

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)**

Chamber Ref: FTS/HPC/PF/20/1372

Property: 34 Donnini Court, Ayr, KA7 1JP

Parties

Kenneth Macleod, 34 Donnini Court, Ayr KA7 1JP
("the Homeowner")

Newton Property Management, 87 Port Dundas Road, Glasgow G4 0HF
("the Factor")

The Tribunal

Graham Harding (Legal Member)
Helen Barclay (Ordinary Member)

DECISION

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

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it was in breach of Section 7 of the Code.

The decision is unanimous.

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

The Factor became a Registered Property Factor on 1 November 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 dated 21 May 2020 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 3 and 7 of the Code and had failed to carry out its property factor's duties. The Homeowner submitted written representations together with a copy of the Deed of Conditions burdening the property, a copy of the Factor's Written Statement of Services and a bundle of productions labelled A1-A13 in support of his application.
2. By Notice of Acceptance dated 30 June 2020 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned.
3. By email dated 6 September 2020 the Homeowner submitted a further Inventory of Productions in support of his application.
4. By email dated 7 September 2020 the Factor submitted its written response to the application.
5. By email dated 9 September 2020 the Homeowner submitted further written submissions to the Tribunal.
6. By email dated 21 September 2020 in response to a direction issued by the Tribunal the Homeowner submitted a copy of the Citadel Quay Owner's Association Constitution.
7. By email dated 22 September 2020 the Factor's representatives Paul Hannah, Solicitors submitted a response to the Tribunal's direction dated 9 September 2020.

Hearing

8. Due to restrictions as a result of the Covid-19 pandemic a hearing was held by tele-conference on 29 September 2020. The Homeowner attended in person. The Factor did not attend and was not represented having indicated in its written response that it intended to rely upon its written submissions.

Summary of submissions

Section 3 of the Code The Contingency Fund

9. The Homeowner complained that the Factor had participated in an arrangement with the Citadel Quay Owners Association to use owners' funds to finalise the previous property managers (James Gibb) account and to subsequently enable restitution back to the owners' fund.
10. The Homeowner explained that a meeting had been called by the Owners Association Committee in order to propose a change of Factor. He said that there had been a large number of proxy votes in favour of change and a

decision had been made to change factor and appoint Newton Property Management. The Homeowner went on to criticise the Owners Association Committee and suggested that owners had been misled for a number of years and had not been clearly told what they were voting for. However, the Homeowner did not dispute that the Owners Association had been properly constituted rather that it did not have the powers or authority claimed.

11. The Tribunal referred the Homeowner to Clause 7.3 1) of the Owners Association Constitution which gave a mandate to the Committee to act and make decisions on behalf of the owners in relation to all matters contained within the Deed of Conditions and to promote and monitor the exercise of Owners' rights and the maintenance of the development and its amenities and environment in accordance with those deeds. The Tribunal queried with the Homeowner if that did not give the Committee wide ranging powers to make decisions on the owners' behalf.
12. For his part the Homeowner submitted that this was not the case and that the Committee's remit was restricted to dealing with the care and maintenance of the areas within the development common to all owners but that Section 10 of the Deed of Conditions left determination of maintenance of individual blocks to the owners in each block.
13. The Homeowner went on to say that the Committee was being supported by the Factor and was acting as enforcer for the Committee. The Homeowner further submitted that when a purchaser bought a property in the development his solicitor would provide him with a copy of the title deeds which would include the Deed of Conditions. The Deed of Conditions made no mention of an owners' association. If the Owners Association was to have the powers being attributed to it then there should have been an application to the Lands Tribunal to have the title amended.
14. The Homeowner explained that there had over a prolonged period been an issue with owners not paying their management fees and outlays to the Factor. On James Gibb's contract being terminated there was a shortfall due to them of £29558.05. The Tribunal was referred to Document Y2E. The Homeowner explained that in order to settle the debt due to James Gibb the Committee arranged for payment from the owners' floats of £22500.00 and the balance of £7058.05 coming from the Sinking/Contingency Fund. The Homeowner said that the sinking fund was supposed to have been ring fenced and should not have been used for expediency purposes to pay James Gibb. The Homeowner confirmed that the funds paid out of the sinking fund had been recouped. The Homeowner also confirmed that there had been no financial benefit to the Factor as a result of the fund being used in this way and referred the Tribunal to the Citadel Quay Owner's Association Newsletter (Production 4A). The Homeowner confirmed it had been the Owner's Association Committee that had instructed the use of the contingency fund and the pursuit of owners who had defaulted on payment of fees but it had been the Factor's debt collectors Gordon & Noble who had provided the Committee with its services.

