

Housing and Property Chamber First-tier Tribunal for Scotland



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/18/1384

15 Lochwood Close, Kilwinning, Ayrshire KA13 6UN
("the Property")

The Parties:-

Mr David Hilditch, residing at 43 Firth Road, Troon, Ayrshire KA10 6TG
("the Homeowner")

and

Hacking and Paterson Management Services, 1 Newton Terrace, Glasgow G3 7PL
("the Factor")

Tribunal Members:-

Andrew Cowan (Legal Member)

Elaine Munroe (Ordinary Member)

DECISION

The Factor has not failed to carry out its Factor's duties.

The Factor has not failed to comply with its duties under section 14(5) of the 2011 Act.

The decision 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 Factors is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules".

The Factor became a Registered Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1 On 11 June 2018 the Homeowner made an Application to the Tribunal regarding potential breaches by the Factor of both the Code and the Factors' duties relative to the property ("the Application"). In the Application, the Homeowner avers that the Factor has failed to comply with the following sections of the Code of Conduct:

- (a) 2.1 You must not provide information which is misleading or false

- (b) 4.7 You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs.

- (c) 4.8 You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention.

- (e) 4.9 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. (In summary) the Factor must not act in an intimidating manner or threaten the Homeowner (apart from reasonable indication that the Factor intends to take legal action).

2 The Homeowner has averred in his Application that the Factor had also failed to carry out the Factors' duties. In a letter dated 3 July 2018 the Homeowner confirmed to the Tribunal that he was satisfied that his complaint was encompassed in his averments of the Factors' failure to comply with the Code of Conduct for Factors. He did not wish to pursue any complaint of failure by the Factors to carry out the Factors duties.

- 3 In support of his application the Homeowner lodged with the Tribunal various emails and letters between the Homeowner and the Factor as well as a copy of a Sheriff Court Notice of Claim under Simple Procedure and which had been raised by the Factor against the Homeowner and his former wife on or around 28 December 2017. He also lodged a copy of a letter from Messrs Black Hay, solicitors confirming that he and his wife intended to enter into a separation agreement which would record their date of separation as 20 April 2015. The Homeowner also lodged a copy of the Factors' Statement of Service.
- 4 The Homeowner also lodged written representations in support of his application by email dated 22nd August 2018.
- 5 The Factor lodged written representations dated 17 August 2018. They lodged two sets of Productions including a copy of the Title Sheet for the property which showed that the owner was the proprietor of the property along with his former wife. They also lodged a number of emails and accounts. The Factors disputes all parts of the Homeowner's application.
- 6 By letter dated 27 July 2017 the parties were advised that the President of the Tribunal had decided to refer the application to a Tribunal for determination. Both parties were both notified in the said letter that a hearing in relation to the application would be heard on 14 September 2018 in Ardrossan Civic Centre, Ardrossan KA22 8EU.
- 7 Prior to the hearing the committee were able to consider the correspondence and written submissions which had been lodged by both parties.

The Hearing

- 8 A hearing took place before the Tribunal at Ardrossan Civic Centre, Ardrossan on 14 September 2018. The Homeowner was present and represented himself. The Factor was represented at the hearing by Mr David Doran, Director, Hacking & Paterson Management

Services. At the hearing the Tribunal considered each part of the Homeowner's application and in particular considered each of the alleged breaches of the Code of Conduct.

Alleged breach of Section 2.1 of the Code of Conduct – You must not provide information which is misleading or false

- 9 At the hearing the Homeowner was asked to explain which information he referred to and why it was misleading or false. The Homeowner explained that the Factor had raised a simple procedure claim against him at Kilmarnock Sheriff Court. In that claim the Factor had the Homeowner's address as 15 Lochwood Close, Kilwinning. The Homeowner explained that at the time the simple procedure was raised the Factor knew that the Homeowner was not residing at that address. In particular the Homeowner made reference to emails which had passed between him and the Factor and, in particular, an email dated 7 September 2015 in which the Homeowner had confirmed he no longer resided at 15 Lochwood Close, Kilwinning. The Homeowner therefore complained that the Factor had provided the Court with information which was misleading or false. The Factor explained that they had followed the rules of Court in raising the simple procedure claim. The claim had been raised against both the Homeowner and his former wife as joint respondents and as joint proprietors of the property at 15 Lochwood Close. The Homeowner had not provided any alternative address.
- 10 The Tribunal noted the terms of Section 2.1 of the Code of Conduct. This section of the Code seeks to ensure good communications between the Factor and the Homeowner. The Tribunal took the view that the duty not to provide information which is misleading or false relates to the duty between the Homeowner and the Factor. In this case the Homeowner is alleging that the Factor gave misleading information to the Court. The Tribunal consider that, even if that were the case, such information falls out-with the scope of the Code. In any case, the Tribunal noted that, although the Homeowner had advised the Factor he was no longer residing at the property, he had not provided any further address. The Factors were entitled to raise the action against both joint proprietors at the address at the property. The Tribunal

