



Decision

Section 17 of the Property Factors (Scotland) Act 2011 and the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

Chamber Reference: FTS/HPC/PF/22/3879

Re: Property at 18 The Meadows, Dalbeattie, DG5 4AS (“the Property”)

Parties:

Mr Tom Barry, 12 Hameau de la Ville, 50760 Anneville en Saire, France (“the Applicant”)

Lowther Homes Limited, Wheatley House, 25 Cochrane Street, Glasgow, GL1 1HL (“the Respondent”)

Tribunal Members:

Martin McAllister, solicitor, (Legal Member) and Mary Leyden, (Ordinary Member) (“the tribunal”)

Background

1. This is an application by the Applicant in respect of the Property in relation to the Respondent’s actings as a property factor. The application is in terms of Section 17 of the Property Factors (Scotland) Act 2011 (the 2011 Act). The application alleges that the Respondent has failed to comply with sections 1,2,3,10 and 11 of the Overarching Standards of Practice and sections 1.1,1.2,1.3, 2.1, 2.2, 2.3, 2.4, 2.5.2.6, 2.7, 3.1,3.2,3.4, 6.4, 6.6, 6.9 and 7.1 of the 2021 version of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors (“the Code”). The application was not clear with regard to the issue of property factor’s duties. The application was dated 20th January 2023 and was accepted by the Tribunal for determination on 27th February 2022. The application form was accompanied by a number of documents.

2. The Respondent submitted written representations and numbered productions.

Decision

3. **The Property Factor has failed to comply with the Code and it is proposed that a property factor enforcement order be made.**

Case Management Discussion

4. A case management discussion was held by teleconference on 10th May 2022. The Applicant confirmed that he wanted the issue of whether the Property Factor had complied with the property factor's duties to be considered by the tribunal.

The Hearing

5. A Hearing was held at the Glasgow Tribunal Centre on 3 August 2023. The Applicant was present and gave evidence. The Property Factor was represented by Mr David Adams, solicitor. Mrs Vicky Adams, factoring and property manager and Miss Christina Grieve, commercial agent, both employees of the Property Factor were present and gave evidence.

Preliminary Matters

6. Both parties submitted written representations prior to the Hearing.
7. After some discussion and an adjournment, the Applicant helpfully withdrew parts of his application and, as a consequence, the matters for determination were restricted to alleged breaches of the following sections of the Code: 1.1,2.1,2.2,2.5,2.6,2.7,3.1,3.4,6.4,6.6 and 6.9.
8. At the conclusion of the Hearing, the Applicant indicated that he did not want possible failure of the Property Factor to comply with the property factor's duties to be part of the application and this was withdrawn.
9. At the outset of the Hearing, the Applicant set out what he wanted to achieve. He said that he wants to get the same level of service from the Property Factor which other homeowners do and he said that this has not been the case. He said that he feels he has been treated as a "second class citizen." He said that, because he chooses to live abroad, he should receive no less of a service from the Property Factor.

10. Findings in Fact

- 10.1 The Applicant is the proprietor of the Property.
- 10.2 The Applicant does not reside in the Property and the address for correspondence which he has provided to the Property Factor is situated in France.

- 10.3 The Property Factor assumed responsibility for managing the development in which the Property is situated.
- 10.4 The previous property factor was Dumfries and Galloway Housing Partnership who communicated with the Applicant by email.
- 10.5 The property Factor communicated with the Applicant by post and refused to send letters and invoices by email because its systems did not allow for it.
- 10.6 The Applicant did not receive all the postal mail which was sent to him.
- 10.7 The Applicant has not received financial statements from the Property Factor which were sent by post.

Matters not in dispute

11. The Property is not occupied by the Applicant and is tenanted.
12. The Applicant has properties in Carlisle and France and lives between them and he occasionally resides elsewhere.
13. The Property is one of four in a block which formerly was owned by the local authority. Two properties in the block belong to Wheatley Homes South, successors to Dumfries and Galloway Housing Partnership (“DGHP”).
14. The development in which the Property is situated was previously factored by DGHP until its assets were transferred to the Wheatley Group. DGHP became Wheatley Homes South and it appointed its agent, Lowther Homes Ltd (“Lowther”), to be property factor. Lowther Homes Ltd is part of the Wheatley Group.