15. The Homeowner went on to say that he had discovered that there had been nothing in the title deeds that had given the right to set up a contingency fund. He had also discovered that the fund had been used for painting balconies and suggested that the allocation of liability for a share of the cost had not been fair in that it had not mattered what size an owner's balcony was each owner paid the same. The Homeowner confirmed that this did not form part of his complaint against the Factor. The Homeowner went on to say that a number of owners were not wanting to pay into the contingency fund any longer. There had been a period when he had not been invoiced and there had been a time when he had refused to pay but after threats of proceedings being taken against him by the Factor, he had now paid the full amount due of £420.00 into the fund.
16. The Homeowner was of the view that the meeting that set up the contingency fund was a meeting of the whole development but according to the Deed of Conditions there were areas of common interest that affected the whole development and areas that only affected individual blocks. The fund had been set up as common fund for the whole development and that was wrong.
17. The Homeowner went on to say that he felt there were serious consequences for owners as it appeared that the Factor only had to consult with the Owners Association Committee and not with individual owners.
18. For its part the Factor referred the Tribunal in its written submissions to correspondence from Mr Iain McKie, the Chairman of the Owners Association. In that correspondence Mr McKie confirmed that it was the Owners Association Committee who engaged a debt collection agency to recover monies from owners who were in debt on leaving James Gibb. He also confirmed that it had been James Gibb that had apportioned the contingency fund on an estate wide basis rather than a block/individual basis but that the fund had now been allocated by the Factor in accordance with the owner agreement in 2011 on a block/stairwell basis. Mr McKie also made reference to the painting contract for the two Churchill blocks being re-tendered by the Factor at a reduced price and therefore at a saving to all owners.

The Sky Q Box Repair

19. The Homeowner submitted that the Factor had made a false statement in response to his complaint that the repair to the Sky Q box was not a communal repair. The Homeowner explained that the block had an existing satellite dish that supplied Sky and Freesat channels to the various properties in the block. A splitter directed the signal to the various flats. The owner of number 40 had wanted to subscribe to Sky Q and had been supplied with a Sky Q box that remained the property of Sky. The owner had problems with the signal. The Homeowner suggested he should have contacted Sky to have the problem resolved but had contacted the Factor. The Factor had arranged for an engineer to attend. The engineer had connected a power supply unit (PSU). The Homeowner submitted that the PSU only supplied the Sky Q equipment serving the owner of number 40 and not the whole block. He suggested the Factor was trying to mislead by saying that it was part of the

communal system when it was not. The Homeowner referred the Tribunal to Productions X1-X4 and to attachment 3 in the Factors written response, the invoice of 07/08/2018 from Ken Jack Ltd.

20. For its part the Factor in its written submissions suggested that the Sky system was communal and therefore the repair was properly charged. The issue of the poor signal to the block was resolved by renewing the power supply to the multi-switch which provided a signal to all the properties in the block. The Factor also disputed that the owner was entitled to make a complaint under section 3 of the Code as there was no point within this section of the Code that would apply to the Homeowner's complaint.

Fire Alarm Inspection

21. The Homeowner explained that he had requested information from the Factor as to the statutory requirement for quarterly inspection and testing of the fire alarm system in the block. He explained that it was difficult to complain about a service if he did not know what they were doing and why they were doing it. He suggested there had been no clarity from the Factor in this regard. The Homeowner confirmed there was a fire alarm with a sounder in the block and also a smoke detector in the lift room. He said that he would expect some procedures but did not know if they were statutory or not. The Homeowner said that the cost of the Fire Alarm inspection was £35.00 per quarter and this was divided between the twelve owners in the block. The Homeowner confirmed to the Tribunal that there were no commercial premises located within his block. He said the commercial premises were located on the ground floor of the Churchill blocks. The Homeowner commented that on one occasion a contractor had been knocking on owners' doors as he could not find smoke alarms.
22. For its part the Factor had referred the Tribunal to its response to the Homeowner in its email of 20 December 2018 in which it had referred to the testing of the smoke ventilation system on a quarterly basis being in line within Regulations BS5839-1:2017 and BS5839-1:2017. The Tribunal noted these appeared to relate to non-domestic premises. The Factor also submitted that it disputed that the Homeowner could make a complaint under Section 3 of the Code in respect of this matter as there was no point within that section that the complaint would come under.

