

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

Louise Day, 1/1 Harewood Road, Edinburgh EH16 4GF (“the Applicant”)

Residential Management Group, Unit 6, 95 Morrison Street, Glasgow G5 8BE
 (“the Respondent”)

Chamber Ref: FTS/HPC/PF/19/3788

Re: 1/1 Harewood Road, Edinburgh EH16 4GF (“the Property”)

Tribunal Members:

John McHugh (Chairman) and Andrew Taylor (Ordinary (Surveyor) Member).

DECISION

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 of a flat at 1/1 Harewood Road, Edinburgh EH16 4GF ("the Property").
- 2 The Applicant bought the Property in April 2019.
- 3 The Property is located within a larger Development of purpose built flats within multiple blocks and shared amenity areas ("the Development").
- 4 One of the shared amenity areas is known as the "Princess Diana Memorial Garden".
- 5 The Respondent acts as the factor of the Development.
- 6 No AGM or other general owners' meeting has taken place or been arranged to take place between the Respondent's representatives and owners of properties in the Development in the period from April 2019 to date.
- 7 On 9 September 2019 the Applicant emailed a formal complaint to the Respondent.
- 8 The Respondent responded by email of 27 September 2019.
- 9 The Applicant was dissatisfied with the Respondent's response and approached her MSP.
- 10 The Applicant's MSP wrote to the Respondent by email dated 1 October 2019.
- 11 The Respondent responded to the Applicant's MSP on 29 November 2019.
- 12 A Written Statement of Services was first issued by the Respondent to the Applicant in December 2019.
- 13 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.
- 14 The Applicant has, by her correspondence, including that of 15 December 2019, notified the Respondent of the reasons as to why she considers the Respondent has failed to carry out its obligations to comply with its duties under section 14 of the 2011 Act.
- 15 The Respondent has failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at Riverside House, Edinburgh on 12 March 2020.

The Applicant was present at the hearing and accompanied by a supporter.

The Respondent was represented at the hearing by its Regional Manager, Lisa Pieper and its Property Managers, Melissa Syme and Darren Gallagher.

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 Written 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 does not complain of failure to carry out the property factor's duties.

The Code

The Applicant complains of failure to comply with Sections 1; 2.4, 2.5; 3.3; 6.9 and 7.2 of the Code.

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

"SECTION 1: WRITTEN STATEMENT OF SERVICES

You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place

between you and the homeowner. If a homeowner applies to the homeowner housing panel for a determination in terms of section 17 of the Act, the Panel will expect you to be able to show how your actions compare with the written statement as part of your compliance with the requirements of this Code.

You must provide the written statement:

- *to any new homeowners within four weeks of agreeing to provide services to them;*
- *to any new homeowner within four weeks of you being made aware of a change of ownership of a property which you already manage;*
- *to existing homeowners within one year of initial registration as a property factor.*
However, you must supply the full written statement before that time if you are requested to do so by a homeowner (within four weeks of the request) or by the homeowner housing panel (within the timescale the homeowner housing panel specifies);
- *to any homeowner at the earliest opportunity (not exceeding one year) if there are any substantial changes to the terms of the written statement.*

1.1a For situations where the land is owned by the group of homeowners

The written statement should set out:

A. Authority to Act

- a. *a statement of the basis of any authority you have to act on behalf of all the homeowners in the group;*
- b. *where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation;*

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;*

C. Financial and Charging Arrangements

- e. the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee;
- f. what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services each owner within the group is responsible for. If management fees are charged at a flat rate rather than a proportion, this should be stated;
- g. confirmation that you have a debt recovery procedure which is available on request, and may also be available online (see Section 4: Debt recovery);
- h. any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service);
- i. any arrangements for collecting payment from homeowners for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service);
- j. how often you will bill homeowners and by what method they will receive their bills;
- k. how you will collect payments, including timescales and methods (stating any choices available). Any charges relating to late payment, stating the period of time after which these would be applicable (see Section 4: Debt recovery);

D. Communication Arrangements

- l. your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied following completion of your in-house complaints handling procedure (see Section 7: Complaints resolution);
- m. the timescales within which you will respond to enquiries and complaints received by letter or e-mail;
- n. your procedures and timescales for response when dealing with telephone enquiries;

E. Declaration of Interest

- o. a declaration of any financial or other interests (for example, as a homeowner or lettings agent) in the land to be managed or maintained;

F. How to End the Arrangement

- p. clear information on how to change or terminate the service arrangement including signposting to the applicable legislation. This information should state clearly any "cooling off" period, period of notice or penalty charges for early termination...