Applicant’s overarching position and the Property Factor’s response

15. The Applicant said that he was not receiving all communications from the Property Factor and had received no financial statements/invoices. He said that DGHP had previously emailed communications to him and that, in general terms, this worked well. He said that the Property Factor had made a mistake in his French address but, since the French equivalent of the postcode was included in mail sent by it, he would have assumed that it should have reached him and some had, despite errors in the address. He said that, when he is absent from his French address, he has someone check his mail on a regular basis.
He said that there was also an issue where he believed that his personal data had been compromised because he discovered, in a telephone call with the Property Factor, that one of its systems has an address in Stranraer for him. He said that he has no connection with Stranraer.

16. Mr Barry said that the Property Factor has refused to use email to send correspondence to him. He referred the tribunal to a letter from the Property Factor to him which was dated 12 August 2022 and which was a response sent

to him as part of the complaints process. It stated: “our systems are not set up to allow us to email correspondence and invoices to an individual’s email address as part of our mainstream factoring service.”

17. Mrs Aitken said that the Property Factor had an ongoing I.T. project to improve communication with homeowners. She said that one outcome of this project would be that bills could be emailed to them. She said that implementation would be some twelve to eighteen months away.
18. Mrs Aitken said that the Property Factor has an external mail service which deals with mail going to homeowners. She said that there should be no particular issue with letters sent to homeowners who reside abroad and she said that 30% of the Property Factor’s clients do so. She said that she was not aware of issues experienced by other such homeowners.
19. Miss Grieve said that there is a separate mail system which is used to communicate with proprietors of properties in individual blocks. She said that this would have been used to communicate with Mr Barry in relation to repairs.
20. In its response to the Applicant’s complaint, the Property Factor recognised that DGHP had communicated with him by email but stated that this was a bespoke service not provided to other homeowners and that Lowther was not able to offer that service to him. Mrs Aitken said that it was possible for homeowners to go online to get information. Mr Berry said it had not been fully explained to him what information this would provide for him and he said that internet connection was not always reliable for him and that it depended where he was at any particular time.
21. The Applicant was clear in stating that he has not had any invoices from the Property Factor since it took over from DGHP. He said that he had raised this matter on many occasions. He said he was concerned about this because he did not want to accrue debt. He said that this had not occurred because of a credit balance that he had when management was transferred from DGHP and that he had not made any payment towards factoring fees and outlays for two years. Mrs Aitken said that invoices had been sent to Mr Barry.
22. Mr Barry said he never received a written statement of services from Lowther although he did get a letter intimating that Lowther was the property factor in succession to DGHP. He also referred to some mail destined for him having the wrong postage.
23. Mr Barry explained that his background is in Information Technology and that he is sensitive to issues such as websites collecting unauthorised data from him. He said that the Property Factor had been wrongly using cookies on its website and that he had drawn this to its attention. The Property Factor accepted that there had been mistakes in this regard and that the issue had been addressed.
24. Mr Barry spoke about his concerns around the Property Factor’s handling of his data. He said that, in telephone calls with the Property Factor it became clear

that they had an address in Stranraer registered against him. Miss Grieve said that when data had been transferred from DGHP, an incorrect address had been entered in one of the IT systems. She said that the System, Astra, was not one which was used for mailing homeowners and that Mr Barry's data had not been compromised. She said that the particular system was used when homeowners phoned into Lowther. She said that the matter was resolved and the incorrect address had been removed. Mrs Aitken accepted that Mr Barry had not been informed that the Stranraer address had been removed from the system.