Section 7 of the Code Failure to Respond to Final Stage Complaint

23. The Homeowner had complained that the Factor had failed to respond to his final stage complaint contained in an email dated 4 March 2019. The Homeowner acknowledged that the Factor had accepted that it had not replied to this but disputed that this was a "one off" oversight and referred the Tribunal to recent correspondence with the Factor that he said had gone unanswered.

24. The Factor in its written submissions accepted that it had failed to respond to the Homeowner's complaint of 4 March 20019 and for this apologised unreservedly. In mitigation the Factor submitted that it had replied to a substantial number of communications from the Homeowner over a two-year period and suggested that a single omission should not be upheld as evidence of a breach of the Code.

Property Factor's Duties

25. It was the Homeowner's position that the Factor had not complied with the terms of the Deed of Conditions in its administration of the development and in particular with the decisions affecting the Homeowner's block but had instead taken instructions from the Owner's Association committee who did not have the power to instruct the Factor in the way in which it did.

26. The Factor did not address this aspect of the complaint.

Summary

27. The Homeowner submitted that he had been subjected to stress and spent a lot of time and energy dealing with the issues. He felt his right under the Deed of conditions had been subverted with the Factor always supporting the Owners Association Committee. The Homeowner requested that the Tribunal find that the Factor was in breach of the Code and had failed to carry out its property factor's duties and make a financial award as detailed in his application together with a further £41.44 in respect of additional charges that had accrued.

28. In its written submission the Factor submitted it had found the Homeowner's approach unnecessarily combative and wholly unrepresentative of the vast majority of the co-operative and constructive owners of the development including the Owners Association Committee.

The Tribunal make the following findings in fact:

29. The Homeowner is the owner of 34 Donnini Court, Ayr ("the Property")
30. The Property is a flat within the Citadel Quay, Ayr (hereinafter "the Development").
31. The Factor performed the role of the property factor of the Development.
32. The Factor took over from James Gibb as Factor of the Development in October 2017.
33. At that time the outgoing factor had a debt due to them of £29558.05.
34. James Gibb retained £22500.00 of owners floats to partly satisfy the debt.

35. The Citadel Owner's Association Committee ("the Committee") authorised the transfer of £7058.05 from the owners Contingency Fund to pay the balance of the debt due to James Gibb.
36. The Committee instructed a firm of debt collectors to pursue defaulting owners to pay their outstanding fees and outlays.
37. The funds taken from the Contingency Fund were replaced by May 2018.
38. The Factor took no part in the arrangements made with James Gibb nor in pursuing the defaulting owners.
39. When the Contingency Fund was set up it was intended that each block in the development would have a separate account.
40. At some point on a date unknown but prior to October 2017 the Contingency Fund was held by the then factor in a single account.
41. The Contingency Fund was divided into a fund for each block in about February 2020.
42. Although no provision was made for it in the Deed of Conditions, owners formed the Citadel Quay Owner's Association ("the Association").
43. The Association adopted a formal Constitution approved by owners at a Special General Meeting held on 11 October 2015.
44. The Committee was mandated by the Association to act and make decisions on behalf of the owners in relation to all matters contained within the Deed of Conditions and to promote and monitor the exercise of owner's rights and the maintenance of the development and its amenities and environment in accordance with those deeds.
45. The Committee was also mandated by the Association to liaise with the Factors on the owners' behalf to ensure the efficient and effective overall management and maintenance of the development in accordance with the terms of the Deed of Conditions.
46. The Committee was mandated to approve the appointment of service contractors; negotiate and review contracts for the whole or parts of the development; review analyse and recommend to owners capital investment projects, replacement investment and major periodic maintenance and promote communication with proprietors and residents as well as bringing forward rules for approval and representing the interests of owners and tenants in relations with the community and third parties.
47. The Homeowner's block has a satellite dish serving all the properties in the block. It requires a multiswitch to split the signal to each property.
48. The Homeowner does not subscribe to Sky TV.

