

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)**

Reference number: FTS/HPC/PF/19/3303

10 Dudley Drive, Glasgow, G12 9SB ("the Property")

The Parties:

John Dunn, 10 Dudley Drive, Glasgow, G12 9SB ("the Homeowner")

**W. M. Cumming, Turner and Watt, 40 Carlton Place, Glasgow G5 9TS ("the
Property Factor")**

Tribunal Members:

Josephine Bonnar (Legal Member)

Andrew McFarlane (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 2.5, 3.3 and 7.2 of the Code of Conduct for Property Factors. The Property Factor also failed to carry out its property factor duties by failing to issue invoices for common charges and cash cheques sent to them in relation to common charge accounts.

The decision is unanimous

Introduction

In this decision, we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "The Regulations"

The Property Factor became a Registered Property Factor on 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By application received between 16 October 2019 and 29 January 2020 the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Property Factor had failed to comply with the Code of Conduct for Property Factors. The Homeowner stated that the Property Factor had failed to comply with sections 1D, 2.2, 2.4, 2.5, 3.3, 6.9, 7.1 and 7.2 of the Code. The Homeowner also sought a determination that the Property Factor had failed to carry out its property factor duties in terms of section 17(5) of the Act. The Homeowner lodged documentation in support of the application including two letters dated 14 December 2019, addressed to the Property Factor, which provide details of his complaints, other letters to the Property Factor, copies of invoices and four written statements of services ("WSS").
2. On 5 February 2020, a Legal Member of the Tribunal on behalf of the President, referred the matter to a Tribunal for a determination. A hearing was assigned to take place on 2 April 2020. This hearing had to be postponed as a result of Government restrictions due to COVID 19. Parties were advised that the hearing would now take place by telephone conference call on 20 October 2020. Parties were provided with a telephone number and passcode.
3. On 1 March 2020, the Property Factor lodged written representations and a bundle of copy invoices. The Property Factor stated that it did not wish to attend a hearing.
4. The application called for a hearing by telephone conference call on 20 October 2020. The Homeowner participated, represented by his wife, Mrs Dunn. The Property Factor did not participate and was not represented.

The Property Factor's submissions

5. The Property Factor states: -
 - (i) They apologised that the matter had not been resolved before the Tribunal became involved and stated that there has been an internal enquiry, all future correspondence would be dealt with timeously and that letters received had been filed rather than passed to the appropriate member of staff.
 - (ii) All late payment fees have been deducted from accounts - £48
 - (iii) As a goodwill gesture, two management fees have been deducted from outstanding accounts - £76.20

- (iv) The UK Roofing repair charge for plasterwork has been deducted from the common charge account - £61.20
- (v) Quick Response Plumbing are no longer in business. The Homeowner's share of this charge has been deducted from outstanding common charge accounts - £23
- (vi) Copies of Power Rod/Hanlons invoices are provided which show two different issues
- (vii) Copies of AMEY Roofing invoices are provided which show two separate issues
- (viii) Copies of all common charge accounts are provided together with a list of deductions. Balance due is £1496.48
- (ix) The two cheques which were uncashed were stored in the company safe. They have no idea why. They assume there must have been a dispute on the account. It is not normal policy to hold cheques unless advised by the owner.
- (x) They will contact the Homeowner by letter to offer their apologies.

The Hearing

6. As a preliminary matter the Tribunal noted that some of the Homeowner's complaints related to 1995, 1998 and 2003. The Tribunal advised Mr and Mrs Dunn that as 2011 Act did not come into force until October 2012, these matters could not be considered by the Tribunal. However, complaints which related to the Property Factor's failure to provide responses to enquires about work and invoices, where the enquires were made after October 2012, could be considered, even if the enquiry related to events which pre-dated the legislation.
7. Mrs Dunn advised the Tribunal that Mr Dunn is the sole owner of the property. It is a tenement flat in a block of 8 properties. They have lived there for 28 years and Cumming Turner and Watt ("CTW") have been the factor throughout that time.

