Housing and Property Chamber
First-tier Tribunal for Scotland

First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") Property Factors (Scotland) Act 2011 ("the Act"), Section 19

The First-tier Tribunal for Scotland, Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017 ("the 2017 Regulations")

Chamber Ref: FTS/HPC/PF/18/1292

Property: 3A Jerviston Court, Motherwell, ML1 4BS **("the property")**

The Parties:-

William Tweedie, 2, Kilnnell Quadrant, Motherwell, ML1 3JN **("the homeowner")**

APEX Property Factor Limited, 46 Eastside, Kirkintilloch, East Dunbartonshire, G66 1QH **("the property factor")**

Tribunal Members: -

Simone Sweeney (Legal Member), John Blackwood (Ordinary Member)

Decision of the Tribunal Chamber

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal") unanimously determined that the factor has failed to comply with sections 2.5, 3.1, 3.4 and 4.9 of the Code of Conduct for Property Factors ("the Code") as required by section 14(5) of the Act but find no breach of section 1 D M of the Code.

Procedure

1. By application dated 25th May 2018, the homeowner applied to the Tribunal for a determination on whether the factor had failed to comply with;(i) sections

1 D M, 2.5,3.1, 3.4 and 4.9 of the Code imposed by section 14 of the Act and: (ii) to carry out the property factor duties in terms of section 17 of the Act.

2. In compliance with section 17(3) of the Act, by letter dated, 11th June 2018, the homeowner intimated his complaint to the factor. A copy of this letter (amongst others) was produced by the homeowner.
3. By decision dated 5th July 2018, a Convenor referred the application to the Tribunal for a hearing. Notices of referral were sent to the parties on 17th July 2018. A hearing was assigned for 31st August 2018 in Glasgow.
4. A hearing took place on 31st August 2018 at 10am within the Glasgow Tribunals centre, 3 Atlantic Quay, Glasgow. Before the Tribunal were, *inter alia*; (i) written representations from the property factor dated 7th August 2018; (ii) a copy of the statement of services, title deeds and email from the homeowner to the property factors dated 28th April 2018; (iii) copy minutes of meeting of owners of 8th April 2017 and;(iv) letters from the owners of 7, 9 and 12 Jerviston Court dated 7th April 2017. Only the homeowner was in attendance at the hearing. The property factor was neither present nor represented. The Tribunal's administration had written to both parties intimating the date, time and place of the hearing by letter of 17th July 2018. The letter was before the Tribunal. The Tribunal was satisfied that proper intimation had been afforded to both parties. An additional 10 minutes was given prior to commencement of the hearing to allow the property factor further time to attend. No communication was received by the Tribunal's administration to explain the failure of the property factor to attend. The Tribunal proceeded with the hearing in the absence of the property factor.
5. Having considered the evidence before it, the Tribunal identified that a determination would be assisted by parties producing various pieces of information. The Tribunal issued a direction dated 4th September 2018. Reference is made to the terms of the direction. Information was received from each party by mid October 2018. Due to the Tribunal chair being on annual leave thereafter for a period of 3 weeks, parties were advised that a final determination would be shared with them by late November 2018