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

... 2.4 You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).

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 3: FINANCIAL OBLIGATIONS..."

...3.3 You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance...

"...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..."

... 7.2 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 Matters in Dispute

The factual matters complained of relate to:

- (1)** The failure of the Respondent to provide a Written Statement of Services to the Applicant.
- (2)** Failure to Communicate with the Applicant.
- (3)** Failures regarding Financial Matters.
- (4)** Other Issues

We deal with these issues below.

(1) The failure of the Respondent to provide a Written Statement of Services

The Applicant complains that although she moved into the Property in April 2019, the Respondent did not provide her with a Written Statement of Services until December 2019. The obligation under Section 1 of the Code is to provide the Written Statement of Services within four weeks of the Respondent becoming aware that the Applicant had purchased the Property. The Respondent accepts that it failed to provide the Written Statement of Services within the time required by the Code.

Accordingly, we find there to have been a breach of Section 1 of the Code.

(2) Failure to Communicate with the Applicant

The Applicant complains that there have been no AGMs or other meetings between the Respondent and the residents of the Development since she moved in in April 2019, nor is she aware of any such meeting having been scheduled. The Applicant complained that she had requested a meeting with the Respondent's then Property Manager, Greig Archibald to discuss the charges contained in the Respondent's bill of 10 October 2019 but he had failed to arrange this. The Applicant relies on Section 2.4 of the Code.

The Respondent advised that there is a new Property Manager, Mr Gallagher, who had recently been appointed. It was acknowledged that communications needed to be improved. No AGM had yet been scheduled.

We do not identify any breach of the Code Section 2.4 in respect of these matters. However, it is evident that it is likely to be beneficial to the relationship between the Respondent and homeowners such as the

Applicant for a meeting to be scheduled at which the homeowners would have the opportunity to express their wishes/concerns to the Respondent.

The Applicant further complains in terms of Code Section 2.5 that the Respondent failed to communicate adequately with her in respect of her complaint. She complained by email of 9 September 2019 to the Respondent's Customer Service Scotland email address. Her email was headed "Formal Complaint". The mail contained reference to a complaint about the stair light and the history of failure to fix it; the failure to follow up issues she had raised previously including the bin store gate and an abandoned car. It also queried the location of the Princess Diana Memorial Garden and complained of poor grounds maintenance. It raised concern about the level of fees and the lack of opportunities to meet with the Respondent's representatives.

The Applicant advises that she received a response dated 16 September 2019 which advised that her email was being treated as a Stage 1 Complaint and would be investigated and a response issued within 10 working days. The next response was an email of 23 September which indicated that there would be a delay in responding and that a full response would follow within 5-10 working days. The full response came by email on 27 September 2019 from the Respondent's Greig Archibald, Property Manager. That response was headed "Stage 1 Complaint Response". The response was relatively short and did not address all of the points which had been raised by the Applicant. The email finished with a suggestion that further contact should be made, if required, to the Respondent's Customer Service Centre. No mention was made of how to escalate the complaint if the Applicant was unhappy.

The Respondent has, in terms of its Written Statement of Services, a four stage Complaints Procedure. The next level, if the Applicant was dissatisfied with the Stage 1 Response, was to the Regional Manager. The Respondent's email did not offer this. It made no mention of the further available steps under the Complaints Procedure.

The Applicant then sought the assistance of her MSP who wrote to the Respondent on 1 October 2019 expressing the Applicant's concerns. This was responded to on 29 November 2019 by the Respondent's email indicating that the matter would be treated as a Stage 2 Complaint. A substantive response was issued by the Respondent on the same day.

The Complaints Procedure requires a response to be provided within 10 working days at each of the First and Second Stages. The Respondent failed to meet those response targets on both occasions.

At the hearing, the Respondent's representatives initially explained that they considered that there had not been a failure to meet the timescales provided in their Complaints Procedure in relation to the First Stage response on the basis that Section 6 of the Written Statement of Services allowed five days for general responses which they considered should then be added to the ten days specified in the Complaints Procedure within Section 7. They indicated that there can be confusion between general "complaints" which are often, in truth, merely enquiries by homeowners, on the one part, and formal complaints, on the other, and that it is not always immediately obvious which applies. On a plain reading of the Written Statement of Services, there appears no basis for the suggestion that a communication response time may be calculated using the timescale in Section 6 added to the timescale in Section 7. In any event, this was not a case where confusion was likely. The Applicant had headed her email "Formal Complaint". From the heading and the content of the email, it ought to have been abundantly clear that this was a complaint to be dealt with under the Complaints Procedure.

