

Housing and Property Chamber
First-tier Tribunal for Scotland



**Decision of the Housing and Property Chamber of the First-tier
Tribunal for Scotland**

(Hereinafter referred to as “the Tribunal”)

Under the Property Factors (Scotland) Act 2011

Case reference : FTS/HPC/PF/18/2024

Re: Property at 8a Davidson Drive, Gourock PA16 1QD (“the Property”)

The Parties :

Margaret Hughes, 8a Davidson Drive, Gourock PA16 1QD (“Applicant”)

**River Clyde Homes, Roxburgh House, 102 – 112 Roxburgh Street, Greenock,
Inverclyde PA15 4JT (“the Respondents”)**

The Tribunal comprised:-

David Bartos	- Chairperson
Elizabeth Dickson	- Ordinary member

Decision

1. The Respondents have failed to comply with section 14(5) of the Property Factors (Scotland) Act 2011 through breach of section 7.2 of the Code of Conduct for Property Factors. They have not breached sections 7.1 or 7.3 of the Code of Conduct.
2. The Applicant’s complaint of breach of duty in failing to carry out any property factor’s duty (as defined in section 17(5) of said 2011 Act) is refused.

Background:-

3. By application received on 13 August 2018, the Applicant applied to the Tribunal for a determination that the Respondents had :

- (1) failed to carry out their duty as property factors to move rubbish bins .
- (2) failed to comply with section 7 “complaints” of the Code of Conduct in not deciding her complaints.

Findings of Fact

4. Having considered all the evidence, the Tribunal found the following facts to be established:-
 - (a) The Property is one of six flats in a block of flats from the 1950s in central Gourock. It is on the ground floor. The Respondents own two of these six flats. The Respondents' flats have resident tenants.
 - (b) The Applicant has been the owner of the Property since 2002. She resides at the Property.
 - (c) The Respondents became a registered property factor in terms of the Property Factors (Scotland) Act 2011 on 12 December 2012. Their duty under section 14(5) of the 2011 Act to comply with the Code arises from that date. They have issued a written Statement of Services (“WSS”) to the Applicant in connection with the Property.
 - (d) The WSS set out the Respondents' factoring services to the owners of the block including the Applicant. These did not include the moving of rubbish bins from the front alcove of the building to the bin recess at the rear of the building. The only access for such moving is through the main stairwell, down two flights of stairs and out of the back of the building along the rear drying green.
 - (e) There are 3 bins are available for use of all of the 6 flats of the building.
 - (f) By letters dated 14 June, 28 June, 8 July, 19 July and 26 July all 2018 the Applicant complained to the Respondents about the matters forming the subject of this application. The Respondents did not reply with a letter to these complaints. They replied only to the application to the Tribunal with their letter of 6 November 2018. It was not signed by senior management.
5. A Convener of the Tribunal, using her delegated powers under section 18A of the 2011 Act decided under section 18(1) of the 2011 Act to refer the application to the Tribunal. That decision was intimated to the Applicant and to the Respondents on or about 28 November 2018. The Applicant provided written representations to the Tribunal. None were received from the Respondents.

6. Following the referral of the application to them the Tribunal issued a direction dated 6 December 2018 to the parties requiring the production of certain documents. These included production by the Respondents of all correspondence in 2017 and 2018 passing between themselves and the Applicant. The Respondents did not respond to the direction.
7. The parties were informed that the hearing was to take place on Tuesday 15 January 2019 at Gamble Halls, 44 Shore Road, Gourock at 10.00 a.m. The date and times were intimated to the Applicant and the Respondents by letters of 5 December 2018 and 7 January 2019 from the Tribunal.
8. The Applicant lodged various documents with the Tribunal in support of her application.

The Evidence

9. The evidence before the Tribunal consisted of:-

- The application form;
- The Respondents' document entitled "Your Statement of Factoring Services";
- Copy letter from the Applicant to the Respondents Mr McMenemie dated 19 July 2018
- Copy letter from the Applicant to the Respondents dated 26 July 2018
- The Applicant's written representations to the Tribunal in letters dated 12 September, 19 October, 14 November, 19 December all 2018 and 3 January and 10 January 2019
- Copy letter from the Respondents to the Applicant dated 6 November 2018

