Housing and Property Chamber
First-tier Tribunal for Scotland

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

Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (Rules of Procedure) Regulations 2017 ("the regulations")

Chamber Ref: FTS/HPC/PF/20/2270

Re.: 10 Clincart Road, Glasgow, G42 9DJ **(the property)**

The Parties:-

Mr Nigel Ross on behalf of Joy Property Limited **("the homeowner")** represented by Gilson Gray LLP, 29 Rutland Square, Edinburgh, EH21 2BW

Hacking and Paterson Management services, 1, Newton Terrace, Glasgow, G3 7PL **("the property factor")**.

The Tribunal members: Simone Sweeney (legal chairing member) and Elaine Munroe (ordinary housing member)

Decision of the Tribunal Chamber

The Tribunal unanimously determined that there is no failure on the part of the property factor to carry out the Property Factors' duties in terms of section 17 of the Code.

Background

1. By application dated 27th October 2020, the homeowner applied to the Tribunal for a determination on whether the factor had failed to comply with section 3.2 of the

Code of Conduct for Property Factors ("the Code") imposed by section 14 of the Act and to carry out the property factor duties in terms of section 17 (1) (a) of the Act.

2. By notice dated 30th December 2020, a legal member of the Tribunal accepted the application and directed it to the Tribunal for determination.

3. The property is a commercial unit within a block of residential and commercial properties. The homeowner had purchased the unit in February 2018. The firm of solicitors representing the homeowner had provided him with legal services in the purchase. The property factor had provided management services to the building for approximately 20 years until 16th November 2018.

4. A 'paper apart' document attached to the homeowner's application explained that that the homeowner had brought the application before the Tribunal on the order of Sheriff Pryce. A simple procedure action in Glasgow Sheriff court had been brought against the homeowner by the property factor for unpaid debt. The response to the court action revealed matters which Sheriff Pryce determined were properly within the jurisdiction of the Tribunal. By interlocutor dated 13th October 2020, Sheriff Pryce ordered the homeowner to make an application to the Tribunal for consideration of those matters and paused the action in the Sheriff court, meantime.

5. The 'paper apart' document, also provided to the Tribunal the reasons why the homeowner said that the property factor was in breach of its duties in terms of section 17 (5) of the Act. The homeowner's submissions were divided into four main parts.

6. In respect of the first part of his argument, insofar as is relevant, the document provided,

> *"…the Property Factor has breached its duties relating to management in the title conditions. Firstly the Property Factor was in breach of their agency. In October 2016, the Property Factor wrote to the proprietors in the building to advise that they had not been charging common repairs at the 1989 rateable value figures and that they were subsequently increasing the charges. In consideration of the title conditions, it was not for the Property Factor to unilaterally adjust the proportions payable in common repairs. Therefore, the Property Factor was acting without instructions and were in breach of their agency."*

7. The second argument was that, when calculating the proportions payable for each individual property within the block the property factor had failed to apply the correct values. The homeowner alleged that the property factor had used the current rateable values for the commercial subjects and pre 1989 rateable values for the domestic subjects.

8. The homeowner alleged this was in breach of the title deeds over the property which provided that the proportion payable by each property,

> *"shall be ascertained as between the proprietors interested in proportion to the annual value of the separate subjects owned by them severally in the said tenement as appearing in the Valuation Roll for the time being."*

9. The effect of the applying the wrong values was that the,

> *"proportions payable for the commercial properties increased (to 52% and 28% respectively). Said allocations are unlawful in terms of the title conditions. Therefore the homeowner has been significantly overbilled by the Property Factor in contrast to the domestic properties and that was done in clear breach of the title conditions."*

10. The third part of the homeowner's argument was that the invoices issued to the homeowner by the property factor had been calculated erroneously. The paper apart document provided, insofar as is relevant:-

> *"…the title conditions set out that the Property Factor was entitled to charge a fee of £1 per annum, payable half yearly when acting as factor of the tenement. The Property Factor has thus significantly overcharged all proprietors of the tenement in respect of factor's fee payable."*

11. Finally, the homeowner raised an issue about the authority of the property factor to act. The document provided:-

> *"there are significant questions surrounding whether or not the Property Factor was ever the properly appointed factor of the building."*

12. By way of response the property factor had provided written submissions dated 4th February 2021 together with an inventory of productions dated 19th February 2021. The property factor denied any breach of the Property Factor's duties nor any failure on its part to comply with the Code.

