

# Housing and Property Chamber

## First-tier Tribunal for Scotland

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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 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules").

**Reference number: FTS/HPC/PF/19/1747 ("the Application")**

**Re: Flatted Property at 173C, Greenrigg Road, Cumbernauld, Glasgow, G67 2QD ("the Property")**

**The Parties:**

**Mrs. Zainab Kamara, residing 4, Upton Close, Bexley, Kent, DA5 1HJ ("the Applicant"), and**

**Apex Property Factor Limited having a place of business at 46, Eastside, Kirkintilloch, East Dunbartonshire, G66 1QH ("the Factor")**

Tribunal Members

Karen Moore (Legal Member)

Mike Links (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Factor had failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Property Factor Code of Conduct ("the Code") and had breached Sections 2 at 2.5, Section 5 at 5.5 and 5.2 and Section 7 at 7.1 and 7.2 of the Code and had failed to comply with its property factor duties but had not breached Section 1D at m and n of the Code.

Background

1. By application received by the First-tier Tribunal for Scotland (Housing and Property Chamber) between 5 June 2019 and 8 July 2019 ("the Application") the Applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Respondents had failed to comply with Section 1 D at m and

n, Section 2 at 2.5, Section 5 at 5.5 and 5.2 and Section 7 at 7.1 and 7.2 of the Code and had failed to comply with its property factor duties.

2. The Application comprised an application form, copy correspondence (emails and letters), copy photographs of the Property, a copy of the Code and the Factor's Written Statement of Services ("the WSoS").
3. The Application was referred to the Tribunal and a hearing was fixed for 18 September 2019 at the Glasgow Tribunal Centre, 20, York Street, Glasgow G2 8GT at 10.00.
4. By email dated 10<sup>th</sup> September 2019, the Factor submitted that the Application should be dismissed as the Tribunal has no jurisdiction. The Factor also submitted by letter of 22<sup>nd</sup> August 2019 that as the matter at the core of the Application, namely a claim on a common buildings policy, arose before the Factor had dealings with common buildings policy, the Application should be dismissed. The Tribunal advised that it would deal with these submissions as a preliminary matter at the Hearing.
5. By letter dated 11 September 2019, the Factor lodged copies of First-tier Tribunal for Scotland (Housing and Property Chamber) Decisions numbered FTS/HPC/PF/18/2937, 2086,2090,2091,2092, 2093, 2095, 2097, 2098, 2099 and 2100 with the Tribunal and copied the same to the Applicant. Hearing – Preliminary matters
6. The Hearing took place on 18 September 2019 at the said Glasgow Tribunal Centre. The Applicant was present and accompanied by her cousin, Mrs. Mumu, as a supporter in terms of Rule 11 of the Rules. The Factor was represented by Mr. N. Cowan, one of its employees who was accompanied by Mrs. C. Bakharshee-Davidson and Mr. A Coleman.
7. At the outset of the Hearing, the Tribunal advised the Parties that it proposed to hear them on these preliminary matters and would then hear the Parties on the Application under reservation of its determination on the preliminary matters.

#### Jurisdiction

8. The Factor relied on the reasoning set out in the suite of cases which it had lodged. The Tribunal advised the Parties that, in its view, the cases did not set a precedent by which the Tribunal was bound and invited Mr. Cowan to explain the relevance of the cases to the Application. Mr. Cowan submitted that as it had not been validly appointed in terms of the title deeds, it was not a factor and so the Tribunal had no jurisdiction. The Tribunal noted that, although they are eleven in number, the cases referred to by Mr. Cowan were conjoined as the related to the same or a similar complaint by a number of owners in the same development at Greenrigg, Cumbernauld. This is also the development of which the Property forms part. The factor in these cases is the Factor in this Application. Mr. Cowan explained to the Tribunal that the development at Greenrigg, Cumbernauld is a former Cumbernauld Development Corporation development and that the title conditions affecting all of the

properties in the development set out a particular process for the appointment of a factor. This process had not been followed in the appointment of the Factor. Mr. Cowan adopted the view expressed in the cases that if the factor has not been validly appointed, the Tribunal has no jurisdiction.

