

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/20/1846

Kirkland Court, 8 Lasswade Road, Edinburgh, EH16 6 RZ ("the Property")

The Parties:

Robert Buchanan, Kirkland Court, Flat 37, 8 Lasswade Road, Edinburgh, EH16 6RZ ("the Homeowner")

**Trinity Property Factors, 209/211 Bruntsfield Place, Edinburgh, EH10 4 DH
("the Property Factor")**

Tribunal Members:

Josephine Bonnar (Legal Member)

Elizabeth Dickson (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 2.4 of the Code of Conduct for Property Factors. The Property Factor also failed to carry out its property factor duties by failing to consult with the Homeowner in relation to payment of the Housing Managers salary during furlough.

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 on 28 August 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 2.4, 2.5, 3.3, 6.3 and 7.1 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 letters to the Property Factor dated 17 June, 24 July and 14 August 2020, letters from the Property Factor, copies of invoices and a copy of the Property Factor's written statements of services ("WSS").
2. On 10 November 2020, a Legal Member of the Tribunal on behalf of the President, referred the matter to a Tribunal for a determination. Both parties were advised that a hearing would take place by telephone conference call on 6 January 2021 at 10am.
3. Prior to the hearing, the Property Factor lodged written representations and a bundle of documents, including a copy of the deed of conditions for the development.
4. The application called for a hearing by telephone conference call on 6 January 2021 at 10am. The Homeowner participated, represented by Mr McAllister. The Property Factor was represented by Sharon Laird, Property Manager, Gillian Reekie, Property Manager and George McGuire, Director of Operations.

The Hearing

5. As a preliminary matter the Tribunal noted that the Property Factor disputed the Homeowner's entitlement to make an application to the Tribunal because their complaints procedure had not been exhausted before the application was made. The Tribunal noted that the Homeowner sent a letter to the Property Factor setting out his complaints on 17 June 2020. This had been sent recorded delivery and had been signed for by "Trinity", as shown on a Royal Mail track and trace report which was also lodged. The Property Factor indicated in correspondence that this letter was not received as the office was shut during lockdown. Ms Laird advised the Tribunal that The Managing Director was visiting the property weekly to collect mail, but otherwise the office was closed. The original letter has never been found. Ms Laird stated that she could not explain this. A copy of the letter was sent by email to the Property Factor on 22 July 2020, and a further letter dated 24 July 2020 was also emailed to the Property Factor. A response to the complaints contained

in these letters was issued on 6 August 2020. The Homeowner was dissatisfied with the response and sent a further letter to the Property Factor on 14 August setting out his reasons for this and notifying them that he intends to refer the matter to the Tribunal. By email dated 26 August 2020 the Property Factor notified the Homeowner that they could not make an application to the Tribunal until they had completed the complaints process and that the complaint had to be further escalated to the Operations Manager. The Homeowner responded on 4 September 2020, stating that he was not satisfied with the Property Factor's handling of his complaint and that he intended to make an application to the Tribunal.

6. The Tribunal noted that Section 17(3) of the 2011 Act requires a Homeowner to notify the Property Factor of the complaints, prior to making an application to the Tribunal. In addition, in terms of section 17(3)(b) of the 2011 Act, the application can only be made if the "property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowners concern." In terms of their WSS, the Property Factor has a three stage complaints process. Stages 1 and 2 were completed. The Homeowners letters of 17 June and 24 July 2020 were answered by letter on 6 August 2020. However, the Homeowner was dissatisfied with the response and sent a further detailed letter to the Property Factor setting out his concerns. Rather than pass this letter on to the Director of Operations, as specified in the complaints procedure, the Property Factor sent a further email to the Homeowner, providing him a copy of the complaints procedure and advising him that he had to escalate his complaint to the next stage. However, it appeared to the Tribunal that the Homeowner's letter of 14 August 2020 made it clear he did not consider the matter to have been resolved. He may not have used the words "please refer my complaint to the Director of Operations" but, this is what should have occurred. The lack of a final response from the Director of Operations was not the result of the Homeowner's actions, but the Property Factor's failure to apply their own procedure. The Tribunal is satisfied that the Property Factor failed to resolve the Homeowner's complaint and that he was entitled to make the application to the Tribunal.

