

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/18/0509

**91 Albert Road, Gourock PA19 1NJ
("the Property")**

The Parties:-

**Mr Joseph McMahon and Mrs Elizabeth McMahon, 91 Albert Road, Gourock
PA19 1NJ
("the Homeowners")**

**Morrison Walker Property Management Limited
("the Factor")**

Tribunal Members:

**Graham Harding (Legal Member)
John Blackwood (Ordinary Member)**

DECISION

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

The Factor has not failed to comply with its duties under section 14(5) of the 2011 Act.

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.

1. By application dated 3 March 2018 as amended by correspondence dated 2 April 2018 the Homeowners complained to the Tribunal that the Factor had

breached sections 2.1, 4.4, 6.1 and 7.1 of the Code and had also failed to properly carry out its property factor duties.

2. Specifically, the homeowners complained that it had withdrawn its services following a single complaint which had highlighted poor communication, poor repair service, poor financial management of debt and delay in settling the final account. The homeowners also complained that the Factor had refused to agree to mediation, had delayed in responding to communications and had allowed the property to deteriorate because of one owner not paying his share of repairs.
3. A convenor with delegated powers considered the application and by decision dated 2 May 2018 referred the application to a Tribunal.
4. Both parties lodged written representations with the Tribunal prior to the Hearing which took place at Gamble Halls, 44 Shore Road, Gourock on 13 July 2018.

Hearing

5. The Hearing was attended by the Homeowners and by Mr Derek Robinson, Property Manager and Mrs Florence Gallagher, Director for the Factor.

Summary of Submissions

6. Section 2.1 of the Code

For the Homeowners Mrs McMahon explained that on 28 August 2017 she had phoned the Factor to speak to Mr Robertson as she was concerned about the application to the council for funding. She was told Mr Robertson was on the phone and was put on hold and then told he would call back. Mrs McMahon said she had been told that before and was concerned he would not do that as that had happened previously. She said she did not get a call back immediately and when she phoned again was told Mr Robertson had left the office as he was late for another meeting. Mrs McMahon said she was frustrated at what had happened. She said she explained she wanted information about the council funding but was told the staff could not find the file. Mrs McMahon went on to say that later that morning Mr Robertson came around to her house as his meeting had been in the same road and had told her he did not know why his colleagues could not find the file. The Homeowners felt the information they were being given was misleading.

7. For the Factor Mrs Gallagher confirmed that Mr Robertson had been on the phone when Mrs McMahon had called he had been unable to immediately return the call as he was late for a meeting but her colleague Roisin spoke to Mrs McMahon and confirmed that Mr Robertson would contact her later. With regards to the missing share application to the Council Mr Robertson explained that the procedures were new to both the Factor and the council. This was the Factor's first application. There had been some confusion over

the number of shares in the application and the documents had to be resubmitted. This had led to some delay. Also, all the owners had to sign the document and this took time. Both Mr Robertson and Mrs Gallagher denied that the Factor had provided information that was misleading or false.

8. Section 4.4 of the Code.

Mrs McMahon explained that over a lengthy period of time there had been difficulties with one owner in the development failing to pay his share of repairs and maintenance. When she had spoken to the owner about it he had complained about additional charges that had been levied by the factor. Mrs McMahon felt that the Factor should have done more and acted more quickly to collect the funds.

9. For the Factor Mrs Gallagher explained that the Factor had first initiated debt collection procedures in 2008 and successfully obtained payment from the owner in 2009. There was then a fire at the development and although that owner had not paid his home insurance the insurers did in fact eventually pay out but thereafter his debt continued to rise and the Factor proceeded to raise proceedings against the owner for payment and Sheriff Officers were instructed to try to collect the debt. However, as the owner was self employed it was not possible to arrest his wages and the Factor was advised that it would not be worthwhile sequestering him as his mortgage was being paid so it was unlikely that they could force the sale of his home. Mrs Gallagher confirmed the Factor had registered a Notice of Liability and this had been renewed periodically. Following storm damage in 2012 it was discovered that the owner did not have insurance to cover his share. The Factor contacted his mortgage lender to see if they would contribute to the repairs but they were not interested. The Factor therefore reached agreement with four of the other owners to pay the non-paying owner's share. Mrs Gallagher said she could understand the Homeowners frustration at what had happened but that the Factor had done all it could. Mrs Gallagher said that the Factor continued to fund the non-paying owner's share of minor repairs itself and put him on its block insurance policy and paid the premium from its own funds. By 2018 the debt had risen to £13136.00 but by then the owners house had been repossessed and ultimately all the sums due to the Factor and the other homeowners had been paid when the property was sold at the end of May 2018.
10. In response to a question from the Tribunal Mrs Gallagher confirmed that the Factor followed its debt collection procedures throughout the period that the non-paying owner was defaulting.
11. Mrs McMahon queried why it had taken so long to recover the debt but the Tribunal confirmed that the Factor had offered its explanation. Mrs McMahon still felt that more could have been done.
12. Section 6.1 of the Code.