25. Mr Barry said that work required to be done to the block in which the Property is situated. He said that the Property Factor wrote to him on 13 December 2022 requiring a decision by 23 December 2022 with regard to repairs to the block and that he had received the letter on 30 December 2022 despite some mistakes with the address on the envelope. He said that this was because the letter had been franked with postage appropriate to that for mail to be delivered within the United Kingdom. As a consequence, he was not allowed an opportunity to vote on whether or not the repairs should proceed. He also said that he did not understand why a property factor would post such a letter giving such a short time for response given the consequences of Christmas mail and the fact that, at that time, there were strikes by postal workers.
26. Mr Barry said that the works involved rendering and guttering and that his share amounted to £847. He said that, in principle, he has no difficulty in consenting to works which are essential but, in this case, he had been denied the opportunity of being involved in the decision. He said that the matters requiring repair were causing water ingress to the property of one of his neighbour's and that he would have voted for the works had he been given the opportunity. He said that the works proceeded because the other three owners in the block voted for them.
27. Mr Barry said that he raised queries with the Property Factor in relation to the letter which he had received in connection with the repair works and that he got no response from the Property Factor. Miss Grieve said that she was certain that she had responded to the queries raised by Mr Barry but that it was possible that she had not.
28. Mrs Aitken said that the mail system used for communicating with owners in the block is IQ Post Me and that the correct postage should have been selected.
29. Mr Barry said that the "communication path" with the Property Factor was not good and that he had counted eleven different email addresses which it had used to communicate with him. He said that, on some emails the "From" address was different from the "Reply" address. Mr Barry said that, other than the email of 2 January 2023, he has had responses to queries raised by him but that they had not been sent in a timely manner.
30. Mrs Aitken said she accepted that, prior to 2022, the Property Factor's model of communication was not fit for purpose. She said that Lowther now has advisers

in its “Customer First Centre” who are trained to deal with enquiries and have knowledge of the Code. Mr Barry said that he accepts that things are changing and that the Property Factor is addressing some communication issues which there have been.

31. Mr Barry said that he accepts that there is a procedure for the Property Factor to consult with homeowners but he said that it is not enough to have a procedure. He said that this must be effective and that such a procedure must include provision of information.
32. Mr Barry said that the Property Factor did not respond to queries in accordance with its written statement of services. Mr Adams accepted that, in respect of communications with the Applicant, this was sometimes the case.
33. Mr Barry said that the Property Factor arranged no routine inspections of the block in which the Property is situated. Mrs Aitken said that the written statement of services made no provision for routine inspections.
34. Mr Barry said that, where repairs were undertaken by the Property Factor, he received no reports of progress or any information whatsoever.
35. Miss Grieve said that homeowners are given information on repairs matters and progress of any being undertaken.
36. Mr Barry said that he had asked for information with regard to the tendering process for the works carried out to rendering and gutters. He said that no range of options had been given to homeowners. He cited one issue about a charge for replacement of TV antennae which he said was not accurate.
37. Mrs Aitken said that no tendering process was undertaken in relation to the repair works. She said that pages 14 and 15 of the written statement of services set out that inhouse tradespersons would be used for repairs. She said that Lowther/Wheatley has its own direct labour force. It describes repairs being carried out *“directly through the Wheatley family.”* She said that the pricing structure is assessed on an annual basis and that the same charges are made no matter where the works are being carried out. She said that this was probably advantageous for works carried out in somewhere like Dalbeattie. She said that independent contractors would have to factor in such things as travelling time and costs. Mrs Aitken said that the costs are audited on an annual basis to ensure value is being achieved.
38. Mr Barry said that he was uncomfortable that a competitive tendering exercise was not undertaken for the works.

Submissions

39. Mr Barry said that he was entitled to the same level of service that all other homeowners received and that he was not receiving this in a number of areas.

40. Mr Barry said that he lives on a limited income and that the idea of debt accumulating is "frightening." He said that the fact that he was not receiving invoices caused him anxiety and that, in relation to communication, he wanted the same service which had been provided to him by DGHP.
41. Mr Barry said that he failed to get responses to some queries which he raised and was excluded from voting on the repairs matter and was denied a voice in that regard.
42. Mr Adams said that it was accepted that there had been some communication issues between the Property Factor and Mr Barry and that it is accepted that there had been some breaches of the Code. He said that Mr Barry wants the same service as everyone else but that, in fact, he was receiving this. He said that Mr Barry was looking for a unique service and that the Property Factor was not obliged to deal with him in a certain way in terms of the Code and, in particular, using email to communicate.
43. The tribunal asked Mrs Aitken and Miss Grieve if correspondence and invoices could be emailed to Mr Barry. Mrs Aitken said that she could ensure that any mass mailing to homeowners and invoices be sent to Mr Barry by email. She said that this would mean that she would have to personally deal with this but that it could be done. Miss Grieve said that she could ensure that any mail going to Mr Barry in connection with matters concerning the block of flats was emailed to him.