The Homeowner's complaints

7. In the application the Homeowner details several complaints. These include a complaint that there had been a breach of GDPR by the Property Factor as a result of a resident being provided with a set of master keys to the development and having access to residents' personal data in the House Managers' office. Mr McAllister advised that Tribunal that this matter has been the subject of a complaint to the Information Commissioner, and that Mr Buchanan was no longer seeking a decision by the Tribunal in relation to same. Mr McAllister also confirmed that complaints regarding lack of risk assessment and breach of health and safety regulations (lack of a House Manager during lockdown and an arrangement that a resident would take out bins) were also to be withdrawn. The Tribunal noted the issues to be determined by the Tribunal to be as follows –

- (a) Homeowners being charged for the cost of cleaning and bins being put out for collection when these tasks are supposed to be carried out by the House Manager, whose salary is paid by the Homeowners.
- (b) Lack of consultation with Homeowners regarding the House Managers salary during furlough. The Property Factor notified the Homeowners that they were still expected to pay the 20% of the salary not covered by the Government when the House Manager was on furlough between 24 March and 7 July 2020.
- (c) Advertising for a full time House Manager although the Homeowner had carried out a ballot among the residents which supported the recruitment of a part time manager instead.
- (d) Failure to provide a timeous response to complaints from the Homeowner.
- (e) Lack of transparency in relation to the accounts and failure to properly account for additional charges being imposed.

Additional charges for cleaning and bins

- 8. Mr McAllister advised the Tribunal that although the additional charges for cleaning and bins became particularly noticeable during lockdown, Mr Buchanan had noted that these featured in the common charges accounts going back to 2010. He confirmed that Mr Buchanan did not object to the charges incurred during the House Manager's furlough but felt that at other times the cleaning and taking out of bins ought to be covered by the salary paid to the House Manager, as they are part of her job. Ms Laird advised the Tribunal that the Homeowners are only charged for cleaning and taking out the bins when the House Manager is absent due to illness or holiday. She confirmed that each of the Homeowners in the development pay a share of the House Manager's salary. During her furlough, the Government covered 80% of this and once the accounts for the year are finalised, there will require to be an adjustment to the accounts to reflect this. Mr McGuire advised the Tribunal that the House Manger is employed by the Property Factor on behalf of the residents. She is an employee with employment rights, including the right to paid holidays. She works fixed hours and does not reside on site. Ms Reekie advised that the issue of the Housing Managers holidays had been discussed with the residents in the past and they had decided that they did not want a replacement House Manager for these absences. Instead, they had agreed to pay for contractors to carry out the services required during these periods of time. Mr McAllister advised the Tribunal that Mr Buchanan felt that the residents were being charged twice for the same services. He was also concerned that the House Manager would take holidays on Fridays and Mondays, rather than a week or a fortnight at a time, and that the days off would frequently coincide with cleaning and bin days. This resulted in additional charges being incurred frequently.

Salary during furlough

- 9.** It is not disputed that the Property Factor has not consulted with the residents on the issue of the 20% of the House Manager's salary not covered by the Government during furlough. Mr Buchanan, along with the other Homeowners, was issued with a letter on 7 July 2020 which stated that it was the Property Factor's "policy to pay all our furloughed staff their full salary" and that they should not be "penalised for not being able to go to work due to the lockdown". The letter acknowledged that this had been challenged by some residents and indicated that the issue would be "discussed at a proprietors meeting as soon as this was safe and permissible."
- 10.** The Tribunal noted that the Homeowner had carried out a ballot of residents which had confirmed by a large majority that the Homeowners were not in favour of the proposal to pay the additional 20% of the salary. Ms Laird advised the Tribunal that the ballot had not been a valid one, as it did not include the non-resident owners. She said the plan was to hold a meeting regarding the matter. Mr McGuire advised the Tribunal that the Property Factor had wanted to support the House Manager and that a meeting was to take place when this was possible. However, they accepted that a meeting was not required to vote on such matters and that postal ballots were competent in terms of the title deeds.
- 11.** Mr McAllister advised the Tribunal that the Property Factor had failed to act on the ballot carried out by Mr Buchanan. They had also failed to carry out their own ballot, although they had taken a ballot in relation to another issue, the hours to be worked by the new House Manager, a couple of months later.

