Housing and Property Chamber
First-tier Tribunal for Scotland

First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal")

Written statement of reasons of the Tribunal in terms of rule 27 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017

Chamber Ref: FTS/HPC/PF/18/2778

Property: The communal areas as part of the steadings development at 20 Kirklands Park Gardens, Kirkliston, EH29 9ET **("the communal areas")**

The Parties:-

Mr Henryk Zukowski and Mrs Maureen Zukowska, 20 Kirklands Park Gardens, Kirkliston, EH29 9ET **("the homeowners")**

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD **("the property factor")**

The Tribunal members: Simone Sweeney (legal chairing member) and Kingsley Bruce (ordinary surveyor member)

The Tribunal refuses the homeowner's request for compensation. Thereafter, the Tribunal dismisses the application and makes no further order. The decision of the Tribunal is unanimous.

Background

1. Reference is made to previous procedure and, in particular, the direction of the Tribunal of 29th September 2020, the telephone hearing of 2nd December 2020 and the emails from the parties of 1st and 4th December 2020 and 19th January 2021.

2. In attendance at the hearing on 2nd December 2020 was Mr Zukowski on behalf of the homeowners and for the property factor, Karen Jenkins, client relationship and support manager and Mr David Ford, solicitor.

3. Mr Ford submitted that his client was conceding the homeowner's position that the property factor was not properly appointed to manage the development in which the communal areas are situated. He referred to an email which had been sent to the Tribunal's administration on 1st December 2020. Neither the homeowner nor the Tribunal were aware of the email prior to the hearing.

4. Mr Ford drew to the attention of the Tribunal the formal admission within the email which provided:

> *"the Property Factor is prepared to accept that they were not validly appointed as the Property Factor for the Development at the meeting of 14 December 2016. There is accordingly, no identifiable basis for the Property Factor having been appointed under and in terms of the Deed of Conditions relating to the development."*

5. Given the consequence of this concession (the Tribunal cannot determine an application in which there is no appointed factor) the homeowner responded that he was looking for an award of compensation.

6. Mr Ford opposed any award of compensation being awarded to the homeowner.

7. Mr Ford, referred to the terms of his email of 1st December 2020 which provided further that,

> "*It having been determined for the purposes of this application that Charles White are (sic) not the property factor for the development, it must therefore be determined what should happen next in this matter. In Mr Zukowski's application to the Tribunal a number of matters were raised, with Mr Zukowski also setting out how he would like to see these matters resolved. It is respectfully submitted that these points can be addressed as follows: Removal of debt – Charles White will take no further steps to recover any sums from Mr Zukowski in respect of services they have provided to date. All ongoing actions will be brought to an end and the Notice of Potential Liability for Costs will be removed from his title. Clarification of whether or not Charles White has*

authority to act – Charles White has accepted that they do not have any authority to act. Charles White will communicate that position to the other homeowners within the Development. Removal of clause 10 of the Deed of Conditions- this is beyond the Tribunal's jurisdiction. Any variation or discharge of the title conditions will require an application to the Lands Tribunal for Scotland."

8. The homeowner was unable to address the Tribunal on what basis he should be awarded compensation. Recognising that the homeowner had been taken by surprise by the property factor's new position and, having not had an opportunity to consider same, the Tribunal discharged the evidential hearing and continued the application for parties' submissions on the question of whether or not the homeowner should be awarded any compensation for the property factor's error in charging for services, without any legal appointment to do so.

Homeowner's submissions

9. By email of 4th December 2020, the homeowner set out why he should receive compensation from the property factor. The email provided a direct response to Mr Ford's email of 1st December 2020.

10. Essentially the homeowner expanded upon the explanation provided in his application form of 15th October 2018 as to how he would like to see his complaint resolved.

11. The homeowner referred to, *inter alia*, that his complaint against the property factor had been on-going for many years. In 2010, debt recovery action had been brought against him in the sheriff court by the property factor. The homeowner had raised, then, that the property factor had no authority to act. He referred to having produced a copy of the title to the court. His position was that had the property factor considered his arguments at that time, he need not have had to bring an application before the Tribunal. Insofar as is relevant, the email provided:

"…when Charles White took me to court in 2010 and should have honoured the undertaking of their solicitors who had a copy of the titles in court and accepted that I was correct…we would not be in this position today and this before the Factoring

Act. Charles White refused to provide this information and instead taking court actions several times…"

12. In his email of 4th December 2020, the homeowner submitted that the on-going dispute had caused him, *"inconvenience and stress."* The homeowner submitted that his complaint against the property factor had become common knowledge with other homeowners in the development conducting themselves negatively towards him,

> *"many owners are now aware that it is me and after having confrontation in public spaces with owners giving me verbal abuse outside which should not be tolerated…This is the consequences of Charles Whites actions."*

13. Moreover, the homeowner had been pursued for a debt which he had always argued was not due. As there had never been any formal appointment, it was not a debt for the property factor to pursue. A Notice of Potential liability ("NPL") had been registered in 2015 which had been challenged by the homeowner. That dispute was on-going. The homeowner wanted the NPL removed. His email of 4th December 2020 provided, insofar as is relevant,

> *"Regarding the NPL this was originally registered in 2015 without our knowledge regarding the wrong clauses and in breach of communications and not being given the opportunity to reply and again registered in 2018 after opening court case in late 2017 and still refused to remove this NPL. This is an example of how we have been treated. With the dismissal of this case no NPL was live and should have been removed however was refused. I do hope that this NPL will be removed with speed as this has caused extreme stress."*

14. The homeowner failed to specify by how much he ought to be compensated and referred that to the Tribunal. In assessing same he submitted that the Tribunal should take into account the fact that,

> *"due to hostilities here… we have no other option to move. Our house was on the market and at a point of being sold but due to the NPL that Charles White were*

refusing to remove after the dismissal of the case…I have lost considerable amount of money."