Mrs McMahon said that she frequently had to replace light bulbs herself. She felt there was never a clear understanding of how work would be done. She had not been aware that she was paying a 1/6 share and not a 1/5 share and that the Factor had been paying the non-paying owner's share. She said she always had to phone to ask what was happening. The Factor only provided a report once a year. She felt the Factor did not actively manage the property and that was left to the owners and she and her husband were the only owners that were pushing for work to be done.

13. Mr Robertson explained that all invoices issued by the Factor clearly showed that the Homeowners were responsible for a 1/6 share. A property condition report was prepared every 12- 18 months and this told owners what work was required but the Factor required letters of authority from the owners to go ahead with the recommended works and these were never forthcoming even as far back as 2004.

14. Mrs Gallagher pointed out that Mrs McMahon had written to the other owners last year saying that the owners had to take steps to protect their investment and that this had been a good thing but nothing had come of it. She said the Factor did everything asked of it. It obtained estimates when requested but could not instruct works without consent.

15. Mrs McMahon spoke of some plasterwork being in a dangerous condition and that the Factor should have done more as this raised Health and Safety concerns.

16. Mr Robertson said that whilst there were plasterwork repairs to be carried out they had not merited being done as an emergency at that stage. There had been difficulty getting competitive quotes both for the painting works and for the stair lighting and this had taken some time.

17. Mrs McMahon said that previously the owners had not held regular meetings but that they were now self-managing the development and had plans in progress to carry out repainting including repairing the plasterwork and also further maintenance over time.

18. Section 7.1 of the Code

Mrs McMahon said that she had taken advice from a legal clinic at Glasgow University and had been told that there needed to be a vote of no confidence in the Factor by a majority of the homeowners before the contract could be ended. She felt the Factor had used her complaint as a way of getting out of managing the property when there was a huge amount of work needing to be done.

19. Mrs Gallagher said that the decision to terminate the service had been taken in September 2017. She had felt the tone of the letter by Mrs McMahon had been uncalled for. The Factor had put in a lot of work on the owners' behalf over the years and she said she did feel for the owners because of the problems with the non-paying owner. Nonetheless the Factor was, in its terms

and conditions, entitled to give three months' notice of termination. The letter of complaint had been addressed by Mrs Gallagher in her reply to Mrs McMahon

20. Mrs McMahon acknowledged that her language in the letter was horrid but that it had stemmed from wanting to resolve the problems.
21. Mrs McMahon also pointed out that although the contract had been terminated the Factor had still proceeded to instruct the builder to carry out roughcast repairs and had paid for the works without first inspecting the job. Mrs McMahon had been confused by this particularly as scaffolding had been left behind and also some debris.
22. Mrs Gallagher confirmed that it had been agreed that the Factor who had been holding the funds would instruct the builder. She had not been aware of the scaffolding being left or of any problems and would attend to this.

The Tribunal make the following findings in fact:

- 1 The Homeowners are the owners of 91 Albert Road Gourock ("the Property")
- 2 The Property is a flat within the block forming 89,91 and 93 Albert Road Gourock which consists of six flats (hereinafter "the Development").
- 3 The Factor performed the role of the property factor of the Development
- 4 Mr Robertson was unable to take a call from Mrs McMahon on 28 August 2017 as he was on another call. Although Mrs McMahon had been told that Mr Robertson would call back after he was free Mr Robertson was unable to do so as he was late for an appointment. Instead he visited Mrs McMahon at her home as soon as he could later that morning to respond to her query.
- 5 Mr Robertson's colleagues did not have access to paperwork regarding the missing share application to the Council that had been prepared by Mr Robertson.
- 6 There had been some delay in lodging the application as the scheme was new to both the Factor and the Council.
- 7 The Homeowners had not been provided with any information that was misleading or false. The Factor did not breach Section 2.1 of the Code.
- 8 The Factor followed its debt collection procedures in respect of the owner who did not pay his share of the cost of repairs.

