



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 17(1) of the Property Factors (Scotland) Act 2011 (Act)

Chamber Ref: FTS/HPC/PF/24/1954

Parties

**Mrs Pauline Inglis (Applicant)
Newton Property Management (Respondent)**

Mr Matthew McCartney (Applicant's Representative)

Flat B1, Braemar Gardens, 1 Robertson Street, Greenock, PA16 8JE ("the Property")

Tribunal Members:

Alan Strain (Legal Member) and Kingsley Bruce (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Property Factor: has complied with the Section 14 duty in terms of the Act in so far as OSP 2, 3, 4, 5, 9, and 12 of the Property Factor Code of Conduct 2021 is concerned but hasn't complied with OSP 11.

Background

This is an application under Rule 43 and section 17(1) of the Act in respect of the Respondent's alleged breaches of the Code of Conduct.

The Tribunal had regard to the following documents:

1. Application received 30 April 2024 and supporting documents;
2. Written Representations from the Parties.

Hearing

The case called for a Hearing by conference call on 18 December 2024. The Applicant did not participate but was represented by Mr McCartney. The Respondent participated and was represented by Ms Catherine Flannigan, Customer Relationship Manager.

Preliminary Matters

The Tribunal explained the purpose of the Hearing and the process to be gone through. The Tribunal had identified the disputed issues between the Parties which were agreed at the CMD as being the matters specified in section 7 of the application.

The Applicant asserted that OSP 2, 3, 4, 5, 9, 11 and 12 had been breached and detailed 5 duties/legal responsibilities which the Respondent had allegedly not performed and 2 complaints. The Respondent had responded to each in turn by email of 13 August 2024.

Parties had lodged further written submissions as follows:

1. Applicant – 3, 8 and 12 September 2024;
- Respondent – 11 September 2024.

The Applicant had lodged a further submission by email on 18 December 2024 seeking to incorporate a further complaint that it was stated was on identical grounds to the application. The Tribunal informed the Parties at the outset that this submission would not be considered at the Hearing as it came too late in the day and would need to go through the normal process of complaint and then fresh application.

The Tribunal noted that only Mr McCartney and Ms Flannigan would give evidence.

The Tribunal informed the Parties that their respective written representations would be taken as read.

The Tribunal then heard evidence from the Parties.

Evidence

Mr McCartney gave evidence for the Applicant. He spoke to the written representations lodged, was asked and answered questions by the Tribunal and Ms Flannigan.

Ms Flannigan went through the same process for the Respondent.

Observations on the Evidence

The Tribunal accepted the evidence of Mr McCartney and Ms Flannigan as both credible and reliable.

Findings in Fact

In so far as material the Tribunal made the following findings in fact:

1. The Applicant is the owner of the Property;

2. The Respondent is the Property Factor of the Development at Braemar Gardens in which the Property is located and was appointed at a meeting of the proprietors on 22 November 2022. In advance of this meeting the Respondent had issued a proposal document to the proprietors (Appendix J to the application);
3. The Respondent issued a Written Statement of Services (**WSS**) to all Homeowners (July 2021 version) which was produced;
4. The Respondent was appointed property factor under and in terms of the Title Deeds to the Property which provided that a factor appointed by a majority of the proprietors could exercise the proprietors' whole rights and powers and that such majority decisions would be binding on all proprietors (Pages 19-21 of the Applicant's Application).
5. The Respondent submitted a quotation for 2 work packages dated 28 July 2023 comprising £460 plus VAT and £960 plus VAT respectively (Document One of Applicant's Application). This quotation informed proprietors that unless the owners advise they do not wish to proceed by 11 August 2023 then the Respondent will go ahead and instruct the named contractor.
6. The Applicant objected to the quotation by letter of 7 August 2023.
7. The Respondent proceeded on the basis that the quotation was accepted as a majority of proprietors did not object.
8. The Applicant sent a letter of complaint 2 February 2023 (Document C2/6 of the application) to the Respondent;
9. The complaint was replied to by the Respondent's Business Development Manager (Production 2 attached to the Respondent's Submissions) by email of 6 February 2023.
10. The Respondent has a Communication and Complaints Procedure (Application Appendix K) which states: "Once a complaint is received, the response will be managed by a Director who may delegate it to an experienced member of staff, who will consider the points raised and either seek to discuss your concerns with you or provide a written response within seven (7) working days."
11. The Respondent's sent a complaint response on 6 February 2023.
12. The Applicant sent an email of 29 March 2023 (Document C2/20 of the application) asking for the matter to be progressed through the Respondent's Communication and Complaints Procedure. No response was received from the Respondent.

