

Housing and Property Chamber

First-tier Tribunal for Scotland



**Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber)
In an Application under section 17 of the Property Factors (Scotland) Act 2011
by**

Laura Westley, 28 Morton Road, Aylesbury, Norfolk NR11 6BA ("the Applicant")

Lets Move Letting and Mortgage Centre, 10 Ferry Brae, Dunoon, Argyll & Bute PA23 7DJ ("the Respondent")

Reference No: FTS/HPC/PF/20/2275

**Re: Property at 8 Kilmun Court, Dunoon PA23 8SF
("the Property")**

Tribunal Members:

John McHugh (Chairman) and Mike Scott (Ordinary (Housing) Member).

DECISION

The Respondent has failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

- 1 The Applicant is an owner of 8 Kilmun Court, Dunoon PA23 8SF (hereinafter "the Property").
- 2 The Property is a flat located within a Development consisting of flats and associated common areas (hereinafter "the Development")
- 3 The Respondent is the property factor responsible for the management of common areas within the Development.
- 4 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from 13 August 2013.
- 5 The Applicant purchased the Property in the summer of 2020.
- 6 On 16 September 2020, the Applicant received an email from the Respondent advising her that there were outstanding electrical works; that the Development insurance had been cancelled by the insurers because the electrical works had not been carried out; and that the Respondent was instructing ST Electrical to attend to the works in place of the previous contractor, Steven Gibson Ltd.
- 7 On 28 September 2020, the Applicant send a WhatsApp message to the Respondent asking whether the insurance has been renewed. The Respondent replied that it had not been as the electrical works were not yet completed but would be shortly.
- 8 On 29 September 2020, the Applicant emailed the Respondent requesting confirmation of the factor's role and an explanation regarding the electrical works, maintenance arrangements and the insurance cover. She received no reply.
- 9 On 16 October 2020 the Applicant sent a further email to the Respondent. She requested a written statement of services; financial information; maintenance; arrangements for appointing the electrical contractors; communication arrangements; charging arrangements; debt recovery procedures; and information about the insurance. She received no reply.
- 10 On 19 October 2020 the Applicant sent a WhatsApp message to the Respondent raising questions concerning the size of the electrical bill; the background to the cancellation of the insurance and the selection of contractors. The Respondent replied advising that there had been difficulties in organising repairs and that the required electrical works were the result of new legislation.
- 11 The Applicant has, by her correspondence, including by her emails of 16 October 2020, notified the Respondent of the reasons why she considers the Respondent has failed to carry out its obligations to comply with its duties under section 14 of the 2011 Act.
- 12 The Respondent has unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at by telephone conference on 15 January 2021.

The Applicant was present at the hearing.

The Respondent was not represented.

No witnesses were called by either party.

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 2017 Regulations”.

The Respondent became a Registered Property Factor on 13 August 2013 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Tribunal had available to it, and gave consideration to, the documents lodged on behalf of the Applicant. No documents had been lodged by the Respondent.

On 17 November 2020 the Tribunal had made a Direction requiring the Respondent to provide certain documents and information to it by 4 December 2020. The Respondent has failed to comply with the Direction. The Respondent has failed to engage with the process at all.

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant does not complain of failure to carry out the property factor's duties.

The Code

The Applicant complains of failure to comply with the Code.

The Applicant complains of breaches of Sections: 1.1a; 2.1-2.5; 3.3; 4.1; 4.4-4.7; 5.1; 5.2; 5.4; 5.6-5.8; 6.1-6.9; 7.1 and 7.2 of the Code.

The elements of the Code relied upon in the application provide:

"SECTION 1: WRITTEN STATEMENT OF SERVICES

You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner. If a homeowner applies to the homeowner housing panel for a determination in terms of section 17 of the Act, the Panel will expect you to be able to show how your actions compare with the written statement as part of your compliance with the requirements of this Code.