Section 1D of the Code – “The written statement should set out: ... D Communication Arrangements. (l) your in house complaints handling procedure (which may also be available online) and how owners may make an application to the homeowner housing panel if they remain dissatisfied following completion of your in-house complaints handling procedure (see section 7: complaints resolution); (m) the timescales within which you will respond to enquiries and complaints received by letter or email; (n) your procedures and timescales for responses when dealing with telephone enquiries”.

8. The application states "CTW have never followed a complaints process in dealing with our complaints and have never provided any timescales for dealing with complaints – CTW have never acknowledged any complaints raised at all."
9. The Tribunal noted that Mr Dunn lodged four WSS with the application. Mrs Dunn advised that these have been issued to them over a number of years and are undated. Following discussion, Mrs Dunn conceded that the WSS do provide a complaints process with timescales. She advised that their complaint was about failure to follow a complaints procedure, rather than failure to have a procedure in place. She advised the Tribunal that Mr Dunn did not insist on the complaint under this section of the Code.

Section 2.2 of the Code – “You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action).

10. The application states - "you wrote to us threatening court action without ever responding to any of our complaints and completely dismissed all issues raised by us."
11. Mrs Dunn advised the Tribunal that the correspondence from the Property Factor relating to possible court action had not been abusive, intimidating or threatening. Mr Dunn objected to the letters because he had made enquiries about invoices and received no response. However, the language used did not appear to breach this section of the Code and therefore this complaint was withdrawn.

Section 2.4 of the Code – “You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as emergencies).

12. The application states - "CTW sent quote for repair to plasterwork at back door which we refused to pay but you still authorised the work – the work was shoddy and reported to you and you did not acknowledge our complaint in any way so you did not follow process"
13. Mrs Dunn advised the Tribunal that this complaint relates to plasterwork which was carried out in July/August 2012. The Tribunal noted that the work (and any consultation or lack of consultation) occurred before the Code came into force. Mrs Dunn also confirmed that the shoddy work was first reported to the Property Factor by email in August 2012. It is also referred to in several letters sent to the property Factor between June 2013 and December 2018. In any event, Mr Dunn's complaint relates to the instruction of work, when an objection to it had been raised by Mr Dunn, and a failure to deal with complaints about the quality of the work, after it was completed. It therefore does not appear to be related

to the obligations imposed by this section of the Code which stipulates that there must be a procedure for consultation. Mrs Dunn advised that Mr Dunn did not insist on this complaint.

Section 2.5 of the Code – 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 (Section 1 refers).

14. The application states “We have never had any complaints acknowledged or responded to by CTW – they have been ignored completely”.
15. The Tribunal noted that Mr Dunn had lodged copies of 20 letters with the application. Each is addressed to the Property Factor. The first is dated 15 December 2012 and the last 19 December 2018. Each letter starts by referring to a cheque being enclosed in relation to a common charge invoice. The letters seek clarification of certain aspects of invoices which have been issued to Mr Dunn and explain why part of the sums invoiced are being withheld. Mrs Dunn advised the Tribunal that all 20 letters had been sent by first class post and had enclosed cheques. None had been acknowledged. Mr Dunn followed up some of the letters with emails asking for a response. Some emails were acknowledged, with an indication that a fuller response would be provided in due course. The Tribunal was referred to copies of emails to the Property Factor on 17 December 2019 and 5 January 2020 and the response dated 29 January 2020 which states that the sender had been on leave and would now attend to the matter. Mrs Dunn advised that no further response had been received to this or any previous email. She also advised that Mr Dunn had phoned the Property Factor on a few occasions regarding his enquiries and was told that someone would get back to him. Mrs Dunn further advised that they did not accept the Property Factor’s explanation that the letters had been filed away. The Tribunal noted that one of the copy invoices submitted by the Property factor dated 28 February 2013 has a handwritten note on it. This says “25/3/13 left very long letter with Robert outlining why the arrears have not been paid. Several questions are unanswered”.

Section 3.3 of the Code - “You must provide homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charged made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of the charge in advance.”

