

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/20/1377

Flat 1/9, 240 Wallace Street, Glasgow, G5 8AS ("the Property")

Parties:

Dr Mohsan Mallick, 25 Ettrick Drive, Glasgow, G61 4RB ("the Homeowner")

MXM Property Solutions Ltd, Dalsetter Business Centre, Unit 3, 42 Dalsetter Avenue, Glasgow, G15 8TE ("the Property Factor")

Tribunal Members:

Mrs Josephine Bonnar (Legal Member)

Mrs Mary Lyden (Ordinary Member)

DECISION

The Tribunal determined that the application should be dismissed.

The decision is unanimous.

Background

1. The Homeowner lodged an application with the Tribunal in terms of Rule 43 of the Tribunal Procedure Rules 2017 and Section 17 of the 2011 Act. The application states that the Property Factor has failed to comply with Sections 2.5, 3.3, 7.1, 7.2 and 7.4 of the 2012 Property Factors Code of Conduct ("the Code"). The application also states that the property Factor failed to carry out their property factor duties. Documents lodged in support of the application include a copy of the Property Factor's written statement of services ("WSS") and letters to the Property Factor notifying them of the complaints.
2. A Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A hearing took place and a decision with statement of reasons and proposed Property Factor Enforcement Order ("PFEO") were issued. The Property Factor appealed the decision. On 22 July 2022, the Upper Tribunal set aside the decision and remitted the case to a freshly constituted Tribunal for re-determination in accordance with the terms

of the judgement of the Upper Tribunal.

3. A CMD took place on 10 January 2023. The Property Factor was represented by Mr Allan. The Homeowner did not attend. It was then established that the Homeowner's former representative, his father, had died and that the Homeowner may not have received the correspondence from the Tribunal as he had not provided up to date contact details. A further CMD was scheduled (wrongly referred to in the correspondence as a hearing). This took place on 29 March 2023 at Glasgow Tribunals Centre. The Property Factor was again represented by Mr Allan. The Homeowner was represented by his brother, Mr Mallick.
4. During the CMD the Tribunal discussed the application with the parties and identified a number of preliminary matters which would require to be addressed as well as the factual and legal issues to be determined at the hearing. Following the CMD the Tribunal issued a detailed note of the discussion. The Tribunal also issued a direction which required both parties to lodge submissions regarding two of the preliminary matters which had been discussed. The Homeowner was also directed to provide evidence in relation to notification of some of the Code complaints, prior to submission of the application. As Mr Mallick had indicated at the CMD that he wished to amend the application, the Homeowner was also directed to submit a written request with evidence that the new complaints had been properly notified. The Property Factor was directed to provide a response to these submissions. Mr Allan also advised the Tribunal that he could provide a copy of the joint bundle used during the appeal process if this would assist the Tribunal and parties at the hearing. Mr Mallick told the Tribunal that the Homeowner would attend the hearing to give evidence. The Direction and Note were issued on 5 April 2023.
5. The parties were notified that a hearing would take place at Glasgow Tribunal Centre on 3 July 2023 at 10am. Neither party contacted the Tribunal in advance of the hearing. Neither party submitted a response to the direction.
6. The hearing took place on 3 July 2023. Mr Allan attended on behalf of the Property Factor. He brought a copy of the joint bundle referred to at the CMD. He explained that he had not lodged this in advance because he had discovered that there were issues with the document and page numbers. He was therefore not sure whether the Tribunal still required this to be lodged. He also stated that he had not responded to the direction as he thought that he had only to do so once the Homeowner had responded.
7. The Homeowner was not present and was not represented. The Tribunal clerk contacted the Homeowner by telephone at 10.10am. He advised the clerk that he did not intend to attend and that his brother was due to represent him. He said that he would contact his brother. He contacted the clerk a few minutes later to advise that his brother had a family emergency and could not attend. At 10.23 an email was received from the Homeowner requesting a postponement until September 2023, as his brother could not attend for personal reasons. A response was issued by email stating that the request to

adjourn the hearing was refused.

Reasons for Decision

8. The Tribunal is satisfied that it was not in the interests of justice to postpone the hearing to a later date. The Homeowner did not request this in advance of the hearing and only did so when he had been contacted by the Tribunal clerk, after the start of the hearing. This caused considerable inconvenience to both the Property Factor representative and to the Tribunal Members who had all attended on time to proceed with the hearing. This was also the second time that there had been no appearance by the Homeowner. On 23 January 2023, the Homeowner failed to attend or be represented at the CMD. The Tribunal was advised by Mr Allan that the Homeowner's former representative had died. It therefore appeared to the Tribunal that the Homeowner may not have been aware of the date of the CMD, and a decision was taken to postpone to a later date. However, this situation had had been caused by the failure by the Homeowner to provide the Tribunal with up-to-date contact details for himself or his representative. The Tribunal also noted that the application was first lodged in 2020. As a result of a protracted procedure at first instance, and an appeal, the case has been ongoing for three years. Furthermore, the Homeowner failed to provide a valid reason for the failure by his representative or himself to attend the hearing, or any evidence in support of the request. Having regard to the overriding objectives, the Tribunal determined that the hearing should not be postponed.
9. The Tribunal then considered whether the hearing should proceed in the absence of homeowner or his representative and determined that it should not. The Tribunal noted that the onus is on the Homeowner to establish that there has been a failure to comply with the Code or carry out property factor duties. It had already been established that there are a number of factual matters in dispute. The Tribunal required to hear evidence on these matters before decision could be made. The parties were made aware of this at the CMD. The Tribunal was therefore satisfied that the hearing could not proceed in the absence of the Homeowner or any witnesses to give evidence on his behalf.
10. Rule 27(2) of the Tribunal Procedure Rules 2017 states, "The First-tier Tribunal may dismiss the whole or part of the proceedings if the applicant has failed to - ... (b) co-operate with the First-tier Tribunal to such an extent that the First-tier Tribunal cannot deal with the proceedings justly and fairly". The Tribunal noted the following:-
 - (a) The Homeowner failed to provide the Tribunal with up to date contact details. As a result, the details of the CMD which took place on 10 January 2023 were sent to the email address of the Homeowner's father, his previous representative, although he had passed away.

- (b) The Homeowner failed to provide the information and documents specified in the direction issued by the Tribunal following the CMD on 29 March 2023.
 - (c) The Homeowner failed to attend the hearing on 3 July 2023 although it was established at the CMD that this would be an evidential hearing and that there were factual matters in dispute. The Homeowner also failed to notify the Tribunal that he would not be present.
 - (d) The Homeowner failed to ensure that his representative would be present at the hearing or, if he could not attend, arrange for a written postponement request to be submitted in advance or an alternative representative .
 - (e) As outlined in paragraph 9, the Tribunal is satisfied that it cannot deal with the application justly and fairly without evidence and submissions from the Homeowner in relation to factual and legal matters which are in dispute.
11. The Tribunal is therefore satisfied that the application should be dismissed in terms of Rule 27(2) of the Tribunal Procedure Rules.

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.