

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision: Property Factors (Scotland) Act 2011, section 19(1) and the First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016, Rule 31

Chamber Ref: PF/16/0123

The Property:

5d Gillsburn Gardens, Kilmarnock KA3 1DZ

The Parties:-

Mrs Gillian Jamieson, residing at 16 Mallicot Close, Lichfield, Staffordshire WS13 6DG (“the homeowner”)

East Ayrshire Council Housing Asset Services, Burnside Street Kilmarnock KA1 4EX (represented by their agent Ms Julie Nicholson, Solicitor, East Ayrshire Council, Governance Services – Legal, Council Headquarters, London Road, Kilmarnock KA3 7BU (“the factors”)

The tribunal (formerly the Homeowner Housing Panel (“HOHP”)):

David M Preston, Chairman; and Andrew Taylor, Surveyor Member.

Decision:

The tribunal, having made such enquiries as it sees fit for the purpose of determining whether the factor had complied with the Code of Conduct for Property Factors (“the Code of Conduct”) as required by section 14 of the Act, determined unanimously that the factor has failed to comply with the Code of Conduct for Property Factors.

Background:

1. By application dated 31 August 2016 the homeowner applied to HOHP for the determination as to whether the factor had failed to comply with the Code of Conduct and to carry out the Property Factor’s duties.
2. In particular the homeowner complained that the factor had failed to comply with sections: 2.1; 3.3; 6.9; and 7.1. The application did not contain any details of alleged failures to comply with the Property Factor’s duties.
3. By Minute of Decision dated 14 September 2016 the convener of HOHP referred application to the Homeowner Housing Committee. In terms of the Tribunal (Scotland) Act 2014 the functions of the Homeowner Housing Committee were transferred to the tribunal.

Hearing:

4. A hearing took place in North West Kilmarnock Area Centre, KA3 1NQ on 12 January 2017. Present at the hearing were: Mr Jim New, Property Factoring Officer; and Ms Karen McGourty, Housing Maintenance Manager, both on behalf of the factor who was represented by Ms Julie Nicholson, Solicitor. The homeowner had indicated in her response form dated 5 October 2016 that she did not intend to be present at the hearing and asked the tribunal to consider the complaint as submitted in the application and as presented through the factors complaints procedure.
5. In support of her application, the homeowner had lodged emails and correspondence between her and the factor, including invoices and factoring statements.
6. Similarly the factor submitted written representations supported by copy correspondence and other documents as detailed in their Inventory of Productions.
7. The tribunal was satisfied that the homeowner had voluntarily chosen to waive her rights: to attend the hearing to give any further information or explanation; or to question or cross-examine the factor; or challenge any information provided at the hearing. Accordingly the tribunal was content to proceed with the hearing on that basis as it was clear that the homeowner's intention not to attend would apply to any further hearing that might be scheduled.

Preliminary Matters:

8. Notwithstanding the terms of Rule 19, which requires that a list of documents and a list of witnesses upon which a party wishes to rely must be sent to the Tribunal no later than seven days prior to the hearing, emails dated 9, 10 and 11 January 2017 were received from the factor intimating a list of witnesses and lodging further productions.
9. With regard to the list of proposed witnesses, the tribunal noted that the specified persons were in fact representatives of the factor as opposed to witnesses and determined that they should be present at the hearing in that capacity and not as witnesses. In coming to this decision the tribunal noted that both individuals had been directly involved in the correspondence and were responsible for the actions of the factor.
10. With regard to the additional productions, Ms Nicholson referred to her email of 10 January 2017 and explained that what was marked as Production 24 comprised a table of works which had already been lodged as part of factor's Production 13 and also as one of the documents lodged by homeowner. However those copies already lodged were incomplete when printed out as part of the content at the right hand side of the page had been omitted. This new production marked 24 was a complete copy. The new Production 25 comprised a copy of an invoice from Wm Murchlands & Co dated 25 March 2016 job reference 20956835. She submitted that this explained the apparent discrepancy identified

by the homeowner in her email of 23 December 2016 where she had pointed out that her share of the cost of £903 should have been £150.50 as opposed to the £94.73 which was quoted as her share. Ms Nicholson explained that the entry on the copy invoice in respect of a lorry mounted cherry picker had wrongly been included and had been deducted from the total price before the homeowner's share was calculated. The third additional production, 26, comprised the job sheet for a job reference 2075591 dated 17 November 2015. She explained that this related to the roof repair carried out under job number 20757821 (factor's Production 1). She said that it was intended to show that the leak had emanated through the kitchen ceiling of flat 5C which might assist in identifying the location of this leak/repair.