The Respondent's argument does not apply in relation to the much longer delay in responding to the MSP's email where the Respondent accepted that its delay was in breach of its obligations under Code Section 2.5.

We find there to have been a breach of Code Section 2.5 in respect of the delayed response to both communications.

(3) Failure concerning Financial Matters

Yearly Breakdown

The Applicant complains that she has not received a yearly breakdown in respect of the Respondent's charges. She complains by reference to Code Section 3.3.

It is accepted that the Respondent issues detailed quarterly invoices and we therefore consider that a further annual statement is not required and there is no breach of Code Section 3.3 in this respect.

Charges

The Applicant also complains that the Respondent has imposed charges for periods prior to her ownership. She has also noted apparent duplication of charges on the various invoices. At the hearing, the Respondent explained that it was acknowledged that there were anomalies within the billing history

and that charges have been incorrectly allocated. The Respondent is already working on a reconciliation exercise to resolve the issue.

We consider that the obligation in Code Section 3.3 to provide details of charges must include an obligation for the information provided to be accurate. As it is admitted that the information provided in the Respondent's invoices in this case is not accurate, we find there to have been a breach of Code Section 3.3.

(4) Other Issues

Stair Light Repair 6.9

The Applicant complained in relation to the stair light by reference to Code Section 6.9. The stair light was observed to be on during daylight. The Applicant reported the fault to the Respondent but found that the fault continued. On reporting the matter again, she was advised that it had been addressed but she saw no difference. She was concerned that contractors were not completing the works properly and she was then being charged again for the same matter to be addressed.

The Respondent explained that at the electrician's first visit the light had been noted as working properly. On the second visit, the report noted that the time clock was adjusted. On the third visit, the photo sensitive cell was adjusted and the light was now operating satisfactorily.

The Respondent could not explain why the reports are apparently contradictory as the light is either operated by a time clock or by a photo sensitive cell and the reports from those contracted to perform the repair appear contradictory in this respect. In the circumstances we consider that the Respondent has failed to pursue the matter with its contractor and we find there to have been a breach of Code Section 6.9.

Garden Maintenance

The Applicant is unhappy with the general standard of garden maintenance. At the hearing it was identified that there was a gap between the expectations of the Applicant as to what was included within the garden service provided by the Respondent and what was in fact within the scope of the works carried out by the Respondent. At the hearing, the Respondent's representatives agreed that it would provide a gardening specification which would show what works were and were not included within the gardening service provided. The Applicant had never been provided with this. We will make no formal finding in this respect since do not consider that the issue of

garden maintenance forms a specific head of notified complaint in terms of the Code Section relied upon in the Application.

Princess Diana Memorial Garden

At the hearing, the Applicant accepted that she is liable for a share of the cost of the maintenance of this area in terms of the title deeds and that its location has now been made known to her, so the matter no longer requires to be addressed in this Application.

Notification

The Applicant has provided to the Tribunal a completed pro forma notification letter dated 15 December 2019 addressed to the Respondent which contains notification of the detail of her complaint. The Respondent's representatives at the hearing indicated that they were unaware of the content of the letter. The Applicant was able to produce evidence, which we accepted, that the letter was sent to the Respondent. There was discussion at the hearing in which the Respondent's representatives explained that the address to which correspondence relating to the Application had been sent was an office which was not staffed at all times and there had been issues with mail intended for that office being delivered to neighbours and delays in the mail being passed on to the Respondent. That had delayed some of the papers in this case reaching the Respondent. While we can identify no relevant Section of the Code within the Application and make no formal findings in this regard, it is clearly a matter of concern that important mail may be delayed.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

We have a wide discretion as to the terms of the PFEO we may make. In this case we consider it appropriate to order the Respondent to make a payment to the

Applicant. The level of the payment reflects the issues with poor communication. We have also ordered that steps be taken to deal with the reconciliation of the Applicant's account (which steps we were advised at the hearing were already underway) and that improved arrangements should be employed in relation to mail handling.

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: 1 April 2020