

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier tribunal for Scotland (Housing and Property Chamber)

Decision of the First-tier Tribunal for Scotland Housing and Property Chamber in relation to an application made under Section 17(1) of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/23/0588

Property: 42 Silvertrees Wynd, Bothwell G71 8FH (“the Property”)

The Parties:-

Mr Gordon Nuttall, 42 Silvertrees Wynd, Bothwell G71 8FH (“the homeowner”)

Miller Property Management Limited, registered in Scotland under the Companies’ Acts (SC352726), having their registered office at 29 Brandon Street, Hamilton ML3 6DA and having a place of business at Suite 2, Waverley House, Caird Park, Hamilton ML3 0QA (“the property factors”)

Tribunal Members:

George Clark (Legal Member/Chairman) and Kingsley Bruce (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) decided that the property factors had failed to comply with OSP4, OSP10, OSP12 and Sections 2.2 and 2.7 of the Property Factors Code of Conduct effective from 1 October 2012. The Tribunal proposes to make a Property Factor Enforcement Order as set out in the accompanying Notice under Section 19(2)(a) of the Act.

Background

1. By application, dated 23 February 2023, the homeowner sought a Property Factor Enforcement Order against the property factors under the Property Factors (Scotland) Act 2011. He alleged failures to comply with OSP4, OSP10, OSP12 and Sections 2.2, 2.7 and 7.1 of the Property Factors

Code of Conduct. The complaint also related to a failure to carry out the property factor's duties.

2. On 13 January 2022, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the property factors were invited to make written representations by 3 February 2022. The property factors did not make any written representations to the Tribunal.
3. The homeowner stated in his application that the property factors' Director, Mr Harry Miller, had put his hands on him in an attempt top remove him from the Development's communally-owned office. Further, he had made false and misleading statements and had ignored emails of complaint. This had caused a great deal of embarrassment and anguish to the homeowner and his family and he wanted a letter of apology and compensation. He also wished the property factors to issue homeowners with a key to the office.
4. The homeowner contended that on 30 November 2022, he was installing Christmas decorations and lights in the courtyard and garden of the Development, with the consent of all owners. To facilitate this, the janitor had jammed the self-locking communally-owned office door ajar to allow the homeowner access to the toilet and tea making facilities. At approximately 3.30pm, Mr Miller had arrived and needlessly and deliberately removed the door jam, locking the homeowner out. As the homeowner was about to have a tea break, he asked Mr Miller for access to where his flask and other belongings were. Mr Miller reluctantly opened the door. As the homeowner attempted to sit to have his break, Mr Miller manhandled him by grabbing his arm and pushing him. This had been witnessed by another owner and his 5-year-old granddaughter. Three other owners came out and tried to reason with Mr Miller, but to no avail. The use of physical force in an attempt to eject the homeowner was abusive, intimidating and threatening and caused fear and alarm to the homeowner. It was a breach of OSP12.
5. The homeowner stated that the property factors have no title to the office, as it belongs to the owners.
6. On 2 December 2022, the stairwell representatives wrote a formal letter of complaint to the property factors. It was signed by 13 owners and was sent by email. The property factors acknowledged it but failed to respond to it, despite its being headed "Formal Complaint".
7. On 13 December 2022, the property factors wrote to all the owners in the Development and copied to them the email of 2 December 2022. Within

their letter, signed by Mr Miller, they made defamatory, false and misleading statements, accusing “the known group of individuals residing at Block 1” of harassment and anti-social behaviour, shouting, lying and making unfounded allegations. Mr Miller had also stated that the caretaker’s office was for his exclusive and private use and had told one owner that he held the title deeds for the office, which was demonstrably false. He had also falsely stated that the deeds confirmed owners had no right of access to the office. He had stated that the stair representatives were self-appointed, which was also untrue. They had canvassed residents in their stairwells and ascertained the necessary majority in favour of acting in this capacity. They had also written to Mr Miller when they became established. The property factors had, therefore, failed to comply with OSP4.

8. The homeowner believed that the Property factors had failed to comply with OSP10, in that, by copying the email of 2 December 2022, sent privately to them, to all residents, they had failed to handle personal information about them sensitively and in line with legal requirements on data protection.
9. The homeowner contended that the property factors had also failed to comply with Section 2.7 of the Code of Conduct. They had failed to respond to a formal complaint sent to them on 2 December 2022 despite reminders of 30 December 2022 and 25 January 2023. They had in addition failed to respond in accordance with their own complaints procedure but instead had escalated matters by writing to each owner, denigrating those who had complained. It was unreasonable to letter every owner in order to vilify the complainers.

Case Management Discussion

10. A Case Management Discussion was held by means of a telephone conference call on the morning of 1 June 2023. The homeowner was present and was represented by Mrs Caroline Adams. The property factors were not present or represented. They had advised the Tribunal on 25 May 2023 that their Mr Miller would not be attending the Case Management Discussion due to a hospital appointment, but they had not asked for the Case Management Discussion to be postponed.
11. The Tribunal advised the homeowner that, in relation to the complaint regarding the alleged manhandling of the homeowner by Mr Miller, there was a clear dispute on the facts which could only be determined by the Tribunal following a Hearing, but that the Tribunal could determine those parts of the application that were not reliant on that particular incident.