You must provide the written statement:

- *to any new homeowners within four weeks of agreeing to provide services to them;*
- *to any new homeowner within four weeks of you being made aware of a change of ownership of a property which you already manage;*
- *to existing homeowners within one year of initial registration as a property factor. However, you must supply the full written statement before that time if you are requested to do so by a homeowner (within four weeks of the request) or by the homeowner housing panel (within the timescale the homeowner housing panel specifies);*
- *to any homeowner at the earliest opportunity (not exceeding one year) if there are any substantial changes to the terms of the written statement.*

1.1a For situations where the land is owned by the group of homeowners

The written statement should set out:

A. Authority to Act

- a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group ;
- b. where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation;

B. Services Provided

- c. the core services that you will provide. This will include the target times for taking action in response to requests for both routine and emergency repairs and the frequency of property inspections (if part of the core service);
- d. the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a "menu" of services) and how these fees and charges are calculated and notified;

C. Financial and Charging Arrangements

- e. the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee;
- f. what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services each owner within the group is responsible for. If management fees are charged at a flat rate rather than a proportion, this should be stated;
- g. confirmation that you have a debt recovery procedure which is available on request, and may also be available online (see Section 4: Debt recovery);
- h. any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service);
- i. any arrangements for collecting payment from homeowners for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service);
- j. how often you will bill homeowners and by what method they will receive their bills;
- k. how you will collect payments, including timescales and methods (stating any choices available). Any charges relating to late payment, stating the period of time after which these would be applicable (see Section 4: Debt recovery);

D. Communication Arrangements

- l. your in-house complaints handling procedure (which may also be available online) and how homeowners 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 e-mail;*
- n. your procedures and timescales for response when dealing with telephone enquiries;*

E. Declaration of Interest

- o. a declaration of any financial or other interests (for example, as a homeowner or lettings agent) in the land to be managed or maintained;*

F. How to End the Arrangement

- p. clear information on how to change or terminate the service arrangement including signposting to the applicable legislation. This information should state clearly any "cooling off" period, period of notice or penalty charges for early termination.*

SECTION 2: COMMUNICATION AND CONSULTATION

Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:

2.1 You must not provide information which is misleading or false.

2.2 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).

2.3 You must provide homeowners with your contact details, including telephone number. If it is part of the service agreed with homeowners, you must also provide details of arrangements for dealing with out-of-hours emergencies including how to contact out-of-hours contractors.

2.4 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 in emergencies).

...2.5 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)...

...SECTION 3: FINANCIAL OBLIGATIONS...

...3.3 You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges 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 this charge in advance...

...SECTION 4: DEBT RECOVERY

Non-payment by some homeowners can sometimes affect provision of services to the others, or can result in the other homeowners being liable to meet the non-paying homeowner's debts (if they are jointly liable for the debts of others in the group). For this reason it is important that homeowners are aware of the implications of late payment and property factors have clear procedures to deal with this situation and take action as early as possible to prevent non-payment from developing into a problem.

It is a requirement of Section 1 (Written statement of services) that you inform homeowners of any late payment charges and that you have a debt recovery procedure which is available on request.

4.1 You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts.

4.4 You must provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations.

4.5 You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding.

4.6 You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation).

4.7 You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs...

...SECTION 5: INSURANCE

5.1 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.

If your agreement with homeowners includes arranging any type of insurance, the following standards will apply:

5.2 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.

5.3 You must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider. You must also disclose any other charge you make for providing the insurance.

5.4 If applicable, you must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly. If homeowners are responsible for submitting claims on their own behalf (for example, for private or internal works), you must supply all information that they reasonably require in order to be able to do so.

5.5 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.

5.6 On request, you must be able to show how and why you appointed the insurance provider, including any cases where you decided not to obtain multiple quotes.

5.7 If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) should be available for inspection, free of charge, by homeowners on request. If a paper or electronic copy is requested, you may make a reasonable charge for providing this, subject to notifying the homeowner of this charge in advance.

If your agreement with homeowners includes arranging buildings insurance:

5.8 You must inform homeowners of the frequency with which property revaluations will be undertaken for the purposes of buildings insurance, and adjust this frequency if instructed by the appropriate majority of homeowners in the group.

Additional standard for situations where a land maintenance company owns the land:

5.9 On request you must provide homeowners with clear details of the costs of public liability insurance, how their share of the cost was calculated, the terms of the policy and the name of the company providing insurance cover...

...SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE

This section of the Code covers the use of both in-house staff and external contractors.

6.1 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.

6.2 If emergency arrangements are part of the service provided to homeowners, you must have in place procedures for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for giving contractors access to properties in order to carry out emergency repairs, wherever possible.

6.3 On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff.

6.4 If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.

6.5 You must ensure that all contractors appointed by you have public liability insurance.

6.6 If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance.

6.7 You must disclose to homeowners, in writing, any commission, fee or other payment or benefit that you receive from a contractor appointed by you.

6.8 You must disclose to homeowners, in writing, any financial or other interests that you have with any contractors appointed.

6.9 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...

...SECTION 7: COMPLAINTS RESOLUTION

7.1 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.