Advertising for a full time House Manager despite a Homeowners vote for a part time position.

- 12.** Ms Laird advised the Tribunal that the Property Factor has balloted the Homeowners regarding this matter and that they voted 14 to 13 in favour of retaining the full-time post. She also said that the position could only be changed to a part time one if a two thirds majority had voted in favour of this course of action.
- 13.** Mr McAllister advised the Tribunal that Mr Buchanan had carried out his own ballot. This had resulted in a vote in favour of changing the post to a part time position. Although he conceded that people have the right to change their minds, he had some concerns about the Property Factor's processes and, in particular, the previous House Manager's involvement in assisting residents to fill in the ballot papers.

Failure to provide the Homeowner with a timeous response to the complaint.

- 14.** Mr McAllister advised that this complaint relates to Mr Buchanan's initial letter of 17 June 2020, sent by recorded delivery, and for which a Royal Mail track and trace confirming delivery has been provided. Following correspondence from the Property Factor stating that the letter had not been signed for by a

member of staff as the office was closed, Mr Buchanan contacted Royal Mail who informed him that the letter had been signed for by a Trinity employee. Mr McAllister also advised that the response eventually received was inadequate.

15. Ms Laird had advised the Tribunal earlier in the hearing that the letter was never received. She stated that the office had been closed at the relevant time and there would have been no employee present to sign for the letter. She also advised that the Managing Director had been to the office once or twice a week to collect post, but this letter had not been found. She also advised that a copy of it had been emailed to the Property Factor on 22 July 2020, followed by a further emailed letter on 24 July 2020. The Property Factor had sent a full response to these on 6 August 2020, in accordance with the complaints procedure.

Lack of transparency in relation to the accounts

16. Mr McAllister advised the Tribunal that Mr Buchanan was not happy with the limited documentation provided by the Property Factor and felt that there required to be more transparency in relation to their dealings with the development funds. In particular, he felt that there should be fuller explanations for the additional charges and that the accounts should be independently audited. He directed the Tribunal to clause Fifth (e) of the deed of conditions which states specifically states that the Factor is to have the annual accounts independently audited.
17. Ms Laird advised the Tribunal that a budget for each year is established. Invoices are then issued every six months to the residents. At the end of the year, the Accounts Department prepares a full income and expenditure statement, and this is issued to the residents with a summary. All relevant invoices are made available at the development at the AGM, when the accounts are discussed. She advised the Tribunal that if the residents asked for the accounts to be audited, this would be arranged, but there would be a cost for this. In response to questions from the Tribunal Ms Laird advised that Mr Buchanan has never asked to see any additional documents relating to the finances.
18. Mr McAllister advised the Tribunal that Mr Buchanan had challenged additional gardening charges and that following this challenge, the additional charges no longer appeared on his account. This had led to concerns about the accuracy of the accounts. Ms Laird advised the Tribunal that the residents had agreed some time ago to extra expenditure on gardening, but that this was for a fixed purpose and period, so would not feature on accounts going forward.

Final submissions

19. Mr McAllister concluded by stating that Mr Buchanan was no longer insisting on his complaints in terms of 6.3 and 7.1 and the Code but was seeking a finding that Sections 2.4, 2.5 and 3.3 had been breached. He also sought a

finding that there had been a failure to carry out property factor duties.