9. The Tribunal drew Mr. Cowan's attention to the wording of the Act and in particular to the definitions. Section 2 (1) (a) of the Act states : "In this Act, "property factor" means a person who, in the course of that person's business, manages the common parts of land owned by two or more other persons and used to any extent for residential purposes".
10. Section 10(5) (a) of the Act states : "In this Act, "homeowner" means an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor" and to the facts of this case whereby the Applicant is a homeowner and the Factor has levied a charge for factoring services. Mr. Cowan maintained that the view expressed in the cases he had lodged should be preferred. The Applicant submitted to the Tribunal that she considered the Respondent to be her factor.

#### Date of Insurance Claim.

11. In response to questions from the Tribunal, Mr. Cowan agreed that the date of the insurance claim was not relevant to the duty to comply with the Code but was relevant to the way in which the Factor complied with the Code and so this was a matter to be tested by the Tribunal.
12. The Tribunal advised that it would hear the evidence of the parties under reservation pending its decision on jurisdiction.

#### The Hearing – evidence from the Parties

13. The Applicant advised the Tribunal that her complaints all arose from the one incident being the way in which the Factor handled a claim which she made on the common building policy arranged by the Factor with Liverpool Victoria. The claim had been made in respect of damage from water ingress from the flat above the Property and had been rejected by the insurer because it pre-dated the date of the policy. The Applicant advised the Tribunal that the claim had not been paid, that she had complained to the Financial Ombudsman Service (FOS) after which she learned that no claim on the common policy had been lodged with Liverpool Victoria. With reference to the email correspondence lodged by her, the Applicant advised the Tribunal that the Factor failed to respond to both her and the FOS. The Applicant explained to the Tribunal that before appointing the Factor she had arranged her own buildings insurance with Legal and General and, in fact, had continued this insurance for two years after the Factor was appointed. The Applicant advised the Tribunal that the Factor had written to the Applicant in or around 2015 offering its services, particularly in respect of common buildings insurance, and the Applicant had accepted this offer, albeit reluctantly. The Applicant was of the view that the Property should have been covered by the Factor's common policy at the date of the water ingress, either in respect of the current policy or in respect of the preceding policy, but this turned out not to be the case. In response to questions from the Tribunal, the

Applicant advised that the water ingress had been stopped and that there had been no further reoccurrence. There had been an earlier incidence of water ingress but this had settled some time ago and had no bearing on the water ingress which was the subject of the claim.

14. Mr. Cowan agreed with the Applicant that the Factor had contacted owners offering services in or around 2015 and that the Applicant had accepted this offer. He advised the Tribunal that, following the determination of the cases to which he had referred and on which he relied, the Factor had written to all owners in the Greenrigg developments to advise that it was no longer factor. Mr. Cowan advised the Tribunal that, nonetheless, the Factor continued to manage the common buildings insurance policies and proposed to do so until the financial year end on 31 March 2020. Mr. Cowan advised the Tribunal that the Property had been on cover with Liverpool and General from 28 April 2018 and that the claim might have been refused because the incident took place on 23 April 2018. Mr. Cowan advised the Tribunal that the Applicant's claim was received on 4 September 2018 and immediately passed to the Factor's brokers. He explained that it was usual practice for the brokers or their loss adjusters thereafter to deal with the claim and that the Factor had no further role. He advised that he did not chase the claim up with the loss adjusters and understood that the loss adjusters had either not received the claim or had misplaced it. He agreed that the Factor had not told the Applicant this. He advised the Tribunal that the Factor's usual practice was to leave claims handling to the brokers and that the Factor had no role once a claim was made. He agreed that the Factor had not told the Applicant this. Mr. Cowan advised that Tribunal that the broker had advised the Factor that the claim had been rejected but agreed that the Factor had not told the Applicant this as he thought she would have been told this by the loss adjuster. Mr. Cowan recalled a phone call from the FOS but agreed that he had not responded to emails. Mr. Cowan maintained that the Property had been covered by a common policy arranged by the Factor.
15. The Tribunal asked Mr. Cowan if the Factor could evidence the correspondence with the broker or loss adjustor and evidence that the Property was covered by a common policy. Mr. Cowan advised that this could be done and so the Tribunal adjourned the Hearing for a short time to allow Mr. Cowan to arrange to have the evidence scanned and emailed to the Hearing.
16. The Hearing reconvened and Mr. Cowan produced: -
  - i) A copy spreadsheet which he explained showed that the Property was on block common insurance cover from 6 June 2018;
  - ii) Copy letter from the Factor to the Applicant advising cover is in place to 11 April 2019;
  - iii) Copy letter and copy certificate from the Factor's brokers showing the property is on block common insurance cover from 12 April 2019 to 11 April 2020 and
  - iv) Copy page from a mail book showing an entry sending a claim form to the Factor's brokers on 7 September 2018.