16. The application states “CTW as well as holding payments made, added charges that were never invoiced for to the arrears amount with no explanation and when queried this was ignored”.

17. Both parties lodged copies of quarterly common charges invoices. The bundle lodged by Mr Dunn includes accounts dated 21 August 2013 and 26 August 2014. Mrs Dunn advised the Tribunal that an invoice for November 2013 was also received. However, no invoices were received in February/March or May/June 2014. As a result, Mr Dunn was unable to work out how the figure specified in the invoice dated August 2014 had been calculated. This was one of the issues he raised in the letters to the Property Factor, to which no response was received. The bundle of invoices submitted by the Property Factor includes accounts dated 28 February and 16 May 2014, although two others appear to be missing. Mrs Dunn confirmed that Mr Dunn is not claiming that the figure specified in the invoice of 26 August 2014 is incorrect, only that he was unable to check its accuracy because of the missing invoices. No explanation was provided by the Property Factor and common charges for both quarters would have been due. Mrs Dunn confirmed that they have now had sight of the two invoices, after they were lodged with the Tribunal by the Property Factor, and can now see how the figure specified in the August 2014 invoice was reached.
18. Mr Dunn lodged copies of 2 uncashed cheques with the application. The first is dated 15 December 2012 for £91.25 and the second, 13 December 2013 for £82.84. Mrs Dunn stated that an email was sent to the Property Factor to ask why they were not cashed. Mr Dunn received a response saying that they would be cashed, but no explanation provided for the delay. The cheques were then returned with a request for replacement cheques to be provided. Mrs Dunn advised that the explanation offered by the Property Factor in their submissions is disputed. She pointed out that where charges were in dispute, Mr Dunn withheld payment. If a cheque was sent, the charge was not in dispute.

Section 6.9 of the Code – “You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor”

19. The application states, “When advised of shoddy workmanship (plastering at back) nothing was done to resolve this and no communication was received by CTW to advise steps taken. Any queries about quotes/works from suppliers received no response back from CTW.”
20. Mrs Dunn confirmed that the only shoddy work complained of is the plasterwork carried out in July/August 2012. The work itself (and the initial complaint regarding same) pre-dates the Code coming into force. The complaint that the work was unsatisfactory is repeated in the 20 letters to the Property Factor. No response regarding this issue was ever received.

Section 7.1 of the Code – “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”

Section 7.2 of the Code “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”.

21. The application states, “CTW have not followed any complaints procedure as they have never responded to any complaints raised” Following discussion regarding the terms of the WSS, Mrs Dunn confirmed that Mr Dunn did not insist on the complaint under section 7.1 as it was the failure to follow, rather than the lack of a procedure, which was at issue. The Tribunal noted the evidence already provided regarding the lack of response to the 20 letters in relation to Section 7.2

Property Factor Duties

22. The application states that the Property Factor has failed to carry out its duties for the following reasons – Invoice dated 26 August 2014, queried by Homeowner, told that Mr Watt would respond on his return from holiday, no response received. Not issuing invoices. Uncashed cheques. No explanation given for the increase from £262.40 to £609.52 in the balance outstanding from one invoice to the next. No explanation for apparent duplicate charges for plumbing work. No response to query regarding second demand for payment in relation to plaster work or complaint regarding the quality of the work.
23. The Tribunal noted that the Property Factor has now provided copies of invoices from C Hanlon Ltd and AMEY. Mrs Dunn confirmed that these appear to establish that second visits by both contractors were for different issues. The Tribunal noted that the Homeowner has already provided evidence and information regarding the subject matter of the other property factor duties complaints, in connection with the alleged breaches of the Code.
24. At the conclusion of the hearing Mrs Dunn said that it was sad that it had taken an application to the Tribunal before a response was received from the Property Factor. She also advised the Tribunal that the letter of apology, referred to in the Property Factor’s submissions to the Tribunal, has never been received.

The Tribunal make the following findings in fact:

25. The Homeowner is the heritable proprietor of the property.
26. The Property Factor is the property factor for the property.
27. The Property Factor failed to provide a response to 20 letters from the Homeowner which contained enquiries and complaints.