Evidence of the homeowner

Background to application

6. The homeowner began by offering an explanation to the background to him submitting this application to the Tribunal. The homeowner submitted that he and a number of other homeowners had experienced issues with the standard of service provided by the property factors. This was the second application which he had brought against the property factor. He explained that a meeting of the owners had been convened at his property on 8th April 2017. The purpose of the meeting was to take a vote on dismissing the property factors from providing services to the block. The Tribunal was advised that the homeowner's property is a flat situated within a building of twelve flats. In total there are eleven owners. One owner (Gary Mitten) owned two flats within the building. The homeowner issued invitations to the meeting to all owners in writing by letter in advance of the hearing. The purpose of the meeting was explained to the owners in advance. Eight owners confirmed that they would be in attendance on 8th April 2017. Two owners replied that they would not be in attendance. These owners were Gary Mitten and Daniel Taylor. Mr Taylor was the owner of number 12 Jerviston Court, Motherwell. Mr Mitten was the owner of 7 and 9 Jerviston Court, Motherwell. Both Mr Taylor and Mr Mitten provided the homeowner with proxy votes authorising them to vote in their absence in support of the property factor's dismissal. Copies of their written authority were available to the Tribunal within their bundle of papers.
7. The meeting on 8th April 2017 went ahead. A copy of the minutes of the meeting was before the Tribunal. A vote was taken. The motion to dismiss the property factors was carried unanimously by eight votes. This included the two proxy votes for properties, 7,9 and 12 Jerviston Court. It was the homeowner's submission that, as at 8th April 2017, as a result of the outcome of the vote, the property factor was without authority to act..
8. After the meeting, the homeowner undertook to intimate the decision of the owners to the property factors together with a copy of the minutes. The minutes were signed by all in attendance. They were then posted to Messrs Taylor and Mitten to approve and sign which they did. The homeowner provided the signed principal minutes to a solicitor appointed to act on behalf of the owners in their dismissal of the property factor. The solicitor sent the

minutes to the property factor by recorded delivery post. The property factor refused to sign for the recorded delivery letter. Therefore the solicitor intimated a copy of the minutes to the property factor by fax and by email.

9. The homeowner submitted that the outcome of the vote was ignored by the property factor and they continued to provide and charge for factoring services at the property.
10. Since April 2017, the property factor has continued to issue invoices every few months for grass cutting and cleaning, including a management fee. However, it was the evidence of the homeowner that the only work which the property factor had actually carried out was grass cutting. The property has not been cleaned despite the charges. The homeowner submitted that he had refused to pay for any works from 8th April 2017. He understood that many of the other owners had also refused payment. As at 8th April 2017 the homeowner had an overpayment of £600 on his factoring account. Once the further bills exhausted this amount, the charges continued but the homeowner refused to pay.
11. The homeowner submitted that the title deeds were silent on dismissal of a factor but the procedure which the property factor required an owner to follow was set out in the written statement of services (a copy of which was before the Tribunal). It was the homeowner's position that the correct procedure had been followed to bring about an end to the property factor's appointment.
12. The homeowner then set out the specific sections of the Code which he said had been breached by the property factor.

The specific alleged breaches

Section 1.D.M of the Code

13. This section of the code requires that the property factor's written statement of services must provide, *"the timescales within which you will respond to enquiries and complaints received by letter or e-mail."*
14. It was the evidence of the homeowner that the property factor was in breach of this section by their failure to respond to his email of 28th April 2018. A copy of this email was before the Tribunal. It was addressed to Neil Cowan, legal manager for the property factors. The email read,

"Dear Mr Cowan we are now writing to you with regard to the be (sic) what I can only describe as harassment from your company Apex. At a Meeting with the Home Owners on the 8th April 2017 Apex were dismissed as Factors for the Block 1 to 12 Jerviston Court and a copy of the minutes and outcome sent to you, which you then duly ignored and continued to act as Factor… Finally Mr Cowan if Apex continues ignoring their dismissal we will be forced to employ a solicitor and take this to the Housing and Property Chamber and would look to pass all costs to Apex."

15. The homeowner submitted that, having received no response from the property factor to the email and in light of the property factors continuing to seek payment from him for services, he was left with no alternative but to pursue this application before the Tribunal.
16. The homeowner was in receipt of a copy of the written statement of services.

Section 2.5 of the Code

17. Section 2.5 of the Code requires a property factor to respond to enquiries and complaints received by letter or email within prompt timescales. It provides that,

    1. *"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 (Section 1 refers)*"

18. The homeowner referred to his previous evidence that the property factor had failed to respond to his email of 28th April 2018. The failure to respond left the homeowner with no option other than to submit an application to the Tribunal for its determination. The homeowner referred again to the letter of 8th May 2018 which the property factor alleged to have sent to him. The homeowner confirmed, again, that he had never received this. Had he received it, he could and would have responded to the letter.