17. Mr. Cowan explained that the office was understaffed and that this was all which could be produced at short notice.
18. The Tribunal then turned to the specific heads of complaint in the Application. The Applicant stated that these all related to the evidence she had submitted in respect of the insurance claim and referred the Tribunal to the email she had lodged.
19. With reference to the complaint under Section 1 at 1m and 1n , the Tribunal noted that these paragraphs refer to the requirement in the WSoS which set response times. The Applicant agreed that the WSoS set out response times and explained that her complaint is that these were not adhered to.
20. With reference to a breach of 2.5 of the Code, which 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"*, Mr. Cowan agreed the Factor had not complied with its WSOS as it had not adhered to its processes and timescales.
21. With reference to a breach of 5.5 of the Code, which states :*"You must keep homeowners informed of the progress of their claim or provide them with sufficient information to allow them to pursue the matter themselves."*, Mr. Cowan's position was that the Factor does not handle the claims and passed the claim to its brokers.
22. With reference to a breach of 5.2 of the Code, which states:*"You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this."*, Mr. Cowan advised the Tribunal that this information would have been sent to the Applicant and referred to the copy certificate he had produced at the Hearing. He confirmed that this would have been sent to the Applicant's home address and not the Property. The Applicant advised the Tribunal that she had not received any of this information.
23. With reference to 7.1 and 7.2 of the Code, which state: *"You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors"* and *"When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel."*, Mr. Cowan advised the Tribunal that the Factor had not implemented its complaints

procedure as it did not consider the Applicant's letters and emails received to be a complaint as the term "complaint" had not been specifically used by the Applicant.

24. With reference to duties, the Applicant advised that she only became aware that there was no cover until the claim was rejected and the FOS became involved. The Applicant advised that she had paid block policy insurance premiums to the Factor in 2016, 2017, 2018 and 2019 and that she believed no cover had been effected for these times and so these charges were levied fraudulently. Mr. Cowan refuted that no cover had been in place. He offered to produce evidence of cover for the Applicant and to provide her with a certificate of insurance for the cover to April 2018 to allow her to make a fresh claim.

#### Decision of the Tribunal on jurisdiction

25. The Tribunal considered the question of jurisdiction. The Tribunal noted that the Factor relied on the reasoning set out in the cases which it had lodged and relied on the proposition that as the Factor had not been validly appointed in terms of the title deeds, it was not a factor and so the Tribunal had no jurisdiction.
26. The Tribunal considered the wording of the Act and in particular to the definitions. Section 2 (1) (a) of the Act states :*"In this Act, "property factor" means a person who, in the course of that person's business, manages the common parts of land owned by two or more other persons and used to any extent for residential purposes"*. Section 10(5) (a) of the Act states :*"In this Act, "homeowner" means an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor"*. Neither definition refers to title deeds or to the way in which a factor is appointed. The Explanatory Notes which accompany the Act do not refer to title deeds or to the way in which a factor is appointed. Therefore, the Tribunal took the view, contrary to the tribunal which had determined the cases relied on by the Factor, that it is the actions and status of the parties which is relevant and not the way in which the parties came to have that status or carry out those actions. The Tribunal then had regard to the wording of the Act as applicable to the Parties. Mr. Cowan agreed that the Factor's business is property management and advised the Tribunal that the Factor still arranges buildings insurance for the Applicant even though the homeowner/factor relationship had ended. It appeared to the Tribunal that these actions by the Factor correspond to the definition of "property factor" of Section 2(1)(a) of the Act. The Tribunal had regard to one of the productions submitted as part of the Application and noted that the Applicant is the owner of the Property in terms of Land Certificate number DMB27899, that the Property is residential, and that common property is part of the Applicant's ownership. The Applicant is, therefore, a "homeowner" in terms of Section 10(5) (a) of the Act. It follows, therefore, that both definitions being satisfied, the Act applies to the Parties and so the Tribunal has jurisdiction.