Consideration of the evidence

44. There were some matters which the tribunal could not determine. The issue of mail being sent to France was critical for the Applicant but was one where the tribunal could come to no view. It had no reason to doubt the Property Factor's position that its mail systems were actioning mail to be sent to Mr Barry at his home in France and it had no reason to doubt his evidence that the correspondence was not received.
45. The tribunal considered that the Property Factor's response to knowledge that Mr Barry advised it that he was not receiving mail was something which it would have to consider in determining whether or not there was failure to comply with the Code.

The Code

46. 1.1 *A property factor must provide each homeowner with a comprehensible WSS setting out, in a simple, structured way, the terms and service delivery standards of the arrangement in place between them and the homeowner. If a homeowner makes an application under section 17 of the 2011 Act to the First-tier Tribunal for a determination, the First-tier Tribunal will expect the property factor to be able to demonstrate how their actions compare with their WSS as part of their compliance with the requirements of this Code.*
47. The tribunal could come to no view. The Property Factor's position was that the written statement of services had been sent to the Applicant and his was that he had not received it. It was also possible to access this online. The tribunal made no finding that this paragraph of the Code had been breached
48. 2.1 *Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes and promoting mutual respect. It is the homeowners' responsibility to make sure the common parts of their building are maintained to a good standard. They therefore need to be consulted appropriately in decision making and have access to the information that they need to understand the operation of the property factor, what to expect and whether the property factor has met its obligations.*
49. It was accepted by the Property Factor that there had been failings in its communications with the Applicant. Fundamental to the application is Mr Barry's contention that Lowther should treat him in the same way as DGHP who had emailed him any communications including invoices. Mrs Aitken made the surprising statement that 30% of Lowther's factoring customers resided abroad. She said that none of them had issues in receiving mail. The Property Factor became aware that, for whatever reason, Mr Barry was not receiving mail from it. It seemed to the tribunal that, having this information, the Property Factor could have resolved the issue by using email. Since there were no similar issues with other homeowners, it would not have been a significant burden to ensure that this was done. The tribunal noted that the Property Factor is involved in an IT project and that one of its aims is that communications would be able to be emailed to homeowners.
50. The tribunal determined that the Property Factor had not complied with this paragraph of the Code.
51. 2.2 *Factors are required to comply with current data protection legislation when handling their client's personal data, and to ensure that this information is held and used safely and appropriately.*
52. It was noted that there were two issues with regard to data: the matter of cookies on the website and the incorrect address for the Applicant which was in one IT system of the Property Factor.

53. The tribunal considered these matters, now resolved, to have been *de minimis* and it determined that there was no failure to comply with this paragraph of the Code.
54. *2.5 A property factor must provide a homeowner with their contact details, including full postal address with post code, telephone number, contact e-mail address (if they have an e-mail address) and any other relevant mechanism for reporting issues or making enquiries. If it is part of the service agreed with homeowners, a property factor must also provide details of arrangements for dealing with out-of-hours emergencies including how a homeowner can contact out-of-hours contractors.*
55. The Applicant accepted that the Property Factor did have relevant procedures and his position was that they were not properly adhered to because of the lack of communication.
56. The tribunal considered that the Property Factor had provided the necessary contact details and had appropriate procedures in place and that there was no breach of the Code in respect of this paragraph. There were communication issues but these are dealt with in connection with breaches of other paragraphs of the Code.
57. *2.6 A property factor must have a procedure to consult with all homeowners and seek homeowners' consent, in accordance with the provisions of the deed of condition or provisions of the agreed contract service, 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 there is an agreed level of delegated authority, in writing with homeowners, to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies). This written procedure must be made available if requested by a homeowner.*
58. The issue in relation to this paragraph of the Code is that the property Factor had a procedure to consult all homeowners and to seek consent for work. In Mr Barry's case, he did not receive the communication timeously because of the wrong postage which had been franked on it and it was reasonable that, because of the Property Factor's knowledge of postage issues, he should have received it by email. In addition, it was Mr Barry's position that the Property Factor did not have an effective procedure to notify him about repairs given that the letter about the work for rendering and gutters dated 13 December 2022 was requiring a response by 23 December 2022. He said that this was against the background of there typically being issues at that time of year because of Christmas mail and, in addition, there were postal strikes in 2022.
59. The tribunal considered that failings in this regard were mainly due to communication issues but that any procedure had to be effective and giving homeowners such a short time to respond in December 2022 did not demonstrate such effectiveness. The tribunal found that the Property Factor had failed to comply with this paragraph of the Code.