The homeowner was content to proceed on the basis that the Tribunal would make no finding in relation to that particular head of complaint, but that, should the Tribunal's Decision be recalled or reviewed, the Tribunal would proceed to a full evidential Hearing on all aspects of the application.

12. The homeowner told the Tribunal that the janitor is employed directly by the property factors, who reimburse his salary and other costs through their factoring accounts. The caretaker's office is not integral to either of the block in the Development, but is in a separate building. It is a single room with a toilet and sink, a microwave and fridge. A whole range of other workmen use it and the janitor is only there for about two hours per day. The Development of which the Property forms part is in a block of 20 flats (Block 1). The second Block in the Development (Block 2) has 40 flats. The age profile of the residents is between 60 and 90, so it had been particularly upsetting for those who had put their names to the formal complaint to find that the property factors had circulated this personal information to all owners, creating possible tension within the Development. The Applicant had at one time been a keyholder for the office, but the property factors had changed the lock without consent of the owners and had not given a key to any of the owners. The office building is owned by all the owners in common.
13. The homeowner confirmed that, apart from an acknowledgement, there has still been no response to the formal complaint.

Findings of Fact

1. The homeowner is the proprietor of the property, which comprises a ground floor flat within one of two blocks at the Silvertrees Development in Bothwell. The block of which the Property forms part contains 40 flats (Block 1) and the other Block contains 20 flats. In addition, there is a separate building containing a caretaker's office within the curtilage of the Development.
2. The property factors, in the course of their business, manage the common parts of the development of which the Property forms part. The property factors, therefore, fall within the definition of "property factor" set out in Section 2(1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").
3. The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.

4. The date of Registration of the property factors was 1 November 2012 and the date of their current registration is 9 January 2019.
5. The homeowner has notified the property factors in writing as to why she considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
6. The homeowner made an application to the First-tier Tribunal for Scotland Housing and Property Chamber, dated 23 February 2023, under Section 17(1) of the Act.
7. The concerns set out in the application have not been addressed to the homeowner's satisfaction.
8. The caretaker's office forms part of the common parts of the Development.

Reasons for Decision

14. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it sufficient information and documentation it required to enable it to decide the application without a Hearing.
15. **OSP4 of the Code** states "You must not provide information that is deliberately or negligently misleading or false." The Tribunal upheld the complaint under this heading. On 18 February 2023, the property factors emailed the homeowner and told him that the Fire Department "now have their own key to the fire alarm system therefore there is no requirement for any owners to hold a key or any access requirement by owners as this is not a communal area." This was in response to an email from the homeowner of 3 December 2022 stating that he was issued a key to the caretaker's office when he was chairman of the "SOA" but that the property factors had changed the lock and had not issued a key to any owner. The homeowner had been concerned that if there was a "trip" in the electricity supply to the external Christmas lights, the owners had no access to the office. Earlier on 3 December 2022, the property factors had told him by email that a key would not be provided "as stated by Mr Miller in previous correspondence to you."
16. On 23 December 2022, the homeowner was a signatory to an email to the property factors reporting that they had confirmation from Strathclyde Fire & Rescue that they categorically did not at any time accept a key from the property factors for the caretaker's office and that the crew commander had inspected the Development and had told the property factors that they should provide keys to residents in the event of a false alarm happening outwith the property factors' opening hours.

17. The homeowner also provided a copy of an email of 27 March 2023 from the Watch Commander, Scottish Fire and Rescue Service, Lanarkshire Area, Hamilton Amber Watch which stated "I confirm that we don't have keys to the property at Silvertrees Wynd, Bothwell and if required we would request the attendance of a keyholder through our Operations Control."
18. The view of the Tribunal was that the statement in the property factors' email of 18 February 2023 that the Fire and Rescue Service "now have their own key to the fire alarm system" was clearly untrue and that it had been made deliberately. Accordingly, the Tribunal upheld this aspect of the complaint under OSP4 of the Code of Conduct.
19. The property factors stated in a letter to all owners on 13 December 2022 that owners have no access or entry rights to the caretaker's office. This office forms part of the common parts of the Development and, whilst there may be sound reasons for the owners as a collective controlling access by authorising a limited number of keyholders, the property factors do not have the right to refuse to provide a key. The homeowner had stated that the property factors had said that the caretaker's office was for his exclusive and private use and had told one owner that he held the title deeds for the office. The Tribunal made no finding on the homeowner's statement, as he had provided no evidence to support it, but the Tribunal held that the statement by the property factors in their letter of 13 December 2022 that the owners have no access, use or entry rights to the caretaker's office was false and had been deliberately made. Accordingly, the Tribunal upheld this aspect of the complaint under OSP4 of the Code of Conduct.
20. The homeowner had also complained that the property factors had stated that the stair representatives were self-appointed, which was, he said, also untrue. They had canvassed residents in their stairwells and ascertained the necessary majority in favour of acting in this capacity. They had also written to Mr Miller when they became established. The Tribunal noted that in an email of 19 February 2023, the property factors were advised that as the SOA was no longer active/operational the owners in Block One had, by majority, organised stairwell representatives. In their letter to owners of March 2023, the property factors had described them as "self appointed". The Tribunal recognised that the property factors were entitled to seek clarification of the process by which they had been appointed, but to describe them, in a letter to all owners as "self appointed" was misleading, standing the email of 19 February 2023, and had been deliberate. Accordingly, the Tribunal upheld this aspect of the complaint under OSP4 of the Code of Conduct.
21. **OSP10 of the Code** states "You must ensure you handle all personal information sensitively and in line with legal requirements on data protection." This was dealt with by the Tribunal alongside the complaint under **Section 2.2 of the Code**, which states "Factors are required to