7.2 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.”

The Matters in Dispute

The Applicant complains in relation to the following issues:

- (1) The Respondent has failed to issue a written statement of services.
- (2) The Respondent has failed to provide appropriate insurance and advise of its terms.
- (3) The Respondent has failed to provide information regarding the carrying out of electrical works and the instruction of a contractor to perform those works.
- (4) The Respondent has failed to provide information regarding its charges and the debt position at the Development.
- (5) The Respondent's failure to respond to communications.
- (6) The handling of the Applicant's complaint to the Respondent

We deal with these issues below.

1 Failure to issue a written statement of services

The Applicant purchased the Property in the Summer of 2020. The Respondent was made aware that the Applicant had purchased the Property. The Respondent did not provide a written statement of services within four weeks.

The Applicant requested a written statement of services by her letter of 16 October 2020. None has been provided.

In the circumstances, we consider there to have been a breach of Section 1 of the Code.

2 Insurance

The Applicant complains that insurance may not have been in place or that it may not have been the appropriate insurance. The Respondent advised the Applicant on 16 September 2020 that the buildings insurance for the Development had not been renewed because of an electrical safety issue. The Applicant attempted to ascertain from the Respondent details of the issue, when it had come to light and whether there was inadequate insurance in place.

On 19 October 2020, the Applicant asked the Respondent for details of the policy. This was not provided. Having been unable to obtain details of the insurance cover from the Respondent, the Applicant made contact with the brokers. They advised that they could not respond to the Applicant as the policy has been set up with the Respondent as the owner of the Development rather than proprietors such as the Applicant. The Applicant was concerned that there was either no insurance or no adequate insurance in place and so obtained her own policy at her own cost.

We consider that the Respondent has failed to provide information regarding the insurance as required by Section 5.2 of the Code and has therefore breached that Section.

3 Electrical Works and the instruction of a contractor

The Applicant was surprised to find out shortly after buying the Property that there were significant electrical works outstanding. She sought information from the Respondent in her letter of 16 October and her WhatsApp message of 19 October 2020 about the state of the works and how long they had been outstanding. She asked about the basis upon which the contractor had been selected. No substantive response was provided by the Respondent.

We consider that the Respondent is in breach of its duties to supply information regarding the progress of the electrical works under Code Section 6.1 and its duty under Code Section 6.3 to explain the basis of the appointment of the new electrical contractor.

5 Arrangements concerning charges and debts

The Applicant complains that in its email of 16 September 2020 the Respondent advised that a number of owners were in arrears and asked them to make payment of those arrears. It

stated that those arrears were hindering completion of important maintenance works. The Applicant complains that no information has been provided about the amount of arrears, steps taken to collect them or the exact effect upon the provision of services.

In her email of 16 October 2020, the Applicant requested that the Respondent provide information on the debt position and its procedures for collecting same. This was not provided.

We find that the Respondent has breached its duty under Code Section 4.1 to have a clear written procedure for debt recovery and its duty under Code Section 4.4 to provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations.

6 Communication

The Applicant complains of the Respondent's failure to respond to her. Other than the very limited response by the Respondent in its WhatsApp message of 19 October 2020, the Respondent has failed to respond to the Applicant's many queries on a range of important matters, which queries were raised in her emails of 29 September and 16 October 2020.

We consider the Respondent's conduct to amount to a breach of Code section 2.5.

7 The handling of the Applicant's complaint to the Respondent

The Applicant complains that the Respondent has failed to comply with its complaint handling obligations.

There is no evidence that the Respondent has, or has followed, any kind of Complaints Procedure. It has failed to treat the Applicant's communications as a formal complaint when they were obviously intended to be complaints. It has not advised the Applicant of the right to complain to the Tribunal. In the circumstances, we consider there to have been a breach of Code sections 7.1 and 7.2.

Note

The Applicant had identified a large number of potential Code Sections where she considered a breach might exist. Where we have not made a specific finding in this Decision that a Code Section has been breached, this indicates that we have found there to be insufficient evidence that a breach exists.

Observations

The Respondent has engaged in fundamental failings of duty. In addition, the Respondent has failed to engage with the Tribunal and has failed to respond to the Tribunal's Direction. Those responsible for registration of factors should give consideration to these matters in considering whether the Respondent continues to be a fit and proper person to act as a factor.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order (“PFEO”). The terms of the proposed PFEO are set out in the attached document.

APPEALS

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.

JOHN M MCHUGH

CHAIRMAN

DATE: 28 January 2021