Hearing of 26th February 2021

13. A hearing by way of telephone conference took place on 26th February 2021. In attendance for the homeowner was Mr Iain Grant, solicitor. The property factor was represented by Mr David Doran, Managing Director.

Preliminary issue- authority of property factor to act

14. The Tribunal chair raised a preliminary issue which had been identified within the homeowner's papers which was the question around the appointment of the property factor. The Tribunal pointed to the relevant averments of the homeowner, referred to as the fourth argument, above.

15. Mr Grant confirmed that the homeowner was satisfied that the property factor had authority to act at the time of his complaint. No longer was he taking issue with this matter.

16. Moreover, neither was the homeowner relying upon the allegation that there had been a failure on the part of the property factor to comply with section 3.2 of the Code. This allegation was withdrawn.

17. Finally, no longer was the homeowner taking issue with the allegation that the property factor had applied incorrect valuations when calculating the correct apportionment to be applied to the homeowner's property in October 2016. Mr Grant explained that information provided by the property factor in its inventory of productions dated 19th February 2021 satisfied the homeowner that this allegation could also be withdrawn.

18. Mr Grant submitted that the information provided within the property factor's inventory of 19th February 2019 ought to have been provided sooner; that the homeowner had been requesting the information for 3 years; that the information addressed the homeowner's issues around how costs had been apportioned between

owners; and that the property factors had breached their duties in failing to provide the information until 19th February 2021. The Tribunal chair enquired whether the homeowner was now raising a complaint about delay on the part of the property factor. If so, where was there evidence within the application that notice of this complaint had been given to the other side. Mr Grant did not attempt to pursue this matter any further.

19. Mr Grant submitted that the homeowner's complaint was now restricted to the way in which the property factor had calculated payment for services. Mr Grant submitted that the calculations applied by the property factor were erroneous.

20. In support of his argument, Mr Grant made reference to the terms of the title conditions which provided:-

> *"The Factors for the said tenement, who shall be nominated by all the proprietors…shall be the judges of what repairs and renewals are necessary for the upkeep of all common and mutual portions of the said tenement, shall instruct same, superintend the execution thereof, settle the accounts therefor and recover the cost in the proportions hereinbefore provided, for which services they shall be entitled to charge against our said dispones and their foresaids an Annual Fee of one pound payable half yearly along with the feuduty before mentioned:"*

21. Mr Grant emphasised that the homeowner was not suggesting that one pound was proper remuneration for the services provided by the property factor. Rather, his argument was that, when he purchased his property in 2018, there was an existing agreement in place between the property factor and the other owners in the block as to how much should be paid to the property factor for their services. Mr Grant submitted that there was nothing to say that this agreement was binding on the homeowner.

22. Mr Grant submitted that, as a matter of law, the title conditions place an obligation on the homeowner to pay no more than one pound per annum. Any sum above one pound per annum becomes a matter of agreement between the owners and the property factor. Given that his client had never entered into a specific agreement with the property factor nor been party to the agreement reached by the other

owners at the property, then the homeowner was not legally bound to pay any more than that which was set out in the title conditions, ie. one pound per annum.

23. In conclusion, Mr Grant submitted that the property factor has overcharged his client. Moreover in the absence of any contract between the homeowner and the property factor, there is no obligation on the homeowner to pay the sums which the property factor says he is due to pay.

Evidence of the property factor

24. In response, Mr Doran began by submitting that the Tribunal had no jurisdiction to look beyond the date in 2018 when the homeowner purchased the property.

25. Mr Doran provided some background to the Tribunal. He explained that the firm of solicitors which represented the homeowner in these proceedings (Gilson Gray) had acted on behalf of the homeowner when he purchased the property in 2018.

26. At the date of purchase, the apportionment of common charges agreed in 2016 was in place.

27. Mr Doran submitted that prior to conclusion of missives the homeowner, through his solicitor, was made aware of the burdens applicable to ownership, including the percentage of costs applicable to his property and the management fee charged by the property factor.

28. The homeowner's solicitor had been provided with a copy of the up to date common charges account. This provided the homeowner with the amount of management fees which were in place at the time of the property purchase in 2018.