comply with current data protection legislation when handling their client's personal data, and to ensure that this information is held and used safely and appropriately."

22. The homeowner's complaint related to an emailed formal complaint of 2 December 2022. It came from 13 named residents, including the homeowner. Instead of dealing with it as a private complaint, the property factors had circulated it to all the owners within the Development. The Tribunal did not make a finding as to whether this constituted a failure to comply with data protection legislation but was satisfied that the manner in which the property factors had handled the personal information, namely disclosing to other owners the identities of those who had put their names to the email, amounted to a failure to handle personal information sensitively and appropriately. Accordingly, the Tribunal upheld the complaints under OSP10 and Section 2.2 of the Code of Conduct.
23. **OSP12 of the Code** states "You must not communicate with homeowners in any way that is abusive, intimidating or threatening." The Tribunal made no finding in relation to the allegation that the property factors' Mr Miller had manhandled the homeowner in an attempt to remove him from the caretaker's office, as there were contradictory versions of events which could only be determined at a full evidential Hearing. The homeowner agreed that the Tribunal might consider the other elements of his complaint at the Case Management Discussion, but if the present Decision is Recalled, a Hearing will be set and the issue will be determined by the Tribunal.
24. The Tribunal did, however, uphold the complaint under OSP12 insofar as it related to the correspondence sent by Mr Miller of the property factors to all the owners in the Development on 13 December 2022. Using phrases such as "the known group of individuals residing in Block 1", accusing them of a "contrived attempt to discredit the Factor", describing the complaint as "threatening" and referring to the stairwell representatives as "self-appointed" was wholly inappropriate in a communication to all the owners and could reasonably be interpreted by the homeowner, who was one of the complainants, as designed to intimidate the homeowner, amongst others. Accordingly, the Tribunal upheld the complaint under OSP12 of the Code of Conduct.
25. **Section 2.7 of the Code** states "A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in their WSS. Overall property factors should aim to deal with enquiries and complaints as quickly and as fully as possible,

and to keep the homeowner(s) informed if they are not able to respond within the agreed timescale.”

26. The Tribunal upheld the complaint under Section 2.7 of the Code of Conduct. The property factors failed to provide a substantive response to the homeowner and the other owners who put their names to the email of 2 December 2022, despite two reminders of 30 December 2022 and 25 January 2023. It was clearly a formal complaint, but the property factors merely acknowledged it on 6 December. Instead of dealing with the complaint in line with their Complaints Procedure, for reasons best known to themselves, they circulated it to all the owners in the Development.
27. **Section 7.1 of the Code** states “A property factor must have a written complaints handling procedure. The procedure should be applied consistently and reasonably. It is a requirement of Section 1 of the Code that the property factor must provide homeowners with a copy of its complaints handling procedure on request.”
28. The Tribunal did not uphold the complaint under Section 7.1 of the Code of Conduct. The property factors have a written complaints procedure, and no evidence was provided to indicate that they had failed to comply with any request for a copy. The Tribunal could not make a finding as to whether they had applied the procedure consistently and reasonably, as they had not responded at all to the formal complaint.
29. Having decided that the property factors had failed to comply with OSP4, OSP10, OSP12 and Sections 2.1 and 2.7 of the Code of Conduct, the Tribunal then considered whether to make a Property Factor Enforcement Order. The Tribunal’s view was that the failures on the part of the property factors had been very serious and had caused the homeowner considerable distress and inconvenience. The Tribunal decided that it would be appropriate to make a Property Factor Enforcement Order.
30. The Tribunal proposes, therefore, to make a Property Factor Enforcement Order requiring the property factors to pay the homeowner the sum of £500 as reasonable compensation for the inconvenience and distress caused by the property factors’ failures to comply with the Code of Conduct.
31. The homeowner had requested that the Tribunal instruct the property factors to issue homeowners with a key to the office. The Tribunal does not have the power to issue such a Direction.

32. The decision of the Tribunal was unanimous.

Right of Appeal

In terms of Section 46 of the Tribunal (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.

Signed

Date: 14 June 2023

George Clark (Legal Member/Chairman)