent) in the land to be managed or maintained."*

The factors denied that they owned any flats in the property and maintained that position throughout their involvement in this application. At the CMD they explained that when two flat owners had become heavily indebted to the factors, Mrs Davidson-Bakhshaee had bought the debt from the factors and then had accepted a transfer of the title in the flats to her from the trustees in sequestration of the individuals involved. The tribunal noted from the title sheet that this had been in 2015. These flats had been sold within the previous few weeks. The factors asserted that they therefore did not have any interest which required to be disclosed in the WSS. We rejected this explanation in its entirety. There is patently an interest to declare. Mrs Davidson-Bakhshaee had an interest as a director in the factors and also had an interest as a homeowner in two of the flats. These interests were in conflict, particularly, as pointed out by the homeowner if the owners had sought to remove and replace the factors. Even in their response to the application they failed to disclose the interest. Initially they denied that this section of the Code existed (they were referring to Section 1.1**b**, not 1,1**a**). Even in

their response to the complaint about a breach of Section 4.6**,** they failed to disclose that one of the methods of debt recovery they use is for their directors to buy out debts and take title to properties.

23. Section 2.1: *"You must not provide information which is misleading or false."*

The responses to the homeowner from the factors seen by the tribunal to complaints and issues raised by the homeowner were, in many respects unsatisfactory and the tribunal accepted the evidence from the homeowner and her witness that the factor provided some false information by saying work had been done when it had not, or at least not to a satisfactory standard. We had regard to the photographs produced by the homeowner which clearly showed a level of tidiness far below that which would be expected if regular effective visits had been made. The homeowner contended that the factors had charged for visits by their staff who either did not attend for landscaping or cleaning as charged for, or that the work they did was cursory. She provided photographic evidence and her oral representations were credible and supported by Mr Ward. We were also satisfied that by failing to disclose Mrs Davidson-Bakhshaee's interest in the flats both when directly raised by the homeowner in her letter of 31 January 2017 and also at the CMD the factors had misled the homeowner and had sought to mislead the tribunal. When asked to produce evidence of the transactions relating to the ownership of the flats, they merely produced the title deeds of the flats and not any details or correspondence in relation to the transactions leading to the transfer of title. We find that all correspondence from the factors in relation to this was designed by them to mislead and conceal that interest. In their written response to the application the factors said that there was no such section as E.o in the Code and it appears that they were looking at the section of the Code applicable to the "land management" model. We were more than somewhat surprised that the factors could misdirect themselves in regard to the Code to this extent after apparently operating under the Code for eight years.

*24.* Section 2.5: "*You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement."*

The factors failed to respond effectively to the homeowners concerns about the cleaning, landscaping and maintenance of the common areas and their lack of support for the homeowner for the work and effort she put in. She wrote to the factors on a number of occasions with the same complaints. The factors said that all complaints are thoroughly investigated, however this was not borne out in the correspondence presented to us. In particular the homeowner wrote three letters dated 30 September 2018, 18 March and 2 May 2019, all clearly marked "Complaint". The factors' letter of 8 October 2018 contained no reference to that of 30 September. While their letter of 3 April was in response to that of 18 March, they depended upon the fact that their maintenance staff completed timesheets after each visit upon which

they relied entirely. At the CMD they said that the senior staff did visit the property, but not while their staff were on site to directly observe their work, despite the points raised by the homeowner.

25. Section 3.3: "*You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance."*

    In their written response to the application the factors referred to their monthly invoices and did not expand on the simple description of work, such as "cleaning" or "litter picking", which, in any event the homeowner contested was not actually carried out.

*26.* Section 4.6: *"You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation)."*

    The factors response to the application referred to "methods of debt recovery" other then re-apportioning debt as per their WSS. They referred to Notices of Potential Liability and/or raising Court Action and maintained that other owners were not directly affected by bad debts of others. The homeowner contested this and pointed out that she had asked about the debts due to the factors which were having an adverse impact on the carrying out of necessary work. She specifically asked about debts due in her letters of 31 January 2017 and 30 September 2018 and said she did not receive a detailed response from the factor. In any event no such response was produced to us. We find that the factors should have been more explicit about the extent of indebtedness which would have an impact, which was clearly the intention of the drafters of the Code. In any event they did not keep the homeowner informed about such problems.

27. Section 6.3: *"On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff."*

    We were not provided with any information to indicate any consultation with the homeowner about the appointment of the factors' maintenance staff to carry out the landscaping and maintenance of the common parts of the property. In response to the application the factors said that they normally obtain a minimum of three quotations which are supplied to homeowners with a mandate to allow homeowners to choose their preferred contractor. However, they did not address the question of the appointment of their own staff in contravention of this section.