20. Ms Laird advised the Tribunal that the Property Factor had provided a satisfactory response to all of the issues raised. The Tribunal asked for some further information regarding AGMs. The Property Factor had lodged the minutes of 2 AGMs from October 2017 and October 2018. Ms Laird confirmed that there has not been a meeting since October 2018. The meeting which would ordinarily have taken place in October 2019 was postponed as a new computer system meant that the accounts were delayed. This was then arranged for 18 March 2020. This was cancelled due to the COVID 19 pandemic. In response to questions from the Tribunal Ms Reekie confirmed that, as stated in the minutes, the residents agreed at the October 2018 meeting to spend some money on flowers and plants. Mr Buchanan had objected but the matter was agreed, as far as she can recall, by a show of hands. However, the large additional expenditure on the gardens which had been referred to earlier in the hearing, was agreed several years ago, when Mr Buchanan was not resident at the development. He did not purchase his property until 2017. Mr McAllister responded to this information, stating that Mr Buchanan had been at the October 2018 meeting and that there had been no show of hands or other vote in relation to the garden expenditure.

The Tribunal make the following findings in fact:

21. The Homeowner is the heritable proprietor of the property.
22. The Property Factor is the property factor for the property.
23. The Property Factor failed to consult with the Homeowner and other Homeowners in the development before deciding that the Homeowners would be charged for the 20% of the House Managers salary not covered by the Government, when she was on furlough.
24. The Property Factor failed to arrange for annual accounts to be audited or consult with the Homeowners on the issue of and costs associated with the accounts being independently audited.
25. The Property Factor carried out a ballot in relation to changing the House Manager post to a part time position. The Homeowners voted 14 to 13 in favour of a full-time post.
26. The Property Factor did not receive the Homeowner's letter of 17 June 2020 until it was emailed to them on 22 July 2020.

Reasons for Decision

27. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.
28. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.4, 2.5 and 3.3 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. 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." These duties are generally to be found in the deed of conditions for the property in question.

Additional charges for cleaning and bins.

29. The Tribunal noted that the Homeowner does not object to charges incurred during the Housing Managers furlough, when these services had to be provided by contractors. However, at all other times, the Homeowner is of the view that the salary paid to the Housing Manager should cover all cleaning and bin related tasks. The Tribunal is not persuaded by this argument. The Homeowner does not dispute (indeed he accepts) that these services are often required when the House Manager is not scheduled to be at work, due to annual or sick leave. The development does not pay the House Manager specifically for these services. They pay her an annual salary to work set days and times with entitlement to annual leave. When at work, the cleaning of common areas and taking out bins are part of her job. However, when she is absent from work, there must be some provision for these tasks which will require to be paid for over and above the House Managers salary. The Tribunal note that the residents in the development refused the option of a relief House Manager, presumably because this would have been the more expensive option. Instead, they elected to pay for specific services to be carried out by contractors. It would appear that this decision was made before the Homeowner became a resident. However, the Tribunal is satisfied that the residents are not being charged twice for the same service. This would only be the case if the charges related to periods when the House Manager was working. The Tribunal is therefore not satisfied that there has been any breach of the Code or failure to carry out property factor duties in relation to this matter and is satisfied that the Property Factor is entitled to invoice the residents for cleaning and other services carried out by contractors when the House Manager is on leave, or which are required outwith her contracted hours.

Salary during furlough

30. The Tribunal is satisfied that the Property Factor has failed to consult with the Homeowner and the other residents in relation to the 20% of the House Manager's salary not paid by the Government. No satisfactory explanation for this has been put forward. While it might be arguable that it is preferable to have such matters discussed at a meeting, this is not currently possible and is unlikely to be possible for some time to come. The deed of conditions allows for a vote to be taken by postal ballot. The Property Factor used this method to take a vote on the issue of the post of House Manager becoming a part time one. They could have done so in relation to the salary issue and chose not to do so, although they were aware that some residents objected to the proposal. Although the deed of conditions states that it is for the Property Factor to appoint a House Manager, terminate that appointment and determine the terms and conditions of the employment, the Tribunal is satisfied that a decision to pay the salary, when the House Manager was not attending work or carrying out any of her duties, would fall outwith this provision. The circumstances are unusual and presumably were not anticipated when the deed of conditions was drafted. The Tribunal is satisfied that the failure to consult on this matter was a failure to carry out their property factor duties. Furthermore, as the property Factor did not "seek" the "written approval" of the Homeowners before making a decision which incurred "charges of fees", as specified in Section 2.4 of the Code, the Tribunal is also satisfied that the Property Factor has breached this section of the Code.