- 9** The Factor took all legal steps open to it short of sequestration to try to recover the debts due.
- 10** The Factor sought advice on whether to initiate sequestration proceedings and was advised against doing so.
- 11** The Factor paid from its own funds the non-paying owners share of minor repairs and from 2013 paid the non-paying owners share of the block insurance premium.
- 12** The Factor kept the other owners informed of the difficulties it was having with the non-paying owner.
- 13** By registering and renewing notices of Liability the Factor was ultimately able to recover all the sums due by the non-paying owner to it and to the other owners in May 2018 following the non-paying owner's property being re-possessed and eventually sold. The Factor did not breach Section 4.4 of the Code.
- 14** The Homeowners were able to contact the Factor if they had any issues within the Development that required to be addressed.
- 15** The Factor provided the Homeowners with a property condition report every twelve to eighteen months. The report made recommendations for works to be carried out and requested authority. Throughout the period the Factor provided its service it never received signed authorities from a majority of homeowners.
- 16** Although the most recent report had referred to plasterwork needing repairs it had not been in such a dangerous condition as to merit the Factor taking immediate action on Health and Safety grounds.
- 17** There was a delay in obtaining competitive quotes for painting and stair lighting work due to a lack of local tradesmen being prepared to tender.
- 18** Following the termination of the Factor's services the Homeowners and the other owners in the Development are self-managing and are in the process of arranging for painting and stair lighting work to be done.
- 19** The Factor did not breach Section 6.1 of the Code.
- 20** The Factor in terms of its Statement of Service was entitled to give three months written notice of its intention to terminate its services.
- 21** The Factors Statement of Services has a clear Formal Complaints Handling Procedure
- 22** The Factor addressed the Homeowners complaints in its reply dated 28 September 2017.

- 23** The Factor did not breach Section 7.1 of the Code.
- 24** The Factor continued to instruct repairs to the roughcast at the development during the notice period and used funds held on behalf of the Homeowners and the other owners to pay for these works after its services had terminated by agreement with the Homeowners.
- 25** The Factor paid the contractor for the work without inspecting the work or consulting the Homeowners.
- 26** The Factor has undertaken to ensure that this work has been completed to an acceptable standard and that all scaffolding and debris is removed by the contractor.

Reasons for Decision

- 27** Whilst the Tribunal could understand and sympathise with the Homeowners at their frustration with the time it was taking to progress the missing share application there was nothing in the evidence before the Tribunal to suggest that this was due to the fault of the Factor nor that the Factor had provided misleading information. It appeared to the Tribunal that the Factor had tried to answer the Homeowners query on 28 August as promptly and as thoroughly as possible.
- 28** It appeared to the Tribunal that not only had the Factor done all it could to try to recover the debt due by the non-paying owner it had gone beyond its duty in that regard by paying from its own funds over a number of years the non-paying owner's share for minor repairs and insurance premiums. The Tribunal is well aware of the difficulties and length of time it can take to recover a debt even when a court order is in place. The Tribunal was of the view that the Factor could not have done more to enforce the debt due by the non-paying owner.
- 29** It appeared to the Tribunal that whilst the Factor made recommendations to all the owners regarding proposed works there may well have been a reluctance on the part of the majority of the owners to meet the cost of the recommended works even if the Homeowners themselves were in favour of the work being done. In the absence of a majority there was nothing more the Factor could do.
- 30** The Tribunal was of the view that the Homeowners had been misinformed if they had been advised that the Factor could not terminate its service by giving notice. This was clearly a contractual provision. The Factor did have a complaints procedure and complied with it.
- 31** The issue of the Factor paying the contractor for the roughcast works after the termination of its services did not form part of the Homeowners complaint and therefore whilst the Tribunal noted what was said by both parties in

connection with this matter it was not something it could adjudicate upon but was pleased to note that the Factor intended to ensure that the Homeowners concerns were in any event properly addressed.

32 Although in their application the Homeowners had referred to a failure on the Factor's part to carry out its Property Factors duties in terms of Section 17 of the Act no evidence was led in this regard and there was nothing in the Homeowners' letter of complaint to the Factor dated 2nd April 2018 that this part of the application was being insisted upon.

33 Taking everything into account the Tribunal was satisfied that the Factor had not breached the Code and the Homeowners complaints should not be upheld.

34 The Tribunal's decision was unanimous.

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.

Legal Member and Chair

18 Aug 2018 Date