Section 3.1 of the Code

19. Section 3.1 provides that,

> *"If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services)."*

20. It was the position of the homeowner that the property factor had failed to satisfy the terms of this section by failing to issue him with a bill for the 3 month period after the date of the dismissal. The homeowner maintained that there was an overpayment of £600 on the account at the date of dismissal.

Section 3.4 of the Code

21. Section 3.4 provides,

> *"You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property)."*

22. The homeowner referred again to the surplus of £600 on his account which he believed he should have had paid back to him by the property factors. He submitted that because the money was never paid back to him, this was evidence that the property factors could not have had any procedure in place for dealing with payments made in advance by homeowners and where these payments are to be returned.

Section 4.9 of the Code

23. The next section which it was alleged had been breached was section 4.9 of the code. This provides that,

> *"When contacting debtors you, or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position."*

24. The homeowner explained that having refused to pay any invoices after the decision had been taken to dismiss the property factors, the homeowner was *"chased for money"* by the property factors. He received many phone calls. The homeowner maintained his position at every call; that the property factors were dismissed by a majority of homeowners on 8th April 2017. Therefore they had no locus to undertake any works at the property and had no basis to charge the homeowner. The homeowner advised the property factors repeatedly that he did not believe that he owed any money to them from 8th April 2017.
25. The homeowner accepted that telephone was a reasonable method for a property factor to communicate the issue of a debt with a homeowner. It was not the phone calls themselves which formed the basis of the homeowner's complaint, but the fact that the property factor was attempting to recover money from him which he did not believe they had any grounds to recover after 8th April 2017. The homeowner submitted that the calls could make him quite frustrated at times. The homeowner recalled one incident when he was with his partner and became angry during the course of the call. He felt that the caller was trying to speak over him and refusing to listen to his position. After the call ended, his partner was forced to calm him down.

Defences

26. The Tribunal referred the homeowner to the written representations within the papers which had been lodged by the property factors on 7th August 2018 in response to the application. The property factor's defence read,

"1. The homeowner has not previously notified us of why he considers we have failed to carry out our duties - the Property Factors (Scotland) Act 2011, Section 17(3).

2. The complaints made by the Homeowner are very similar to those made by him under Case Number FTS/HPC/PF/17/0223, which were not accepted by the Tribunal. This would appear to come within the terms of the Property Factors (Scotland) Act 2011, Section 18 (2) (c)."

27. In response, the homeowner denied that the allegation that he had failed to intimate his complaint in advance of lodging his application before the Tribunal. The homeowner submitted that his email of 28th April 2017 was formal intimation of his complaint to the property factors. He never received any response to this complaint and made the application as a result of the property factor's failure to respond. The homeowner had also formally intimated his complaint on 11th June 2018 by sending them a 'Property Factor Code of Conduct letter' as required by the Tribunal process. This letter identifies the sections of the code on which the homeowner brings his application. This had brought about no response from the property factors. Since the application has been on-going, the property factors have had ample time to investigate his complaint but have failed to do so.
28. The homeowner confirmed that he had brought an earlier application against the property factors. A Tribunal had considered the evidence of both parties at a hearing and issued a Property Factor Enforcement Order.
29. In answer to the Tribunal's question as to what the property factors could do to resolve the problem, the homeowner submitted that he simply wanted the property factors to accept that they were dismissed on 8th April 2017 by the homeowners.

