

Housing and Property Chamber First-tier Tribunal for Scotland



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

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended

Chamber Ref: FTS/HPC/PF/20/1993

78B Clydesdale Road, Bellshill, ML4 2QL (“the House”)

The Parties:-

Dr Zubair Ahmed, c/o Austin Lafferty Solicitors, 213 Edinburgh House, East Kilbride, G74 1LJ (“the Homeowner”)

Apex, 46 Eastside, Kirkintilloch, East Dunbartonshire G66 1QH (“the Factor”)

Tribunal Members

Ms Helen Forbes (Legal Member)

Mrs Elizabeth Dickson (Ordinary Member)

Decision

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) determined that the Factor has failed to comply with the Section 14 duty in terms of the Property Factors (Scotland) Act 2011 in respect of compliance with paragraphs 2.5 and 6.1 of the Property Factor Code of Conduct (“the Code”) as required by section 14(5) of the Act. The Tribunal determined that the Factor also failed to carry out its property factor duties in terms of section 17(1) of the Act.

The decision is unanimous.

Background

1. By application made on 15th September 2020, the Homeowner applied to the Tribunal for a determination on whether the Factor had failed to comply with sections 2.5, 5.1 and 6.1 of the Code, and whether or not the Factor had failed in carrying out its property factor duties.

2. Details of the alleged failures were outlined in the Homeowner's application and associated documents including correspondence between the parties and a statement of account. The complaint concerns a delay in responding to correspondence, a failure to have professional indemnity insurance, and a failure to inform the Homeowner of progress in relation to repairs paid for by the Homeowner that ought to have been carried out. The repairs were not carried out. The Homeowner's account showed a balance due to the Factor on 10th February 2017. An email from the Factor on 13th February 2017 confirms this balance was paid in full by the Homeowner.
3. The Homeowner intimated his concerns to the Factor by emails sent over a period from 2017 to 2020. A final notification was sent to the Factor on 8th September 2020.
4. By decision dated 5th October 2020, a Convenor on behalf of the President of the Tribunal (Housing and Property Chamber) decided to refer the application to a tribunal for a hearing.
5. Hearing notification letters were sent out to parties on 13th October 2020.
6. By letter dated 30th October 2020, the representative for the Homeowner made written representations and lodged copy emails that had been sent to the Factor.
7. Intimation of the application and hearing was made upon the Factor by Sheriff Officers depositing papers on 6th November 2020.

The Hearing

8. The hearing was held on 27th November 2020 by telephone conference. Neither part was in attendance. The Homeowner was represented by Mr Omair Ahmed, Solicitor.
9. The Tribunal considered the terms of Rule 29 of the Rules. The Tribunal determined that the Factor had been given reasonable notice of the time and date of the Hearing, together with details on joining the telephone conference, as Sheriff Officers had made service at the Factor's registered office. The Tribunal determined that the requirements of Rule 24(1) had been satisfied and that it was appropriate to proceed with the application in the absence of the Factor upon the representations of the Homeowner and the material before the Tribunal

Evidence of the Homeowner

Alleged failure to comply with paragraph 2.5 of the Code

10. The Code states: *You must respond to enquiries and complaints received by letter or email within prompt timescales. 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.

11. Mr Ahmed said the Homeowner had paid a share of common works that required to be carried out to the block of flats of which the House forms part. The works were structural and were to address a problem with rot, however, the Factor never made clear to the Homeowner the exact nature of the work, and no work was carried out. The Factor said they were awaiting a share of costs from other owners within the block. The Homeowner attempted to contact the Factor on numerous occasions for an update on the work. No estimates or updates were provided.
12. The Homeowner's statement of account and the Factor's email showed the Homeowner paid the sum of £5717.12. From 2019, the Homeowner contacted the Factor on several occasions to request that the balance be refunded to him as the works had not been carried out. No responses were forthcoming from the Factor.
13. Repairs had been outstanding at the time of purchase of the House in 2014, and there was a Notice of Potential Liability on the House at that time. The Homeowner made payment of the sum due in terms of the Notice. He made further payment, including a sum of £5466 due in April 2016.
14. Responding to questions from the Tribunal as to whether the sum due to the Homeowner was £5466 or £5717.12, as some of the entries on the statement of account appeared to relate to factoring invoices, Mr Ahmed said it was impossible to ascertain whether any factoring works were ever carried out by the Factor due to a lack of invoices and information. There had certainly been no factoring services provided by the Factor since 2017, and it was dubious whether any had been carried out prior to that date.