29. The common charges also detailed the applicable percentages. The common charges were provided by the property factor on the request of the homeowner's solicitor prior to concluding missives on the purchase. Essentially the apportionment of the common charges and the level of management fee were within the knowledge of the homeowner at the time of the purchase.

30. Mr Doran referred the Tribunal to an email chain which had been submitted with the homeowner's application. An email from the property factor to the homeowner dated 22nd October 2018 provided, insofar as is relevant,

"You mention the management fee applied. This is a matter for the owners to collectively decide. For many years the management fee has been set and agreed by the homeowners. In 2012, our Terms of Service and Delivery Standards issued to all homeowners confirmed the level of fee and our method of review. This process has continued, and has been accepted by the homeowners, since then. This being both prior to, and after your purchase of your unit."

31. The homeowner had included his response, an email also dated 22nd October 2018. In that email the homeowner confirmed that he was aware of the obligations on him set out in the title conditions,

"When we purchased the property, we were indeed aware of the burdens set out under the deeds, including the limitation of your fees at £1 per annum."

32. Mr Doran submitted that, at the time of the property purchase, an agreement was in place between the existing owners and the property factor on the level of management fees. The homeowner was bound by that agreement.

33. Moreover Mr Doran referred to the terms of the property factor's written statement of services which provided details of the management fee applicable. The property factor has been obliged by statute to provide a written statement of services since introduction of the 2011 Act. The statement, which pre-dates the homeowner purchasing his property sets out the duties and costs arising from the provision of the core factoring service. A copy of the written statement was provided to the homeowner in 2018. It was within the property factor's inventory. It provided, insofar as is relevant:-

"Each homeowner's proportion of charges for common works and services is detailed in common charges accounts rendered by HPMS. Clarification can also be provided upon request.

Property management fees due to HPMS for provision of the Core Factoring services are charged at a flat rate and are reviewed annually at the beginning of each year.

Any changes are intimated to homeowners in the next account rendered following a review."

34. Mr Doran referred again to the fact that the homeowner's solicitor had been provided with a copy of the common charges account in advance of conclusion of missives.

35. Mr Doran did not understand the factual basis for the homeowner's argument that he should pay no more than one pound per annum towards his management fee. A decision was taken by the owners to accept a different management fee in 2016. In 2018, when he purchased the property, the homeowner was bound by that agreement. Mr Doran submitted that the title deeds provide a mechanism for the homeowners to make that decision. Equally it was open to the homeowner to use that mechanism to call a meeting of owners and seek their agreement that they pay only one pound per annum by way of a fee.

36. Mr Doran insisted that the homeowner was aware of this mechanism. The Tribunal was referred to an email from the homeowner dated, 26th September 2018 which supported that the homeowner was familiar with the mechanism. Insofar as is relevant, the email provided:-

"If one is to follow the deed then one has to follow all of it, including the prescribed fee for the managing agent. I fully understand if H & P do not wish to continue at that level and I would invite the residential lessees to nominate another firm who will do so, at which time the commercial tenants will decide if that firm is acceptable, as we have the majority of the votes. On the question of outstanding costs no one has yet answered Mervyn's question as to why the percentages were altered without holding a duly authorised meeting. If a satisfactory answer is given to that I will pay my part, subject to the agents fees being altered as prescribed by the deed and everything the commercial lessees are not obliged to contribute to being taken out."

37. Mr Doran submitted that the content of this email indicated that the homeowner was aware of how he could go about returning the current management fee back to one pound per annum if he wished but chose not to.

38. A copy of invoices issued to the homeowner were included in the property factor's fourth inventory (submitted on 19th February 2021). The management fee is shown within the invoices from the property factors dated, 15th May, 9th August and 9th November 2018 at the sum of £41.75 per quarter.

39. It was explained that although the total amount of management fees outstanding was only £120.25, the homeowner had incurred a debt of over £1,000 in outstanding common charges. In an effort to resolve matters, Mr Doran advised that the property factor had written to the homeowner on 2nd May 2019. A copy of that letter formed production number 10 on the property factor's inventory. The property factor had offered to credit the homeowner's account with £300 in an effort to resolve matters and avoid the time and inconvenience to both parties of court action. No settlement had been reached, the property factor had been forced to bring court action to recover the debt and then to the additional time and cost of defending the application before the Tribunal. Mr Doran expressed his disappointment that matters could not have been resolved at an earlier stage.