Decision and Reasons

The Tribunal dealt with each issue and complaint in turn as follows:

1. Failure to comply with the burdens section of the Title Deeds in relation to obtaining Owners' agreement.

This specifically refers to the first complaint. The Applicant asserts that the Respondent submitted a quotation of 28 July 2023 in which they proposed to do work to the value of £1,704 (which figure differs from the amount in the quotation which was £1,420 plus VAT). This quotation informed proprietors that unless the owners advise they do not wish to proceed by 11 August 2023 then the Respondent will go ahead and instruct the named contractor.

The Applicant assets that this is contrary to the Burdens section of the Title Deeds and the Respondent's WSS.

The Applicant further states that she objected to the works by letter of 7 August 2023.

The Applicant produced the section of the Title Deeds relied upon with her application at Appendix A. The section of the Title Deeds relied upon (General One and Ten) refers to the rights between respective proprietors, the ability to call meetings and provides for decision by majority. These provisions do not relate to a property factor appointed by the proprietors.

Clause Eleven does relate to factors and specifies that factors are subject to any limits on expenditure fixed by the proprietors.

The Respondent contends that the Burdens were complied with and they normally proceeded by informing proprietors of proposed works and unless this was objected to by a majority of proprietors it was assumed that agreement was given. This proceeded on the basis that no response was acquiescence.

The Applicant further asserted that the reference in the Burdens (Clause 11) to "any limits on expenditure fixed by proprietors" meant that the Respondent could not proceed with works in excess of the £50 limit specified in the WSS (Appendix B page 2 clause g.) This provided that estimates would be provided if the cost per homeowner for the works exceeded £50 (inc VAT). This section was qualified by a reference to Section C (a) of the WSS (Appendix C page 4) which provided:

“However, in an emergency (or in any other circumstances we think are justified, such as a duty to maintain the property, as set out in the deed of conditions or other legislation) we can arrange the work and recover the cost from you without asking your permission first.”

Once again the Respondent relied upon their practice of informing proprietors and taking a lack of response as acquiescence.

Furthermore, it was stated that Section c (a) of the WSS gave the Respondent authority to proceed in any circumstances they thought were justified. The justification being lack of objection and deemed acceptance. So even if the value of the works ought to have been considered collectively and exceeded the limit the Respondent was justified in proceeding under this section.

The Tribunal find that in the circumstances estimates did not need to be provided. Further, the Respondent was entitled to proceed as they did even if the limit had applied. A lack of response where put on notice meant that the Respondent was entitled to consider they had deemed acceptance of their proposal if proprietors failed to object (acquiescence).

Further the Burden section referred to (General One and Ten) does not apply to the actions of a property factor. There was no need to convene a meeting.

The Tribunal find that there was no breach of the Deeds or the WSS.

The complaint is accordingly unfounded.

2. Failure to comply with Written Statement of Services (in relation to obtaining owners agreement).

This complaint overlaps with the first complaint. The Applicant asserts that the Respondent comply with the WSS in that owners' agreement was not obtained for works that were in excess of the £50 (inc VAT) limit.

For the reasons provided in 1 above the Tribunal find this complaint to be unfounded.

3. Failure to comply with Written Statement of Services (in relation to obtaining estimates when costs exceed £1050.00 (£50 including VAT per flat) and consulting with Contractors about the type of repair and materials to be used

The first part of this complaint relates to an alleged failure to obtain estimates where works exceed £50 (inc VAT) per proprietor. This has been dealt with above.

The second part of the complaint relates to the Applicant's assertion that the Respondent failed to adequately specify the type of repair and materials to be used. This is of concern in case of any defective works or concerns about the adequacy of the work or unsatisfactory work.

The Respondent adopts the detail contained within the quotation of 28 July 2023 as providing sufficient specification of the proposed works.

The Tribunal considers that this specification is adequate in the circumstances. A factor cannot be expected to provide detailed specification of the materials a contractor is to use. A broad description of the works is reasonable in the circumstances.

The Tribunal finds this complaint to be unfounded.

4. Failure to comply with the undertaken given, in the Newton Quotation document (section 5) states If several repairs or maintenance are required, we will work with committee / owners to create a timeline of work. This ensures works are carried out timely but at a rate that is as affordable as possible. (note Appendix J Projected Spend).

The Applicant complain that the Respondent proposed several repairs or maintenance and did not work with the proprietors to create a timeline of work. This was contrary to the Respondent's factoring proposal (Appendix J of the Application) which provided at section 5 that the Respondent would work with the proprietors to create a timeline of work where several repairs or maintenance are required.