49. At least one proprietor in the block has subscribed to Sky Q.
50. A subscriber to Sky Q is provided with a Sky Q box on loan from Sky.
51. In order to receive Sky Q in a Multi Domestic Unit such as the Homeowner's block, the existing multiswitch required to be redesigned to incorporate the new dSCR (digital satellite cable router) multiswitch for Sky Q functionality.
52. When the dSCR multiswitch was installed the contractor did not provide a power supply unit.
53. Following a request from another Homeowner with Sky Q the Factor instructed Ken Jack to investigate the satellite system at the Homeowner's block and found the new Sky Q switch fitted without a power supply unit and fitted a power supply unit at a cost of £175.08.
54. The Factor arranged for quarterly inspections and testing of the smoke ventilation and control systems within the development and the testing of the fire alarm and smoke alarm within the Homeowner's block.
55. The Factor failed to respond to the Homeowner's email of 4 March 2019.

Reasons for Decision

Section 3 of the Code

56. The Homeowner was of the view that the Factor had participated in an arrangement with the Committee to use the Contingency Fund to finalise the previous factor's outstanding debt and then arrange restitution back to the fund from monies collected from previously defaulting owners. The only reason that the Homeowner could provide to substantiate this view was that the debt collection agents used had been recommended by the Factor as they were also used by it. The correspondence from Mr McKie the Chairman of the Committee stated that the Committee independently instructed the debt collection agency and only received advice from the Factor. The Tribunal concluded that any decision with regards to the use of the Contingency Fund was taken by the Committee and not by the Factor.
57. It appears that the original decision to have a Contingency Fund was taken at the AGM of the Association on 27 March 2011. At that time, it was envisaged by the then Factors that each block would have its fund held separately. For reasons that are not known when James Gibb took over as Factor the Contingency Fund was subsumed into a single fund for the whole development. That remained the case until following discussions within the Committee and after representations from owners, in February this year the Committee determined that the fund would be once again divided into a fund for each block according to the number of properties in the block. The Tribunal from the information before it was unable to determine whether as a result of the way in which the fund had been administered in the past the

Homeowner had gained or lost. The Deed of Conditions made provision for a float to be paid by each proprietor. The float was fixed at £150.00 but there was provision for this to be increased by a meeting of proprietors. It did not provide for an additional Contingency Fund. That was a creation that had been proposed by a previous factor and approved by a majority of owners at an AGM of the Association. The purpose of such a fund was to ensure that funds would be available for projects involving major expenditure and avoid the need for proprietors to find large amounts at a single point in time. The issue for the Tribunal to consider, given that the Deed of Conditions was silent was whether a decision of the Association to have a Contingency Fund was binding on the owners and therefore would permit the Committee to instruct the Factor at the time to collect the funds and invest it on behalf of the owners. The Tribunal was satisfied that a properly constituted meeting of proprietors agreed to the setting up of the Contingency Fund which in effect was a modification of the provision in the Deed of Conditions to increase the float. The Tribunal was therefore satisfied that the Factor did have authority to invoice the Homeowner in its quarterly account. The information provided by the Committee in its newsletter to the Homeowner with regards to the use of the fund and its subsequent restitution provided the Homeowner with the information he required. As the Factor was not involved in the negotiations with the previous factor or in pursuing the debts due by other proprietors the Tribunal concluded that the Factor would have been unable to have provided the Homeowner with the information requested.

58. The Tribunal from its own enquiries was able to ascertain that in order to support a signal to a Sky Q box the existing satellite multiswitch serving the property required to be replaced. The Tribunal concluded that the Sky or other contractor installing the owner's Q box must have fitted a dSCR multiswitch to replace the existing multiswitch. The Tribunal was able to establish that a dSCR multiswitch used significantly more power and this could explain why the signal that the owner with Sky Q was receiving was poor. The Tribunal was unable to ascertain from the evidence submitted if other owners in the block suffered any deterioration in reception. The Homeowner said he had not been affected. The Tribunal was unable to ascertain if the Sky or other contractor would if asked have fitted a PSU. It was also not clear from the evidence if the dSCR multiswitch now fitted would only supply the one owner who has a Sky Q box or would in fact supply others in the block. The Tribunal from its enquiries discovered that it may be that more than one Sky Q box could be operated depending on the number of outputs. The Tribunal was not presented with any evidence in this regard. The Tribunal accepted that in general terms the dSCR multiswitch served all the proprietors in the block irrespective of whether they subscribed to Sky or not. It was therefore a piece of equipment that was communal to the block. If communal equipment required upgrading by installing in this case a PSU then even if in practice it only benefited one owner nevertheless the cost of upgrading would fall to be shared between all the owners in the block. Therefore, the Factor was entitled to charge the Homeowner for his share of the cost.
59. BS5839-6 applies to domestic properties and as the Factor stated in its response to the Homeowner and to the Tribunal BS5839-1 applies to non-