The Hearing

10. The hearing took place on the date, time and venue fixed. The Applicant did not attend the hearing. Richard Orr, senior project manager of the Respondents and Gary McMenamie, factoring manager of the Respondents attended. Mr Orr made submissions for the Respondents.
11. On Monday 14 January 2019 the Tribunal received a written request from the Applicant dated 10 January 2019 for a postponement of the hearing. The reason given was that on 9 January she had received a mandate from the Respondents stating that they had "come to an agreement with the cleansing department" to move the bins at a cost of £ 7 per week for each owner, but that she objected to being charged this cost.
12. The Tribunal noted that the postponement request did not set out any agreement

between the parties on the resolution of the Applicant's complaint. No reason had been put forward why there should be the delay in dealing with the application. Given the Applicant's objection to the Respondents' proposal the Tribunal was unable to identify any prejudice to the Applicant in the hearing going ahead. Therefore the Tribunal refused the postponement request. Given that the Applicant did not provide the Tribunal with either a telephone contact or electronic mail contact and the lack of time for postal notification of the refusal, the refusal of postponement could not be notified before the hearing itself.

13. The Tribunal was satisfied that the Applicant was aware of the time and place for the hearing despite her non-attendance. Having checked with the Tribunal Office immediately before the hearing for any message from the Applicant and having confirmed that no message relating to her non-attendance had been left, the Tribunal concluded that the Applicant had chosen not to attend. In these circumstances the hearing proceeded.

Removal of Rubbish Bins

14. The essence of the Applicant's written submission was that among the services which the Respondents required to provide under their factoring agreement was to ensure the removal of wheeled rubbish bins (including black bin liners) from the front entrance alcove of the tenement down two flights of stairs through the common stairwell area to a recess in the building at the rear accessed from the drying green. The Applicant complained that the respondents were in breach of their duty by allowing other resident including 2 of the Respondents' tenants to leave their bins in the alcove.
15. That being the Respondents' duty, she submitted that they had not complied with it. Rubbish bins had been left in the front entrance alcove by the other residents. This failure had continued despite her letters of complaint to them over the past two years. It meant that she was unable to sit in the alcove and had to pass the bins every time she entered the building. submission for the Respondents was that removal of the bins and bin liners was not covered by their core services on page 3 of the written Statement of Services ("WSS") for which the tenement owners paid a management fee. They also submitted that it was not a service listed on page 4 of the WSS such as caretaking or ground maintenance that a majority of owners had instructed them to carry out for additional charge. The Respondents also confirmed that storing the bins in the alcove was not prohibited within the title deeds for the property.
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17. Mr Orr submitted that the ground maintenance service covered the cutting of the grass in the rear area. It did not cover removal of the bins. He explained that the bins in the front alcove served the whole tenement. They were not specific to any particular flat or to the Respondents' tenants. They were open for use by the Applicant herself even if she didn't use them. The Respondents had no power as factors to prevent the bins from being removed by owners or tenants from the recess at the rear of the building.
18. The Respondents had not provided a caretaking service for the tenement in the past but that they were prepared to do so in the future if the tenement owners made a binding decision that they wished it. This would involve an additional charge. The Respondents had carried out a tendering exercise to hire contractors to carry out the work sought by the Applicant. Increasing the Respondents' services to include the bin removal would involve additional charges for all owners for which the Applicant's share would be £ 7 per week. The majority of owners including the applicant had rejected this proposal.
19. The Tribunal was persuaded by the Respondents' submission. The Applicant sought to rely on breach of a factor's duty. The only evidence of the factors' duties given to the Tribunal was the Respondents' own Written Statement of Services which had been issued to the Applicant. Nowhere in that WSS are the Respondents required to remove bins. The removal of bins does not come under either the core services or the additional services listed in the WSS on pages 3 or 4. It does not amount to ground maintenance and no caretaking service is currently provided.
20. In these circumstances there was no factor's duty to remove the bins or prevent them being stored in the alcove and therefore no breach of property factor's duty by the Respondents.