60.2.7 A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in their WSS. Overall, a property factor should aim to deal with enquiries and complaints as quickly and as fully as possible, and to keep the homeowner(s) informed if they are not able to respond within the agreed timescale.

61. The Tribunal determined that the property Factor had failed to comply with this paragraph of the Code. In its written representations the Property Factor stated that “there were some delayed responses to Mr Barry that were out with our timescales for suitable response.” The representations go on to state that procedures have been revised to improve response times.

62.3.1 While transparency is important in the full range of services provided by a property factor, it is essential for building trust in financial matters. Homeowners should be confident that they know what they are being asked to pay for, how the charges were calculated and that no improper payment requests are included on any financial statements/bills. If a property factor does not charge for services, the sections on finance and debt recovery do not apply.

63. Mr Barry did not receive certain communications relating to financial matters. This was because of communication issues. The tribunal determined that there was no breach of this paragraph of the Code.

64.3.4 A property factor must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial statement showing a breakdown of charges made and a detailed description of the activities and works carried out which are charged for.

65. There was no submission by the Applicant that a detailed financial statement was not provided to homeowners. His position was that he did not receive it because of the communication issues. The tribunal found no failure to comply with this paragraph of the Code.

66.6.4 Where a property factor arranges inspections and repairs this must be done in an appropriate timescale and homeowners informed of the progress of this work, including estimated timescales for completion, unless they have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required. Where work is cancelled, homeowners should be made aware in a reasonable timescale and information given on next steps and what will happen to any money collected to fund the work.

67. In terms of the written statement of services, the Property Factor does not arrange inspections. The Applicant’s position was that he was not informed of progress of works. This is down to these issues and the tribunal determined that any lack of information was because of communication issues and determined that there had been no breach of this paragraph of the Code.

68.6.6 A property factor must have arrangements in place to ensure that a range of options on repair are considered and, where appropriate, recommending the input of professional advice. The cost of the repair or maintenance must be balanced with other factors such as likely quality and longevity and the property

factor must be able to demonstrate how and why they appointed contractors, including cases where they have decided not to carry out a competitive tendering exercise or use in-house staff. This information must be made available if requested by a homeowner.

69. Because of the terms of pages 14 and 15 of the written statement of services, there is no compunction on the Property Factor to consider a range of contractors to carry out repairs. The Property Factor was able to determine why in-house staff was used. The tribunal determined that there was no failure to comply with this paragraph of the Code.
70. *6.9 If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) must be made available if requested by a homeowner.*
71. There was no tendering or selection process. The tribunal determined that there was no breach of this paragraph of the Code.

Discussion and Disposal

72. The written and oral evidence provided by parties was straightforward and there were no issues of credibility or reliability. The tribunal accepted that the Property Factor adopted its normal procedure of mailing communications to homeowners and it accepted that Mr Barry did not get all communications.
73. It was not the Property Factor's position that it did not know that Mr Barry was having difficulties in receiving communications from it, but rather that its systems did not allow for email communication. The tribunal did not accept this to be a reasonable position and considered that, when the Property Factor had the knowledge that Mr Barry was not receiving documentation, it should have attempted an alternative system of communication, such as email. The tribunal's view was strengthened by the very straightforward approach of Mrs Aitken and Miss Grieve when they both stated that they could ensure that email be used in the future.
74. Mr Barry had been put to some inconvenience and he was frustrated and concerned by the failure to address the communication problem. The tribunal determined that it would be appropriate for an award of compensation to be made to him. It considered that £300 would be reasonable and that this should be included in a proposed property factor enforcement order.
75. It was noted that the Property Factor is undertaking an IT project with the aim for its communications to be sent to homeowners by email. In the interim, the tribunal determined that the Property Factor should provide an undertaking that all letters, invoices and other communications are sent to Mr Barry by email.
76. In terms of Section 19(2) of the 2011 Act,

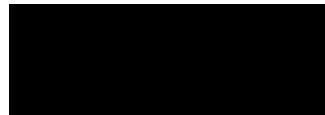
"in any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so-

- (a) Give notice of the proposal to the property factor, and
- (b) Allow the parties an opportunity to make representations to them."

A document containing the proposed property factor enforcement order is issued of even date with this Decision.

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.



**Martin J. McAllister
Legal Member
25 August 2023**