domestic properties. The development comprises both domestic and non-domestic properties. The Factor has provided confirmation of the certification from PTM Security Solutions Limited dated 11/7/18. The Homeowner has indicated that inspections of the fire alarm systems are being undertaken quarterly. The issue for the Tribunal was whether the inspections instructed by the Factor were in compliance with a statutory obligation or by recommendation. The Tribunal was not presented with much evidence in this regard. From its own enquiries it appeared that fire alarm tests in some cases should be carried out weekly, monthly, quarterly or six monthly depending on circumstances. The Tribunal therefore concluded that a quarterly test was not unusual or unreasonable particularly as there would be testing required quarterly in the blocks with commercial premises in the development.

60. Section 3 of the Code's overriding objectives are the protection of Homeowner's funds; clarity and transparency in all accounting procedures and the ability to make a clear distinction between Homeowners' funds and the property factor's funds. This section of the Code also makes specific provision for dealing with Homeowners on termination of their contract or sale of their property as well as supplying a detailed financial breakdown annually and making provision for advance payments. As the Factor has submitted, neither the Homeowner's complaint as regards the Sky Q box or the Fire Alarm inspection would apply to this section of the Code and the Tribunal did not uphold the Homeowner's complaint in this regard.
61. It was apparent that the Homeowner disagreed with the authority exercised by the Committee however the Tribunal was satisfied that the Deed of Conditions did not preclude the formation of an Owners Association and it was not disputed by the Homeowner that it had been properly constituted. The owners of the development had given the Committee wide ranging powers to make decisions on their behalf. It was not the role of the Tribunal to interfere with the operation of the Association or the Committee.
62. Taking everything into account the Tribunal was satisfied that the Factor was not in breach of Section 3 of the Code.

Section 7 of the Code

63. The Factor acknowledged it had not replied to the Homeowner's email of 4 March 2019. Failure to respond to a formal complaint is a breach of Section 2.5 of the Code and by not responding to a formal complaint the Tribunal was satisfied that this also amounted to a breach of Section 7.2 of the Code. However, the Tribunal acknowledged that the Factor accepted it had been at fault in advance of the hearing and offered the Homeowner an unreserved apology.

Property Factor's Duties

64. The Homeowner's grievances with the Factor centred on the relationship between the Committee and the Factor and the authority it imposed in relation to the block in which the Homeowner's property was located. Clause TENTH

of the Deed of Conditions provided for any proprietor calling a meeting of the proprietors within his block to discuss any common or mutual operations, repairs or decoration or to make regulations or enter into service contracts. The Homeowner did not lead any evidence to say that he had been precluded from holding such meetings rather than such meetings had not been held because the Committee had made the decisions and instructed the Factor. As noted above the Association mandated the Committee with significant powers. The Tribunal concluded that given the delegated authority of the Committee to instruct the Factor in accordance with the Association's Constitution and given that there was no evidence to suggest that the Homeowner had been prevented from exercising his rights in terms of Clause TENTH of the Deed of Conditions the Tribunal concluded that the Factor had not failed to carry out its Property Factor's duties.

Conclusion

65. The Tribunal carefully considered the written submissions and documentary evidence submitted by both parties as well as the Homeowner's oral evidence and as noted above found that the Factor was not in breach of Section 3 of the Code nor had it failed to carry out its property factor's duties but was in breach of Section 7 of the Code in that it had failed to reply to the Homeowner's email of 4 March 2020. The Tribunal therefore had to decide in terms of Section 19(1)(b) of the 2011 Act whether to make a Property Factor Enforcement Order. In reaching its decision the Tribunal acknowledged that the Factor accepted its failure in advance of the hearing and offered the Homeowner an unreserved apology. The Tribunal also noted that the Homeowner was looking for a monetary award in his favour. Had the Tribunal been satisfied that the Factor was in breach of Section 3 of the Code or had failed to carry out its property factor's duties then a monetary award may well have been appropriate. However, the Tribunal concluded that in these circumstances it would not be appropriate to make any award and that it was not necessary to make a Property Factor Enforcement Order. The Tribunal would however recommend that the Factor takes steps to ensure that in the future all correspondence from the Homeowner is replied to promptly.

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.



Graham Harding
12 October 2020

Legal Member and Chair
Date