Section 7.2 of the Code – complaint handling

21. Section 7.2 of the Code provides,
"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 [now Housing and Property Chamber of the First-tier Tribunal for Scotland]."
22. The Applicant complained that she had written to the Respondents' Stevie McLachlan on 14 June, 28 June and 8 July all 2018 and had not received any response never mind a final decision from senior management. There was therefore a breach of section 7 of the Code in respect of what she described as "complaints" on the application form. There was no complaint about the absence of a complaints resolution procedure, nor a complaint about charging for handling complaints. Accordingly the Tribunal took it that the Applicant's complaint related to section 7.2 of the Code.
23. For the Respondents Mr Orr explained that all letters came to a central point within the Respondents' organization where information of them was stored. He had looked at the records but these had shown no evidence of the Applicant's letters which she relied on. However he did not dispute that they had been sent. He explained that Mr McLachlan was employed in the Respondents' landlord division rather than their factoring division. It was possible that the Applicant's letters had been seen as complaints about the Respondents' tenants in the building leaving the bins rather than about the Respondents' factoring service not removing the bins.
24. At the hearing Mr Orr also sought to lodge with the Tribunal late productions being (1) letters from the Respondents to the Applicant dated 25 May 2015 and from the Applicant to the Respondents dated 20 August, 27 August, and 16 October 2015; and (2) from the Applicant to the Respondents dated 21 September 2017 and from the Respondents to the Applicant dated 5 October 2017. The purpose of these letters was to demonstrate that the Respondents had dealt with the Applicant's complaint fully on previous occasions in 2015 and 2017 and that the complaints in 2018 were a repeat of those earlier complaints. Mr Orr accepted that this argument was being made for the first time at the hearing and that the Respondents had not lodged any written representations to the Tribunal at all. He was unable to explain why the direction had not been complied with by the Respondents, which would have resulted in the 2017 letters being lodged at the very least. He explained that he had been unavailable in late 2018 when the representations should have been submitted. He was unable to explain why the letters had not been sent to the Tribunal timeously no later than 7 days before the hearing. He apologized for the lateness.
25. The Tribunal noted the terms of rule 22 of the schedule to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 which requires parties to send to the tribunal a copies of documents to be relied on no later than 7 days before a hearing and which provides that before allowing a document to be lodged late the tribunal must be satisfied that the party has a reasonable excuse.

26. The Tribunal was not satisfied that any reasonable excuse had been put forward by the Respondents. Indeed the failure to lodge productions was simply one element of a general failure of the Respondents to engage with the tribunal process until the final hearing. The effect of the failure was that if lodged late the Applicant would be denied an opportunity of commenting on the letters. This would be productive of unfairness. In all the circumstances the interests of justice favoured the refusal of the late lodging of the letters and the Tribunal refused the Respondents' request.
27. The Tribunal accepted that the Applicant's letters in 2018 had been sent. The Tribunal had no reason to disbelieve her on that matter. No written response to those letters had been presented to the Tribunal. The only letter from the Respondents dealing with the matter lodged with the Tribunal was that to the Applicant dated 6 November 2018. That had been sent well after not merely the letters mentioned in the application but also the Applicant's letters dated 19 and 26 July 2018. That was in breach of the Respondents' own complaints procedure set out on page 12 of the WSS. The letter of 6 November 2018 did not contain a confirmation from senior management nor did it refer the Applicant to the Tribunal. In these circumstances the Tribunal found that the Respondents had breached section 7.2 of the Code.

Property Factor Enforcement Order

28. In her application the Applicant sought an order requiring the Respondents to remove the bins. Given that the Respondents have no duty to do so the Tribunal refused to make that order.
29. At the hearing it was pointed out to the Respondents' representative, that no remedy was sought for the breach of the Code. Mr Orr, very fairly, explained that the Respondents would be prepared to pay compensation of £ 100 to the Applicant within 4 weeks of the hearing. In light of this, the Tribunal propose the Property Factor Enforcement order in the terms accompanying this decision.
30. The Tribunal was of the view that this whole process could have been avoided had there been proper communication within the Respondents' organization (and their factor and landlord divisions) and between the Respondents and the Applicant. That must be the real lesson for the Respondents.

Court Proceedings

31. The parties are reminded that except in any appeal, no matter adjudicated on in this decision may be adjudicated on by a court or another tribunal.

Opportunity for Representations and Rights of Appeal

32. The Applicant and Respondents are invited to make representations to the First-tier Tribunal on this decision and the proposal. The parties must make such representations in writing to the Tribunal by no later than 14 days after the day of this decision
33. The opportunity to make representations is not an opportunity to present fresh evidence, such as additional documents. Bearing in mind that the parties have already had an oral hearing, should the parties wish a further oral hearing they should include with their written representations a request for such a hearing giving specific reasons as to why written representations would be inadequate.
34. Following the making of representations or the expiry of the period for making them, the First-tier Tribunal will be entitled to review this decision. If it remains satisfied after taking account of any representations that the Respondents have failed to comply with their duties, it must make a property factor enforcement order. Both parties will then have a right to seek permission to appeal on a point of law against the whole or any part of such final decision and enforcement order.
35. In the meantime and in any event, the parties may seek permission to appeal on a point of law against this decision to the Upper Tribunal by means of an application to the First-tier Tribunal made within 30 days beginning with the date when this decision was sent to the party seeking permission. All rights of appeal are under section 46 of the Tribunals (Scotland) Act 2014 and the Scottish Tribunals (Time Limits) Regulations 2016.

Signed .

Date: 15 January 2019.....

David Bartos, Chairperson