28. Factors Duties:

We were satisfied on the evidence of photographs of the common areas of the property that the lack of overall maintenance was such as to have caused the property to deteriorate significantly. Whilst a schedule of works had been prepared and costed the factors had failed to take adequate steps to make arrangements for the essential work to be carried out. They had sought payment from homeowners of an unrealistic and unaffordable amount, which could have been minimised by properly prioritising the work and maximising the grant funding available. There were very few meetings with homeowners, although we accept that there was little response from owners who let their properties out, however more effective steps could have been taken to comply with their duties.

**Property Factor Enforcement Order ("PFEO"):**

29. Having determined that the Factors were in breach of the Code, the tribunal then considered the terms of a proposed PFEO and considered that the factors should pay to the homeowner the sum of £1500 to the Applicant within a period of 30 days after service of Notice of PFEO.

30. In arriving at this figure the tribunal had regard to: the length of time over which the homeowner had raised her concerns without satisfactory response; the provision of materials for carrying out aspects of the cleaning and maintenance; the time spent by her on these tasks; and the stress and inconvenience of the events brought about by the factors'

**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.**


4 February 2020

5 February 2020
This is the Schedule referred to
in the foregoing Decision

Housing and Property Chamber
First-tier Tribunal for Scotland

..... Chairman

**Notes on a Case Management Discussion of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017**

**Chamber Ref: FTS/HPC/PF/19/1395**

**Re: Property at 22 Jerviston Court, Motherwell Lanarkshire ML1 4BS ("the Property")**

**Parties:**

**Miss Sophie Wells, residing at 22 Jerviston Court, aforesaid ("the homeowner")**

**and**

**Apex Property Factor Ltd, Company Number SC419173, 46 Eastside, Kirkintilloch, East Dunbartonshire G66 1QH ("the factors")**

Tribunal Member:

David Preston (Legal Member) and Carol Jones, Surveyor (Ordinary Member).

Summary of Discussion

1. This is an application to the tribunal for a finding that the factors have failed to comply with: section 1, paragraphs B(c), D(m) and E(o); sections 2.1 and 2.5; section 3.3; section 4.6; and section 6.3 of the Code of Conduct for Property Factors ("the Code") and that the factors have failed to carry out their property factors duties. The hearing took the form of a Case Management Discussion CMD at 10.00am on Thursday 7 November 2019 at the Glasgow Tribunals Centre, 20 York Street, Glasgow

2. The applicant had lodged a number of documents and emails in support of her application and in response the factors had submitted written representations and documents and emails.

3. Present at the hearing were: the applicant, represented by Ms Erica Young, Hamilton Citizens Advice Bureau; Mr Neil Cowan and Mrs Christine Davidson-Bakhshaee representing the factors.

4. At the start, the Chairman highlighted the complaints and sought to clarify the effect of the complaints under section 1 of the Code. He explained that section 1 related to the factors obligation to issue a Written Statement Of Services ("WSS") which was required to set out the matters outlined in parts A–F of the Code. A copy of the factors WSS had been lodged and it contained the matters specified at B and D, namely the Services Provided and the Communication arrangements. With regard to the requirement at E, if there was no Declaration of Interest, there would be none specified in the WSS.

5. The applicant said that in her view the factors did have such an interest insofar as she understood that they owned at least two of the flats in the block and she asserted that this could be a conflict of interest should the owners in the block decide to vote to change factors. The factors denied that they owned any flats but acknowledged that Mrs Davidson-Bakhshaee had done so. They explained that in about 2015 the owners of two flats had been in significant arrears with their factoring charges and she had bought the debt from the factors and had subsequently accepted the flats from the trustees following the sequestration of the individuals. These flats had now been sold. The factors were satisfied that these transactions had been legitimate and did not amount to an interest which required to be specified in their WSS because the ownership was personal to Mrs Davidson-Bakhshaee. They said that in any event Ms Davidson-Bakhshaee's ownership of the flats had been common knowledge amongst the owners and had been intimated at meetings of owners. She did not see that this information would also require to be contained in the WSS.

6. The homeowner confirmed that her complaints in the main related to the breaches of the Code as outlined in the application. Her concern regarding the factors' duties related to the fact that the factors had not carried out any repair work whatsoever to ensure the integrity of the building which would largely be covered by the Code breaches.

7. The parties advised that the block comprised 12 flats, most of which were generally occupied by tenants. The homeowner said she was the only owner occupier in the block and that 5 flats were vacant. There appeared to be a general lack of interest on the part of the other owners as the properties were rented. As a consequence, there was poor attendance at the meetings of owners called by the factors.