28. The Property Factor failed to issue common charges invoices to the Homeowner for the periods November 2013 to February 2014 and February 2014 to May 2014.
29. The Property Factor failed to cash two cheques sent to it by the Homeowner for common charges.
30. The property Factor failed to provide the Homeowner with a final decision on his complaints or provide information about applying to the Tribunal.

Reasons for Decision

31. The Tribunal proceeded to consider the application, the documents lodged in support of the application, the evidence and submissions made at the hearing and the submissions lodged by the Property Factor.

Sections 1D, 2.2, 2.4, 7.1 of the Code

32. The Tribunal noted that the complaints under these sections of the Code were withdrawn.

Section 2.5 of the Code

33. The Property Factor does not deny that the Homeowners complaints and enquiries were not answered. The explanation provided is that these letters were filed, rather than being passed to the relevant employee for a response. The Tribunal is not persuaded by this explanation. For one or two letters to have been incorrectly processed is understandable. However, for twenty letters over a significant period to have suffered the same fate, is simply not credible. Furthermore, the handwritten note on the invoice dated 28 February 2013, submitted by the Property Factor, establishes that at least one of the letters had been identified as requiring a response. The Tribunal notes that there are handwritten notes on other invoices, including the one dated November 2014, which refers to a dispute in relation to the management fee, and several letters having been sent in. The Tribunal is satisfied that the Property Factor failed to comply with Section 2.5 of the Code on numerous occasions and over a prolonged period of time.

Section 3.3 of the Code

34. The Homeowners complaint relates to quarterly invoices rather than the annual statement specified in Section 3.3. However, it appears that the quarterly invoices were the "detailed financial breakdown of charges made" which the Property Factor issued to the Homeowner. The Property Factor has submitted copies of two common charge invoices which were not received by the Homeowner. Furthermore, when the Homeowner queried the matter and asked

for information about certain charges on common charge accounts, the Property Factor failed to respond. It is also not clear why the Property Factor has been able to furnish the Tribunal with copies of invoices from C Hanlon dated May and June 2014, but fail to provide these to the Homeowner, despite numerous requests over several years. The Tribunal is satisfied that the Property Factor has failed to comply with Section 3.3 of the Code.

Section 6.9 of the Code

35. The Tribunal notes that the alleged shoddy plasterwork pre-dates the date from which the Property Factor was required to comply with the Code. However, it appears that the Property Factor continued in their failure to act after the relevant date. There is no suggestion by the Property Factor that they did pursue the contractor who carried out the plasterwork. On the other hand, they would only have been required to do so if they accepted that the work had been defective. There is no evidence to suggest that this was the case. On the basis on the information available the Tribunal is not persuaded that the Property Factor failed to comply with this section of the Code.

Section 7.2 of the Code

36. The Tribunal is satisfied that the Homeowner was not issued with written confirmation of a final decision on his complaints or provided with information on how to apply to the Tribunal. The Tribunal is satisfied that the Property Factor has failed to comply with Section 7.2 of the Code.

Property Factor duties

37. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, “(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner.”

38. The property is a tenement flat in a block of 8. From the invoices provided it is evident that there is a common insurance policy and regular charges in relation to stair lighting, as well as charges for common repairs. As part of the service provided by the property Factor, they are required to calculate the share of the various charges due by each homeowner and ingather those payments. The Tribunal is therefore satisfied that issuing invoices and cashing cheques received from Homeowners, are part of the duties of the Property Factor. The Property Factor failed to issue two invoices. It also failed to cash cheques from the Homeowner on two occasions. The Tribunal concludes that the property Factor failed to carry out its property factor duties in relation to these invoices and cheques.

39. The Tribunal is not satisfied that the Property Factors failure to respond to enquiries or complaints is a failure to carry out property factor duties as this is not connected to the management or maintenance of property. The Tribunal

therefore determines that the other complaints made by the Homeowner in relation to property factor duties have not been established

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) Notice.

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.

Josephine Bonnar, Legal Member
30 October 2020