Full time rather than part time Housing Manager

31. The Homeowner does not dispute that the Property Factor balloted the residents in relation to this matter. The outcome was different to the ballot he had arranged before the Property Factor carried out their own ballot. However, the Tribunal is satisfied that it is one of the Property Factor's functions to consult with and take a vote in relation to this matter, in terms of Clause Tenth of the deed of conditions. The Tribunal notes that the Property Factor was under the impression that they could only change the position to a part time one if two thirds of the residents voted for this change. This does not appear to be the case. Clause Tenth states that the Property Factor will use their best endeavours to provide the development with a full-time house manager. However, it goes on to say that the house manager will work "such hours and days as may be agreed between the Factor and a majority of the proprietors". It therefore appears that the hours and days to be worked could be changed by a simple majority voting for such a change, as specified in clause Twelfth. However, as 14 to 13 voted in favour of a full-time post, the Property Factor has a simple majority in favour of the status quo. The Tribunal noted that the Homeowner had some concerns about the Property Factor's ballot, but the Tribunal was not provided with any information or evidence which would suggest that it was invalid or flawed. In the circumstances the Tribunal is satisfied that there has been no breach of the Code or failure to carry out property factor duties in relation to this issue.

Failure to provide a timely response to complaint

32. The Tribunal notes that this complaint only relates to the Homeowner's first letter, sent by recorded delivery on 17 June 2020. The Tribunal heard evidence and submissions from both parties. It is clear that the letter was sent recorded delivery and that a Royal Mail track and trace indicates that it was signed for. On the other hand, this occurred during lockdown and the Tribunal is also satisfied that the Property Factors office was closed, as were most offices during this period. There is also an issue with the signature obtained by the postman. Usually, a track and trace report identifies the person who signed for the letter by name. This was not the case. Instead, it simply states "Trinity". Even if not signed for, the letter should still have been delivered. However, given the circumstances which prevailed between March and July 2020, the Tribunal is satisfied, from the information provided at the hearing, that the letter was not received by the Property Factor in June and that they did reply to it, within reasonable timescales, when it was sent on to them by email on 22 July 2020. On the basis on the information available the Tribunal is not persuaded that the Property Factor failed to comply with Section 2.5 of the Code.

Transparency of accounts

33. The Tribunal is satisfied that the Property Factor provides the Homeowner and the other residents with a copy of the accounts each year. However, not all the related documents are sent out by post or email. Some of the documents, such as copies of the invoices, are provided at the AGM. There has not been an AGM since October 2018. The meeting scheduled for October 2019 was postponed to March 2020 and then cancelled due to the pandemic. This appears to have resulted in the accounts being sent out late, which was perhaps unavoidable. However, it does not appear that the Homeowner requested copies of invoices or other documents related to the accounts. In the circumstances the Tribunal is not persuaded that the Property Factor has breached section 3.3 of the Code.

34. The Property Factor has failed to arrange for the development accounts to be audited by an independent chartered accountant, as required by the deed of conditions. The reason provided is that there would be a cost associated with this. The Tribunal is satisfied that the Property Factor is currently required to have the accounts audited. They have failed to do so, or even consult with the Homeowners on the issue. However, when the Homeowner notified the Property Factor of his complaints, he stated that there was a lack of transparency and irregularities in the accounts. At the hearing, he did not provide any examples of this, other than the gardening charges, for which the Property Factor was able to provide an explanation. The Property Factor was not notified of the complaint about the accounts not being audited. As the Tribunal can only deal with complaints which were notified in advance, the Tribunal is unable to uphold this complaint. However, the Tribunal recommends that the Property Factor acts on this issue, as the terms of the deed of conditions require them to do so.

35. As the Homeowner failed to establish any irregularities in relation to the accounts, the Tribunal is not satisfied that there has been a breach of the Code or a failure to carry out duties in relation to this complaint. However, the Tribunal would recommend that the Property Factor improves its procedures regarding the conduct of residents' meetings and, in particular, the procedure for voting on matters which are discussed and how these votes are recorded in the minutes of the meetings.

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
17 January 2021