#### Findings of the Tribunal

27. Having decided that it has jurisdiction, the Tribunal proceeded to consider the evidence before it.

28. The Tribunal found that there had been an incidence of water ingress from a neighbouring property into the Property which caused damage to the Property, that the Applicant had attempted to make a claim on a common building policy in respect of that incident, that she had submitted a claim form to the Factor who in turn appeared to have passed the claim form to its brokers but for a reason or reasons unknown to the Tribunal the claim did not proceed. The Tribunal found that the Factor has a WSoS which outlines its services in respect of insurance matters, response times for correspondence and contact and a complaints procedure. The Tribunal found that, by its own admission, the Factor did not comply with its WSoS in respect of response times. The Tribunal found that the Factor appears to have arranged buildings insurance cover for the Property from 12 April 2019 to 11 April 2020.

#### Decision of the Tribunal and reasons for the decision

29. The Tribunal's decision is based on all of the information before it, whether or not specifically referenced herein.

30. With reference to the complaint under Section 1 at 1m and 1n, the Tribunal noted that the Factor's WSoS sets out response times and so is satisfied that the Factor has complied with this part of the Code.

31. With reference to the complaint under 5.5 of the Code, the Tribunal noted that the Factor, of its own admission, took no part in pursuing the Applicant's claim on her behalf nor did it advise her that it would not do so. From the email correspondence submitted by the Applicant, the Factor had ample opportunity to explain this to the Applicant and to the FOS who contacted it on her behalf. Therefore, the Tribunal found that the Factor had breached this part of the Code.

32. With reference to the complaint under of a breach of 5.2 of the Code, the Tribunal noted that the Factor provided the required information in respect of the year to April 2020 but had not produced any information for previous years and did not appear to be able to confirm this information orally at the Hearing. On the balance of probabilities, the Tribunal preferred the Applicant's evidence that she had not received the information in this regard and so the Tribunal was not satisfied that the Factor had complied with this part of the Code.

33. With reference to the complaint under 7.1 and 7.2 of the Code, the Tribunal noted Mr. Cowan's position that the Factor had not implemented its complaints procedure as it did not consider the Applicant's letters and emails to it to be a complaint as the term "complaint" had not been specifically used by the Applicant. However, having regard to the content and tenor of these emails, the Tribunal found it clear that the intention of the Applicant was to raise a complaint and dissatisfaction at the Factor's level of customer service and found it unlikely that any competent business professional would interpret the emails in any other way. Therefore, the Tribunal found that the Factor had breached these parts of the Code.

34. With reference to the complaint of a failure to comply with duties, the Tribunal accepted the Applicant's position that she cannot be certain that there has been sufficient buildings block policy cover for the Property for which she has paid

premiums to the Factor in 2016, 2017, 2018 and 2019. Therefore, the Tribunal found that the Factor has failed to comply with its general property factor duties.

#### Property Factor Enforcement Order.

35. The Tribunal having so determined, then considered whether to make a Property Factor Enforcement Order (PFEO) in terms of Section 19 of the Act and took the view that a PFEO is appropriate.

36. Accordingly, the Tribunal propose to make a PFEO which will follow separately to conform with Section 19 (2) of the Act which states:- *"In any case where the First-tier Tribunal proposes to make a property Respondents enforcement order, it must before doing so (a)give notice of the proposal to the property Respondents, and (b)allow the parties an opportunity to make representations to it."*

37. The decision is unanimous.

#### Appeal

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

Karen Moore

Chairperson

23 October 2019