Property factor's response to application

30. Within their letter of 7th August 2018, the property factors had provided to the Tribunal their written representations.
31. In relation to the allegation of a breach of section 1 D M, the property factors stated that, *"Our Statement of Services details the timescales we adhere to,*

for both written and telephone services." A copy of the statement of services was produced within an Inventory of Productions, attached. The Tribunal identified that the relevant section read,

> *"Customer service standard…We aim to acknowledge all communications within 14 working days of receipt. Our aim is to respond fully to enquiries within 21 days…"*

32. In respect of the alleged breach of section 2.5 the property factors responded ,

> *"All enquiries and complaints are responded to, within the timescales detailed in our Statement of Services. The last communication from the homeowner was received on 28 April 2018 and responded to on 8 May 2018."*

33. In response to the allegation of a breach of section 3.1 of the code, the property factors stated that,

> *"The homeowners attempted to terminate our appointment as Factor. However, proper procedures were no (sic) carried out in accordance with the Tenements (Scotland) Act 2004. Signed proxy votes from a homeowner with 2 flats were not provided prior to the homeowners' meeting; the meeting did not therefore have a majority to terminate our services."*

34. In response to the allegation of a breach of section 3.4 of the code, the property factors stated,

> *"Payments made in advance are "ring fenced" and are returned to homeowners if the proposed work does not proceed or the property is sold. This homeowner has not paid in advance for any proposed works."*

35. In response to the allegation of a breach of section 4.9 of the code, the property factors stated that,

"Apex do not act in an intimidating manner or threaten homeowners. This homeowner has not been contacted by Apex since 31 January 2018 when a courtesy telephone call was made in respect of the homeowner's debt to Apex. We have not misrepresented our authority as we remain the properly appointed Factor."

36. Amongst the other papers submitted by the property factors was a letter to the homeowner dated 8th May 2018. The letter referred to the email of the homeowner of 28th April 2018. The letter read,

"As has been advised previously, the proxy votes from Gary Mitten (flats 7 and 9) dated 7 April 2017, are unsigned and there is no indication how the proxy was transmitted to yourself. Mr Mitten has signed the Minutes of the Meeting, but this was not until 23 April 2017 i.e. 2 weeks after the meeting; his votes should not therefore have been cast at the meeting. On that basis there were only 6 votes cast in favour of removing Apex as Factor. In terms of the Tenements (Scotland) Act 2004 a majority of the 12 owners is required to make a decision. The decision is therefore invalid."

Findings in fact

37. That, within the building in which the homeowner's property is located, there are 12 flats in total.
38. That there are 11 owners at the building.
39. That Gary Mitten is the owner of 2 flats at 7 and 9 Jerviston Court which provided him with 2 votes.
40. That Daniel Taylor is the owner of 12 Jerviston Court.
41. That the homeowner invited all owners to a meeting at 3 Jerviston Court on 8th April 2017.
42. That the minutes of the meeting narrate that 5 owners were in attendance at the meeting and 4 owners failed to attend.

43. That Gary Mitten and Daniel Taylor provided the homeowner with their authority to vote in favour of dismissal of the property factors.
44. That the minutes provide that there was a majority of 8 votes cast in favour of the property factors' dismissal.
45. The minutes of the meeting were signed by Gary Mitten and Daniel Taylor after the meeting.
46. The minutes of the meeting were signed by each of the owners supporting the dismissal of the property factors.
47. That the letter of 8th May 2018 confirms that the property factors received the minutes signed by Gary Mitten
48. That the written statement of services provides a timescale by which the property factors aim to acknowledge all communications from homeowners.
49. That a meeting of owners at Jerviston Court, Motherwell took place at the homeowner's property on 8th April 2017.
50. That a vote was taken to dismiss the property factors.
51. That the minutes of the meeting reflect the outcome of the meeting.
52. That a letter dated 5th May 2017 from Freelands solicitors was within the papers before the Tribunal lodged by the property factors in October 2018.
53. That the minutes of the meeting of owners of 8th April 2017 were intimated to the property factors by Freelands solicitors on behalf of the owners by fax and by recorded delivery.
54. That an email dated 17th May 2017 from Freelands solicitors to the homeowner read,

> *"I have heard nothing further from Apex since sending the paperwork to them following on from the meeting of the homeowners."*

55. That within the papers submitted by the property factors on 7th August 2018 was a copy of the homeowner's email of 28th April 2018; that the property factors received this email.
56. That this email set out the outcome of the vote of 8th April 2017 and the homeowner's position that the property factors had been dismissed.
57. That, within the papers lodged by the property factors was a letter to the homeowner dated 8th May 2018.