Alleged failure to comply with Paragraph 5.1 of the Code

15. Paragraph 5.1 states: *You must have, and maintain, adequate professional indemnity insurance, unless you are a social sector property factor who can demonstrate equivalent protections through another route.*
16. Mr Ahmed said he contacted the Factor's Neil Cowan by telephone, following up with an email on 20th January 2020, requesting details of the Factor's professional indemnity insurance. During the telephone call, Neil Cowan said the Factor was insured with HCC International, but no documentation was forthcoming. Mr Ahmed contacted HCC International. It transpired they are an insurance broker rather than an insurer, and they were unable to provide any information regarding the Factor's insurance to Mr Ahmed. There is no copy of any certificate of professional indemnity insurance held on the property factor register. Mr Ahmed fears that the Factor does not have professional indemnity insurance.

Alleged failure to comply with Paragraph 6.1 of the Code

17. Paragraph 6.1 states: *You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.*
18. Mr Ahmed said no information was provided as to the progress of works or estimated timescales for completion. In addition to previous calls for information, a request was made by email on 14th January 2020 for an update and there was no response.

Failure to carry out property factor duties

19. The Homeowner stated in his application that the Factor failed to carry out his property factor duties by failing to carry out work for which the Homeowner had been invoiced and for failing to have professional indemnity insurance.
20. The Tribunal said it would not consider the matter relating to professional indemnity as a failure to carry out property factor duties, as that was covered under alleged failures to comply with the Code.
21. Mr Ahmed referred to his previous submissions in support of the alleged failure to carry out work.

Findings in Fact

- 22.
- i. The Homeowner is the owner of the House, which is a flatted dwelling-house.
 - ii. The Factor registered as a Property Factor on 1st November 2012 under registration number PF000103.
 - iii. The Factor was removed from the Register of Property Factors on 10th January 2020.
 - iv. The factoring relationship between the Homeowner and the Factor commenced in or around October 2014.
 - v. The works to which the Homeowner contributed payment of £5466 were not carried out.
 - vi. At 10th February 2017, there was a balance due by the Homeowner to the Factor, as shown on the factoring account of £5717.12.

- vii. The balance of account was paid by the Homeowner, as confirmed by email to the Homeowner's representative dated 13th February 2017. No further factoring services have been provided since that time.
- viii. The Factor has failed to inform the Homeowner of the progress of the works that were to be carried out and has not provided a timeline for completion.
- ix. The Factor consistently failed to respond timeously to requests for information from the Homeowner and his representative.
- x. The Factor has failed to repay funds that belong to the Homeowner.

Determination and Reasons for Decision

23. The Tribunal took account of all the documentation provided and the written and oral submissions.

Failure to comply with paragraph 2.5 of the Code

24. The Tribunal found that the Factor had failed to comply with this section of the Code, by failing to respond to enquiries and complaints within prompt timescales.

Failure to comply with paragraph 5.1 of the Code

25. The Tribunal did not find that the Factor had failed to comply with this paragraph of the Code, as there was insufficient information before the Tribunal to make a definitive finding in this regard.

Failure to comply with paragraph 6.1 of the Code

26. The Tribunal found that the Factor had failed to comply with this section of the Code, by failing to inform the Homeowner of the progress of the work to be carried out and failing to provide timescales for completion.

Failure to carry out property factor duties

27. The Tribunal found that the Factor had failed in carrying out its property factor duties by taking funds from the Homeowner and failing to carry out work. On the information before the Tribunal, it appeared that a portion of the £5717.12 related to invoices for factoring fees, therefore, the Tribunal found that the sum of £5466 was due to the Homeowner, as it related to the proposed works that were never carried out.

Proposed Property Factor Enforcement Order (PFEO)

28. Having determined that the Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO. The Tribunal decided to make a PFEO.

29. In considering the terms of the PFEO, the Tribunal took into account the distress, frustration and inconvenience caused to the Homeowner by the Factor's failure to comply with the Code.
30. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the Property Factor and allow parties an opportunity to make representations.
31. A proposed PFEO accompanies this decision. Comments may be made in respect of the proposed PFEO within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

Right of Appeal

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

Legal Member and Chairperson

27th November 2020