

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

**James McLaughlin, 38 Brandon House, The Furlongs, Hamilton ML3 0DJ
("the Applicant")**

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

Chamber Ref: FTS/HPC/PF/17/0303

**Re: 38 Brandon House, The Furlongs, Hamilton ML3 0DJ
("the Property")**

Tribunal Members:

John McHugh (Chairman) and Elizabeth Dickson (Ordinary (Housing) Member).

DECISION

The Respondent has not failed to carry out its property factor's duties.

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 the owner and occupier of a flat at 38 Brandon House, Hamilton ("the Property").
- 2 The Property is located within a development known as The Furlongs ("the Development").
- 3 The Development includes five separate buildings and associated parking and common areas.
- 4 One of the buildings is Brandon House
- 5 There are a total of 239 individual dwellings within the Development.
- 6 The Respondent is the factor of the Development.
- 7 The property factor's duties which apply to the Respondent arise from the Respondent's Written Statement of Services. The duties arose with effect from 1 October 2012.
- 8 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a Property Factor (7 December 2012).
- 9 The Applicant has, by his correspondence, including that of 19 July and 14 August 2017 notified the Respondent of the reasons as to why he considers the Respondent has failed to carry out its property factor's duties and its obligations to comply with its duties under section 14 of the 2011 Act.
- 10 The Respondent has failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at Brandon Gate, Hamilton on 12 December 2017.

The Applicant was present at the hearing and was accompanied by his wife, Dorothy McLaughlin.

The Respondent was represented at the hearing by its employee, Neil Watt and its solicitor Michael Ritchie of Hardy MacPhail.

Neither party called additional witnesses.

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 7 December 2012 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 and the Respondent.

The documents before us included the Respondent's undated Statement of Services which we refer to as the "Written Statement of Services".

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of failure to carry out the property factor's duties.

The Written Statement of Services is relied upon in the Application as a source of the property factor's duties.

The Code

The Applicant complains of failure to comply with Sections 1.1aB; 2.5; 6.9; 7.1 and 7.2 of the Code.

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

" 1.1a For situations where the land is owned by the group of homeowners
The written statement should set out:...

...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;...

...SECTION 2: COMMUNICATION AND CONSULTATION...

...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 6: CARRYING OUT REPAIRS AND MAINTENANCE

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 Applicant indicated at the hearing that he was no longer insisting upon his complaint in relation to Code Section 1.1aB.

The Matters in Dispute

The factual matters complained of relate to:

- (1) Damage to the Applicant's door; and (2) the Respondent's handling of the Applicant's complaint.

We deal with these issues below.

(1) Damage to the Property's Door

The Respondent instructed external painting of the Development to be carried out by a contractor, J & R Anderson (Painters) Ltd. The Applicant was on holiday at the time the painting works were carried out. The Applicant had left a key with a neighbour, both to allow for access and for more general purposes.

When the painting was being carried out in around November/December 2016, the painter was provided by the neighbour with the key. The painter carried out undercoating and locked the flat door when he had finished. On his return on a later occasion, the painter was unable to unlock the door. He sought the assistance of other persons to gain entry. These included the neighbour, a gardener and the Residents' Association Chairman, Hugh Stevenson. A key was broken in the lock.

The neighbour and Mr Stevenson attempted to gain access by using saws but had been unsuccessful. Mr Watt happened to have been on site as part of his usual rounds and was asked by Mr Stevenson to assist. Mr Watt advises that he was reluctant to become involved because the flat door was not common property subject to factoring arrangements but was the Applicant's private property. Mr Watt however asked to a joiner who he was using on another job nearby to help. The joiner attended but refused to force entry on account of the damage which would be caused to the doorframe.

Mr Stevenson was eventually able to use force to open the door and carried out some basic repairs to make the door secure again.

The painter was able to take access by a ladder from the outside, without needing to use the front door further.

The Applicant considers that the original jamming of the door lock is the fault of the painter and, by extension, the responsibility of the Respondent as the employer of the painting contractor. He therefore considers that the Respondent should meet the repair costs. He also considers that the factor should have had in place arrangements to deal with obtaining access. The factor was aware, as the Applicant had informed its Accounts Department,

that he would be away from the property. The Respondent had the Applicant's email address and could have used it to contact him to sort out the problem with the lock but did not do so.