Findings in Fact

40. That the homeowner purchased a commercial unit in a development of commercial and residential properties in February 2018.

41. That the property factor provided management services to the property until November 2018.

42. That the homeowner accepted the services of the property factor, without complaint.

43. That the property factor ceased providing management services at the property in November 2018.

44. That an agreement about the level of management fee applicable was reached between the property factor and the other owners at the development in October 2016.

45. That this agreement pre-dated the homeowner purchasing his property in February 2018.

46. That the homeowner was represented by the firm of solicitors in the purchase of the property who represent him in these proceedings.

47. That the solicitors undertook such standard enquiries as would be expected in the purchase of the property.

48. That such enquiries included recovering a copy of contemporaneous common charges account from the property factor in 2018.

49. That this common charges account revealed to the solicitor and to the homeowner the level of management fees in place at the time of the property purchase in 2018.

50. That the written statement of services provided that the management fees due would be charged at a flat rate and reviewed annually at the beginning of each year.

51. That a copy of the written statement of services was provided to the homeowner when he took ownership of the property.

52. That, prior to purchase of the property, the homeowner knew that the level of management fees was above one pound per annum in 2018.

53. That, after being provided with this information through his solicitor, the homeowner proceeded with purchase of the property in 2018.

54. That the management fee is shown within the invoices from the property factors dated, 15th May, 9th August and 9th November 2018 at the sum of £41.75 per quarter.

55. That the homeowner was liable to pay the management fee in place in 2018.

56. That the title deeds set out the obligations on the homeowner.

57. That in an email to the property factor, dated 22nd October, the homeowner confirms that he is aware of the burdens set out in the title deeds.

58. That the title deeds set out a mechanism whereby the homeowner can attempt to vary the management fee.

59. That the email from the homeowner of 26th September 2018 shows that the homeowner was aware of this mechanism.

60. That the homeowner did not apply this mechanism to reduce the management fees in place in 2018.

61. That the homeowner no longer disputes the way in which the common charges were apportioned by the property factor.

Reasons for decision

62. The live issues before the Tribunal were significantly reduced at the outset of the hearing on 26th February 2021. Mr Grant submitted that the only issue in dispute was whether the agreement reached between the property factor and owners at the development in 2016 around the level of management charges was binding on his client in 2018.

63. Mr Grant was of the view that the homeowner could not be bound by an agreement to which he was not party; that there required to have been a separate contract between the homeowner and the property factor in 2018 for him to be bound to pay the same management fee as the other owners and; that in the absence of same, parties had to look to the title deeds which placed an obligation on his client to pay no more than one pound per annum.

64. The Tribunal was not persuaded by Mr Grant's submissions. The evidence before the Tribunal, which was not disputed by Mr Grant, was that the homeowner was made aware of the level of the management fee in advance of him purchasing the property. Should the homeowner have taken issue with the fee, it was open to him to not proceed with the property purchase. However, having information which revealed the level of management fee for which he would be liable, the homeowner proceeded with purchase of the property. Having completed the purchase of the property, with full awareness of the applicable management fee, this is not an argument which the homeowner can now raise. It is not now open to the homeowner to challenge the fee in the way in which he has, at this time.

65. The homeowner was aware of the burdens brought by the title deeds. He made reference to this in his email to the property factor dated 22nd October 2018. By proceeding with the purchase, the homeowner was accepting all obligations which came with that, including a liability to pay the management fee. He cannot pick and choose which obligations he chooses to accept.

66. The level of management fee had been decided by the other owners in 2016. That was not in dispute. Should the homeowner have wanted to alter that, it was open to him to do that and his email of 26th September 2018 confirmed that he was aware of how to do this. He chose not to do so. None of this was challenged by Mr Grant.

67. The title deeds were drawn up in 1946. Mr Grant admitted that one pound per annum was not reasonable remuneration for the services provided by the property factor in 2021.

Decision

68. In all of the circumstances narrated, the Tribunal finds that there is no evidence of any failure by the property factor to carry out the property factor's duties under section 17 (1) (b).

69. In the circumstances there is no basis for the Tribunal to issue a Property Factor Enforcement order ("PFEO").

Appeals

70. 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 within 30 days of the date the decision was sent to them.

Legal Chair, at Glasgow on 15th March 2021