8. Initially the homeowner complained that she had not received responses to her complaint letters within the timescales set out in the WSS. She referred to her letters dated 18 March and 2 May 2019 in particular to which she had not had any reply. The tribunal noted the letters dated 3 April and 31 May 2019 from the factors which were in response to the homeowner's letters of 18 March and 2 May respectively. The homeowner said that she had not received these and had not seen them until lodged by the factors.

9. The homeowner said that there were problems with mail due to the fact that the door entry system had never worked, and she had to lock the door in the evening and unlock it in the morning, otherwise postal and other deliveries could not gain access. The homeowner said that the block suffered from neds and youths vandalising the close and taking drugs etc, which was why she tried to ensure that it was locked at night. The factors did not agree with the homeowner's assertions and said that as far as they were concerned the door was left open all the time.

10. The homeowner further complained that the factors had imposed charges for cleaning and landscaping which she asserted had not taken place. She explained that she was often at home and was in a position to know whether there had been attendances for which charges had been made. She also contended that when they did appear the work was unsatisfactory and she had to do the cleaning as well as grass cutting on numerous occasions. She said that others living in the block would be able to confirm this.

11. The factors denied these assertions and referred to the fact that they required the operatives to complete timesheets, an example of which had been lodged. They said that the information from these timesheets was transferred to an electronic system which they did not think it was necessary to lodge. They explained the detail on the sample timesheet produced which showed that the operatives had been on site from 10.27 until 15.53, including the lunch hour, on 13 October 2016. They said that the closes were cleaned and/or litter picking and landscaping was carried out every two weeks and that senior management carried out additional inspections twice a month and they were satisfied that the work had been done.

12. The homeowner asserted that the lack of maintenance by the factors had resulted in a letter from North Lanarkshire Council ("NLC") dated 12 September 2018 which required immediate action by the homeowners. This had been discussed at a meeting of owners in October or November 2018. A schedule of work had been prepared by the factors in 2014 but none of that work had been carried out. She contended that the cost of the work had been charged to the owners' accounts at £6500 each and this was too large a sum to reasonably expect owners to be able to pay. She said that

she had asked the factors on a number of occasions to detail the costs and break the work down into separate projects and provide evidence of quotes/method selection of contractors etc. This would allow them to tackle essential works which would make the costs more manageable.

13. The factors said that the schedule of work had been prepared in cooperation with NLC with a view to obtaining grant funding. Not all of the works were eligible, as detailed in the undated letter from NLC in response to a letter from the factors of 27 May [2016]. NLC also said that the works would require to be tackled in one go or funding would not be available. The factors explained that they were unable to submit grant applications and had sent application forms to owners, but it was believed that only 2 had been returned. No payments had been made to the factors, so they were unable to instruct contractors. The factors said that these issues had been addressed at meetings of owners, which they acknowledged had not been well attended, despite all owners being requested to attend. They said that notes had been taken of the meetings, which had been sent to the owners after the meetings.

**Outcome:**

14. It was apparent to the tribunal that there was a clear lack of sufficient evidence to support and substantiate assertions by both parties upon which it could make a determination and, after a short adjournment it decided to adjourn the hearing to a future date when both parties could produce evidence by way of witnesses or further documentation to support their contentions

15. In relation to those parts of the complaints which had been considered thus far, the tribunal requires sight of:

- Evidence of the transactions in relation to the ownership of the two flats alleged to have belonged to the factors;
- The electronic timesheets referred to by the factors in relation to cleaning, litter picking and landscaping for at least the years 2018 and 2019;
- Minutes of all meetings of owners of the block;
- Notices of such meetings and letters sending out copy minutes for the years 2018 and 2019;
- The letter of September 2014 with enclosures / attachments;
- The Summary of Works from 2012 - 2018 referred to and attached to the property factor’s letter dated 3 April 2019;
- Evidence of how many homeowners had paid their share of the cost of the work required;

- A list of other owners and/or occupiers in the block willing and able to attend the hearing to substantiate relevant assertions;

16. In addition, the tribunal will require any further documentation or evidence to substantiate assertions in relation to all aspects of the complaints in the application and responses, whether specifically mentioned this morning or not.

17. For clarification, if witnesses are unable to attend a hearing, written statements may be sufficient provided the other party has an opportunity to be given notice of their content.

18. The tribunal clarified that at the next hearing it will consider the application in full to allow it to be satisfied that assertions of either party are more likely to have happened than not.

19. A further hearing will take place on 16 January 2020 at 1000am in the Glasgow Tribunal Centre.

**NOTE: This document is not confidential and will be made available to other First-tier Tribunal for Scotland (Housing and Property Chamber) staff, as well as issued to tribunal members in relation to any future proceedings on unresolved issues.**

Chairman

11 November 2019