15. The homeowner disputed any suggestion that only he had complained about the level of service provided by the property factor over the years and indicated that the dissatisfaction he had expressed was felt by other homeowners. The homeowner made reference to a letter from his MSP in December 2019. He submitted that the MSP's letter was in response to complaint from another homeowner about the way in which the development was being managed by the property factor. The letter was not before the Tribunal and is of no relevance to this application. The Tribunal make no comment about the letter.

16. The homeowner denied that he had found the service of the property factor to be acceptable. Had that been the case, he would not have brought an application before the Tribunal.

17. The homeowner agreed with Mr Ford that removal of clause 10 of the Deed of conditions was beyond the jurisdiction of the Tribunal. This was no longer a resolution which he sought.

Property factor's submissions

18. A response to the homeowner's submission was received from the property factor's solicitor by email on 19th January 2021. The email reinforced Mr Ford's previous opposition to an award of compensation. He submitted that the property factor had provided services to the development over the previous 17 years under the misapprehension that it was properly appointed in terms of the title deeds. During that time the property factor had acted in *"good faith"* and had,

"acted in the best interests of the proprietors and endeavoured to provide the best service they could. Those services were provided without complaint (with the exception of Mr Zukowksi)."

19. The property factor disputed any suggestion that the standard of service provided fell below that which was acceptable. Mr Ford submitted that this had not been disputed by the homeowner in earlier procedure and prayed in aid the Direction of the Tribunal of 28th May 2019. Therein, the Tribunal records the homeowner's issue at a hearing on 8th March 2019 to be the legal appointment of the property factor, not the service provided.

20. Moreover the homeowner had benefitted from these services and had made no payment towards them since October 2011. He should not be compensated for services from which he benefited but did not pay for nor procure elsewhere.

21. The property factor submitted that the homeowner had failed to provide any basis on which the Tribunal could assess compensation in the circumstances. The email provided, insofar as is relevant,

> *"It is noted that Mr Zukowski has again in his email of 4th December 2020 sought to defer to the Tribunal is (sic) so far as any question of compensation is concerned. It is respectfully submitted that this is improper. Not only is this prejudicial to the Property Factor (who has no opportunity to consider or respond to a quantified claim for compensation) but further Mr Zukowksi has failed to provide any evidence upon which the Tribunal could begin to assess compensation."*

22. In response to the other matters raised by the homeowner in his email of 4th December 2020, the property factor submitted that any proceedings in the Sheriff Court were out-with the jurisdiction of the Tribunal, that the property factor undertakes to remove the NPL and that the homeowner's reference to the MSP letter of December 2019 was not relevant to the application before the Tribunal.

Reasons for decision

23. At the hearing on 8th March 2019, the homeowner confirmed that he was not taking issue with the service provided by the property factor but rather its legal appointment. By decision dated 19th February 2020 the Upper Tribunal determined that the property factor was not appointed to act by way of custom and practice. At the hearing on 2nd December 2020, the property factor conceded that it had no legal

basis to provide services to the development prior to 14th December 2016. The homeowner has succeeded in establishing that the property factor had no legal basis upon which it could provide services.

24. It is a matter of agreement between the parties that, services were provided by the property factor. The homeowner insists that he was not alone in complaining that the standard of service provided by the property factor was unacceptable. Even if that is the case, the Tribunal has heard no evidence about those services nor the standard of service provided and makes not comment on this matter.

25. The homeowner does not dispute that he has paid nothing towards the cost of these services since 2011. He does not dispute the property factor's assertion that he has benefitted from the service which he has received. The homeowner has not provided to the Tribunal evidence of any loss for which he should be compensated.

26. The homeowner submits that the property factor took legal action against him in the sheriff court, wrongly, that a NPL was registered which impacted on his ability to sell his home, cost him money and caused him inconvenience and stress. The Tribunal makes no comment about the actions before the sheriff court. With regards to the NPL, the homeowner has received an undertaking from the property factor that the NPL will be removed. The homeowner has provided no evidence to show that he has suffered loss or injury as a result of the acts or omissions of the property factor. The homeowner may wish to seek legal advice on these matters separately.

27. For the reasons set out, the Tribunal determines that there is no basis for the homeowner to be awarded compensation.

28. The Tribunal has jurisdiction to consider an application against a property factor in terms of the Act. It having been conceded by the property factor that they had no authority to act, the application falls. Therefore the Tribunal dismisses the homeowner's application and makes no further order.

Appeals

29. 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 from the First-tier Tribunal. That party must seek permission within 30 days of the date the decision was sent to them.

Legal chair, at Glasgow, on 13th February 2021