58. That the letter of 8th May 2018 set out the contrary position of the property factors that they had not been dismissed and that the vote of the owners was invalid.
59. That this letter of 8th May 2018 is the only evidence before the Tribunal of the property factors responding to their dismissal by the homeowners.
60. That the homeowner did not receive the property factor's letter of 8th May 2018.
61. That, on 8th October 2018, the property factors produced an extract from their *"outgoing mail book"* as evidence of how their letter of 8th May 2018 was sent to the homeowner.
62. That the extract read, *"8/5/18 William Tweedie Letter."*
63. That, in their covering letter of 8th October 2018, the property factors stated that their letter of 8th May 2018 was sent to the homeowner by first class ordinary post.
64. That there is no evidence that the letter sent by first class ordinary post was received by the homeowner. The homeowner did not receive this letter.
65. That, in the absence of that evidence, the Tribunal is of the view that the homeowner received no response to his email of 28th April 2018.
66. That the written statement of services reads,

> *"If homeowners wish to consider terminating our management service, a meeting of homeowners must be convened. All homeowners within the Development must be advised of the proposed termination. In the event that the homeowners entitled to vote to reach an agreement to terminate our service they must notify us, in writing, confirming details of all homeowners in attendance and providing at least 3 months notice of termination. They should provide signed mandates from those voting in favour of terminating our management service."*

67. That the title deeds for the property are silent on the procedure for removal of factors.
68. The homeowner continued to receive invoices from the property factors after the vote on 8th April 2017.
69. That the property factors were dismissed on 8th April 2017.

70. The homeowner requested from the property factors all financial information relating to his account from 8th April 2017.
71. That a copy of the homeowner's account with the property factors was before the Tribunal dated 1st October 2018.
72. That all financial information pertaining to the homeowner was not provided to him by the property factors within 3 months of 8th April 2017.
73. That the information was not provided by the property factors on account of them having not accepted that the arrangement with the homeowner had come to an end.
74. That, in their written representations, the property factors state that their procedure for dealing with payments in advance by homeowners is to keep such payments "ring fenced" for proposed works and should these proposed works not proceed or the property is sold, then the money is returned to the homeowner.
75. The homeowner was unaware of this procedure for dealing with payments in advance.
76. That there is no reference to this procedure within the written statement of services before the Tribunal.
77. That the homeowner's factoring account dated 1st October 2018 shows that payments were made of £1,100 on 23rd February 2017 and £218.71 on 29th June 2017.
78. That there exists a credit balance of £606.12 on the homeowner's factoring account as at 1st October 2018.
79. That the homeowner was contacted by the property factors by telephone on a number of occasions chasing debt that he denied he was due to pay.
80. That the homeowner felt frustration at having to repeat the same position to the callers on each occasion.

Reasons for Decision

Section 1.D.M

81. The written statement of services specifies that the aim of the property factors is to acknowledge communications within 14 working days of receipt and to respond fully to enquiries within 21 days. There was no evidence

produced by the homeowner to point to the contrary. Therefore the Tribunal finds no evidence of this section of the Code having been breached by the property factors.