accordingly determined no failure by the Factor to comply with Section 2.1 of the Code of Conduct.

Section 4.7 of the Code of Conduct - You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs.

11 This section of the Code of Conduct relates to the requirement for the Factor to be able to demonstrate that they have taken reasonable steps to recover unpaid charges from any Homeowner who has not paid their share of costs prior to charging the remaining Homeowners if they are jointly liable for such cost. The Tribunal did not consider that this section of the Code was applicable in relation to the complaint raised by the Homeowner. This section of the Code was designed to cover the situation where one Homeowner in a development did not pay his share and where the Factors sought to recover that share from the other Homeowners in the development. The Homeowner accepted at the hearing that he had misunderstood the obligations imposed by this section of the Code. He did not seek to lead any evidence in support of a breach of this section of the Code.

The Tribunal finally determined that there is no breach of the Factors' Code in this connection.

Paragraph 4.8 of the Code of Conduct - You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention.

12 The Homeowner complained that the Factor had taken legal action without taking reasonable steps to resolve the matter and without giving notice of their intention to do so. The Tribunal noted in this respect that the Factor had issued a number of letters between 11 September 2015 and January 2018 which they sought payment of outstanding invoices. The primary address for the Factors communications in this respect was at the Property. The

Homeowner's former wife had agreed to set up a payment plan and Direct Debit forms had been made available. A number of further common charges invoices, reminder statements and solicitors' letters were sent to the Homeowner at the property. The Homeowner maintained that he had not seen this correspondence as he was no longer residing at the property and that the information concerned had not be passed on to him by his former wife. The Tribunal noted that whilst the Homeowner had indicated in his email dated 7 September 2015 that he was no longer residing at the property he had not provided any forwarding address. In any case the Factor had continued to send correspondence to the property. The Tribunal were of the view that it was incumbent upon the Homeowner to take reasonable steps to ensure that correspondence was passed to him in the event that he no longer resides at the property and/or to give clear instructions to the Factor as to where any such correspondence should be addressed in the future. The Factor could not accept that one co-proprietor was solely liable for any debts unless there was acceptance of the position by both co-proprietors. No such agreement from both parties was made available to the Factor. In the circumstances the Tribunal determined the Factor had taken reasonable steps to resolve issues between the parties and to give notice of their intention to take legal action and that there was no failure by the Factor to comply with the terms of Section 4.8 of the Code.

Section 4.9 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.

- 13 The Tribunal asked the Homeowner at the hearing to specify the actions of the Factor which he considered to be intimidating or threatening. The Homeowner complained that, when he finally found out a Court action had been raised against, him he found this to be frightening. He considered that the raising of the action (where the Factors knew he was no longer residing at the property) was an intimidating and threatening act by the Factors. He stated that, by taking the matter to Court without any prior knowledge or explanation, the Factors had acted in a hostile manner. The Factor maintained that they had not acted in an intimidating manner or threatened the application. They had not acted in a hostile manner. Their position

was that they had been entitled to raise court proceedings as sums due in terms of the factoring account remained outstanding despite a number of requests for payment.

The Tribunal determined that the Factors were entitled to raise Court proceedings for recovery of factoring accounts due. The Tribunal determined that the raising of the Court action was in itself not an intimidating act nor was it threatening or hostile towards the Homeowner.

In all the circumstances the Tribunal determined that there was no failure on the part of the Factors in relation to this part of the Code.

DECISION

- 14 The Factors have not failed to ensure compliance with the Factors' Code of Conduct as required by section 14(5) of the Act. There is no evidence that the Factor has failed to carry out the Factors' duties.

APPEALS

- 15 A Homeowner or 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.

Signed

Legal Member

Date

1/10/18