The Applicant contends that the Respondent did not consult with proprietors regarding prioritising and scheduling of works. This is detailed in emails from the Applicant to the Respondent dated 10 and 26 October 2023 paragraphs 2 and 2 and 3 respectively (Documents 10 and 12 in the Application).

No detail is provided of "several repairs or maintenance" which have been performed without consultation with proprietors. The Applicant details proposed works and projected spends but not actual work or actual spend.

In so far as the Tribunal can ascertain (given the lack of specification) this complaint is unfounded.

5. Failure to comply with Annex 2 of Written Statement of Services Annex 2 "Communication and Complaints Procedure" by failing to respond in relation to complaint 2 only, to a written application and a subject access request made on 2nd February 2023, 10 and 29 March 2023.

The Applicant sent a letter of complaint 2 February 2023 (Document C2/6 of the application) was replied to by the Respondent's Business Development Manager (Production 2 attached to the Respondent's Submissions) by email of 6 February 2023.

The Respondent's Communication and Complaints Procedure (Application Appendix K) states: "Once a complaint is received, the response will be managed by a Director who may delegate it to an experienced member of staff, who will consider the points raised and either seek to discuss your concerns with you or provide a written response within seven (7) working days."

The Respondent's response was sent on 6 February 2023. The Respondent complied with its Communication and Complaints Procedure.

The Applicant's complaint that a Subject Access request was not complied with is out with the jurisdiction of the First-tier Tribunal and was dealt with by the ICO. (Production 3 attached to the Respondent's Submissions)

The Applicant's email of 10 March 2023 (Document C2/18 of the application) does not raise a fresh complaint.

The Applicant's email of 29 March 2023 (Document C2/20 of the application) asks for the matter to be progressed through the Respondent's Communication and Complaints Procedure.

No further response was forthcoming from the Respondent and the Applicant intimated her intent to pursue matters with the Tribunal by email of 30 May 2023 (Document C2/22 of the application).

The Respondent's Communication and Complaints Procedure provides that a response should have been forthcoming within 30 working days where a complainant has not been satisfied with the response received.

As the Respondent did not respond in time it has failed to comply with its Communication and Complaints Procedure and, as such, has failed to comply with OSP 11.

Complaint 1

Newton Property Management submitted a quotation, dated 28/07/2023 in which they proposed work to the value of £1704.00.

The proposal states that "Unless the collective owners advise that they do not wish to proceed by the 11th August 2023, we intend to accept the above quotation and instruct Fresh Facility Services to carry out the works above"

This form of approval being contrary to both Burdens section of the Title Deeds and Newton Property Management Written Statement of Services which specifically states agreement shall be obtained.

As referred to above (complaints 1-3) the Tribunal does not find this complaint established.

Complaint 2

Newton Property Management were engaged as the Property Factors at Braemar Gardens on the 22nd of November 2022. Newton Property Management submitted a quotation (Appendix J to the application) (undated) specifying cost for the individual identified items (Cyclical Costs).

The Applicant contends that there were a number of occasions whereby the Respondent varied quotes and changed suppliers, without issuing an amendment to the contract.

The Applicant makes reference to, by way of example, change in cleaning contractors which came at a cost above that specified in Appendix J.

The Respondent states that the document referred to was an estimate and at that stage no contracts had been entered into by them. This is consistent with the use of the term “estimated” at page 4 of that document in the section relating to cleaning costs.

It is also important to know the reason this document was created. It was created for the respective proprietors to consider at a meeting to decide whether or not to appoint the Respondent as Property Factor. It was clearly a proposal and made various references to estimated costs.

Subsequent to having been appointed as Property Factor the Respondent appointed various contractors to provide the services to the proprietors. This was in accordance with the proposal and also the Respondent’s WSS Section B a).

There was no need to issue any amendment to the document Appendix J. There was no contractual amendment needed for the Respondent to appoint cleaning contractors at a cost higher than estimated.

Property Factor Enforcement Order (PFEO)

Having made a decision in terms of Section 19(1)(a) of the Act that the Property

Factor has failed to comply with the Section 14 duty in so far as OSP 11 is concerned, the Tribunal then proceeded to consider Section 19(1) (b) of the Act which states:

“(1)The First-tier Tribunal must, in relation to a homeowner’s application referred to it … decide … whether to make a property factor enforcement order.”

The Respondent failed to respond to the Applicant’s complaint of 29 March 2023 within the timescales set out in its WSS. The Applicant progressed the subject matter of the complaint to the Tribunal. The failure on the part of the Respondent was minor and covered by its WSS. The Tribunal does not propose to make a PFEO in the circumstances.

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.

Alan Strain

13 January 2025

Legal Member

Date