There is no evidence as to why the lock failed to work for the painter. It does not seem to us to be possible to find that whatever difficulties the painter encountered with the lock were his fault. There is no dispute that it was not the painter, nor anyone else on the instruction of the Respondent, who broke open the door. It is not disputed that that was done by Mr Stevenson.

Mr Watt gave evidence that the original intention had been for access to be taken to all properties from the outside by cherry picker and so no arrangements had been made to take access via the individual flats. He considers that the Respondent was under no duty to contact the Applicant regarding taking access or to advise the Applicant regarding the damaged lock and we accept that. We do not consider that the Respondent had any obligation in respect of the private property of the Applicant as opposed to the common, factored parts.

We do not consider that the actions of the factor in relation to this aspect evidence any breach of the property factor's duties or of the Code.

(2) Complaints Handling

The Applicant further complains that the Respondent has failed to take up the issue of the damaged door with the painting contractor.

Mr Watt advises that efforts were made to pursue the painters over a period of months from the time the Applicant complained until early July 2017. He had found it difficult to obtain any response. The painting contractor did not respond for some months despite repeated efforts to contact them. When the contractor did eventually respond, it was only to advise that their painter had no recollection of the relevant events.

The Applicant first formally complained about the matter on or around March 2017. Neil Watt dealt with the matter. There was an exchange of several emails. The Respondent's communications did not satisfy the Applicant. On 30 June 2017 Mr Watt emailed the Applicant to advise that the "dispute has been put on file". The Applicant views this as a failure to respond and to be a "shutting down" of his complaint. Correspondence continued until, on 27 July

2017, Mr Watt advised the Applicant to write a formal letter to the Respondent and to follow its formal complaints procedure.

The Respondent wrote a formal letter in response to the complaint. The Respondent advises that the letter was sent on 21 August 2017. A recorded delivery posting receipt dated 21 August 2017 has been produced. Evidence from The Royal Mail website of delivery on 1 September has also been produced. The Applicant accepted at the hearing that he received the letter of 21 August 2017 on 1 September 2017. Any delay seems to have been the result of the postal process and not the fault of the Respondent. The Applicant had been concerned to have received a copy of the same letter dated 29 August which Mr Watt explained was caused by the automatic completion of the date by its software.

The letter of 21 August was intended to be the final response by senior management (Neil Watt confirms that it was dictated by the director, George Watt) and rejected the complaint. That letter failed to mention the Applicant's right to refer the matter to this Tribunal as required by Code Section 7.2. However, we note that, by this time, the Applicant had already advised the Respondent of his intention to proceed to the Tribunal so it may be thought that there would have been little practical benefit in containing that information. However, the requirement of Section 7.2 is clear and failure to include that wording leaves a recipient uncertain that the letter is indeed the final step of the complaints process which represents the point at which a right of reference to the Tribunal becomes available.

The Applicant had engaged in correspondence with Neil Watt, which he advised he considered to be a complaint, for several months. Mr Watt had not initially regarded the matter as a formal complaint, he then later in the process regarded the correspondence as being a complaint and eventually decided on 24 July 2017 that he was unable to satisfy the Applicant such that the matter should be referred to the second stage of the Respondent's complaints procedure, reference to senior management.

The Respondent's handling of the complaint was in accordance with the "Complaints" section of its Written Statement of Services and so we find there to be no breach of property factor's duties in this respect. However, that section is itself so brief and so vague that it fails, in our opinion, to comply with Section 7.1 of the Code. For example, the process sets no limit on the initial stage of the complaint. It is for that reason that the issue drifted over a long period where it was unclear whether the matter was being treated as a formal complaint and as to when the first stage of the complaints process had been exhausted. A more detailed Complaints process which "signposts" a

complainant as to whether the matter is being treated as a complaint and what stage the complaint is at would help avoid confusion of the kind which existed in this case.

We find there to have been a breach Code Section 7.1 in respect of the Respondent's complaints procedure which we do not consider to be a "*clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales*".

We find there to have been a breach of Code Section 7.2 in respect of the failure to make reference in the letter of 21 August to the right to refer the matter to this Tribunal. We do not find there to have been any other breaches of the Code.

We have not identified a breach of property factor's duties.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The Respondent brought to our attention that a PFEO had been made in another recent case involving it. That PFEO had required the Respondent to revise its Complaints Procedure and it was confirmed that the Respondent is in the course of doing so. That case is Reference FTS/HPC/PF/17/0122. In the circumstances we consider it appropriate to make a PFEO in this case in similar terms. 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: 20 December 2017