Section 2.5

82. The Tribunal is satisfied that the property factors received the minutes of the meeting of 8th April 2017 from Freelands solicitors and the email of 28th April 2018 from the homeowner. The letter of 8th May 2018 submitted by the property factors addresses points raised by the homeowner in his email. The evidence of the homeowner at the hearing was that he had never received this letter. Evidence was produced by the property factors that they intimated the letter to the homeowner by first class ordinary post. It was open to the property factors to use a method by which they could show evidence that the letter was received. The property factors are an established commercial organisation. They are aware of the obligations incumbent upon them by the code and the Act. Given the dispute on their dismissal, the Tribunal would have expected the property factors to have communicated their reply in a method which they could evidence had reached the homeowner. The homeowner had communicated by email. It was open to the property factor to attach the letter to a reply email but they chose not to do so. The evidence of the homeowner was that he had received no response to his email of 28th April 2018 and the failure to respond was part of the reason for his application. The Tribunal accepted the evidence of the homeowner.
83. Within their written statement of services the property factors commit to,

> *"aim to acknowledge all communications received within 14 working days of receipt. Our aim is to respond fully within 21 working days. This response will advise owners what action we will take to deal with their enquiry and give a reasonable timescale."*

84. Both the letter from Freelands solicitors and the email from the homeowner intimated clearly that the homeowners had dismissed the property factors on 8th April 2017. The Tribunal finds no evidence of the property factor having responded to this information or to the homeowner's enquiry of 28th April 2018

as quickly and fully as possible. In the absence of same, the Tribunal finds the property factors to be in breach of section 2.5 of the code.

Section 3.1

85. The property factors do not specify the relevant section of The Tenements (Scotland) Act 2004 (" the 2004 Act") which they say invalidates the decision of 8th April 2017. However, this is a case where title deeds do not contain a burden which provides for the making of decisions by the owners. Accordingly, section 4 and 5 of the 2004 Act applies. In terms of Rule 3.1(c) (ii), the decision of 8th April 2017 was a decision which the homeowners were entitled to make. The homeowners then followed the procedures set out in schedule 1, rule 2 of the 2004 Act. In any event, reference is made to the terms of Rule 6.1. The homeowners also followed the procedures contained in the property factor's own statement of services. The Tribunal finds that the outcome of the vote on 8th April 2017 terminated the relationship between the owners and the property factors. There was no evidence before the Tribunal that the property factors had produced all financial information relating to the homeowner within 3 months of 8th April 2017. The Tribunal accept that the property factors continue to hold a credit of £606.12 on the homeowner's account that should have been returned to him. The Tribunal finds that the property factors have breached section 3.1 of the code therefore.

Section 3.4

86. The Tribunal accepted the evidence of the homeowner that there was a balance on his factoring account in April 2017. The copy account which he produced showed that a payment of £1,100 had been paid into the account on 23rd February 2017. A balance of £606.12 remained as at 1st October 2018. Within their written representations the property factors do not dispute the homeowner's position that he made payments in advance nor do they dispute the current balance. They refer to a procedure by way they ring fence advance payments for proposed works. The written statement was silent on this procedure. The Tribunal accepted that the homeowner was unaware of the procedure. It does not suffice for a party to assert a procedure without

evidence in support. The Tribunal finds a breach of section 3.4 of the code on the part of the property factors therefore.

Section 4.9

87. In light of their dismissal, there was no basis for the property factors to continue to contact the homeowner. The Tribunal accepted the evidence of the homeowner that he was required to explain the same position to the caller on every contact. The Tribunal finds the conduct of the property factors to have been a misrepresentation of their authority. The Tribunal finds a breach of section 4.9 of the code on the part of the property factors therefore.

Decision

88. The Tribunal, having found the factor to be in breach of sections 2.5, 3.1, 3.4 and 4.9 of the Code, propose a Property Factor Enforcement Order ("PFEO") to accompany this decision.
89. Within the PFEO, the Tribunal orders the property factor to pay compensation to the homeowner of £400. The property factor was dismissed on 8th April 2017. The property factor continued to make contact with the homeowner causing him distress and inconvenience. It is 20 months since the property factor was dismissed. The Tribunal considers £20 per month to be reasonable compensation in the circumstances.

Appeals

90. In terms of section 46 of the Tribunals (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. 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 within 30 days of the date the decision was sent to them.

Simone Sweeney, legal member, 26th November 2018