11. The tribunal carefully considered the submissions made in respect of these late productions and was mindful of its obligations under Rule 3 to ensure that the proceedings are dealt with justly. The fact that the homeowner was not present at the hearing required the tribunal to apply particular care in coming to its decision.
12. In respect of Production 24, the tribunal determined that as the same document had already been lodged, albeit incomplete and as the homeowner had also lodged a copy of the table, again albeit incomplete, there would be no prejudice to the homeowner in permitting it to be lodged.
13. In respect of Productions 25 and 26, the tribunal was of the view that the fact that they were being lodged in a continuing effort to provide an explanation of the circumstances to the homeowner in respect of questions which had been raised by her throughout the correspondence, said more than simply what was contained within the invoice or the job sheet, and the tribunal was of the view that to permit the Productions to be lodged would not prejudice the homeowner in any way.
14. Accordingly the tribunal accepted the late lodging of Productions 24 – 26.
15. By email dated 11 January 2017, the homeowner made reference to a further complaint which she had raised with the Council. She acknowledged that this matter would not be considered today but thought that it might be relevant to the tribunal's considerations. The tribunal did not consider that such information was appropriate in any way and would require to form part of an entirely separate application and accordingly took no account of any further complaint which the homeowner might wish to make.

Evidence and Representations:

16. The tribunal accepted the representations and productions as submitted by the homeowner as a statement of her complaints and consider them in the light of the evidence provided by Mr New and Ms McGourty.

Code of Conduct: Section 2.1

17. The homeowner complained that repairs were not listed chronologically and the nature and location of the repair was not always mentioned which she found

confusing and misleading. She referred to the invoice dated 26 March 2016 which referred to 4 separate job numbers in respect of which she said that there was insufficient detail and information to enable her to identify properly work to which these jobs referred. She referred generally to the correspondence and to the explanations provided by the factor which she considered still did not provide sufficient information to her.

18. In her email of 23 December 2016, the homeowner complained about apparent inaccuracies arising from the factor's written representations and Productions. She complained that she had not received any supporting documentation as opposed to the table of information. She also highlighted inconsistencies in the information provided. In particular she said that: Ms McGourty's email of 25 May said that job number 20980564 was completed on 7/3/16 but the date on which it had been raised was 2 June 2016, which was obviously wrong being 3 months later; the total cost for job number 20956835 was stated to be £903 and that her share was said to be £94.73. Since she had a 1/6 share, her shares should be £150.50; job number 20956385 was to be charged to her in the mid-July invoice but it had not been charged at all.
19. Mr New referred to the explanations provided in his email of 13 April 2016 (factor's Production 9). He explained that the amount of detail which was able to be contained within the factoring statements was limited by the software and only permitted the level of detail provided. He explained that in an effort to clarify matters for homeowners the categorisation of "responsive repairs" and "planned repairs" had been introduced. He pointed to his letter of 9 June 2015 (factor's Production 10) which was an example of prior notification to the homeowner of planned common repairs which had been identified as being necessary which identified a probable cost to the homeowner for such work. He said that responsive repairs arose, as in the jobs under references 20757821, 20778837 and 20842372 which, he explained all related to one repair which had been necessary as a result of storm damage to the roof, resulting in water ingress to flat 5C.
20. By way of background the factor explained that the property comprised 1 flat in a block of six. The Council owned the five other flats in the block. The housing stock owned by the Council amounted to some 13,000 properties and there were 750 private homeowners for whom the Council provided factoring services.
21. Mr New explained that every action taken by the Council was allocated its own job number. Accordingly the repair which was eventually carried out on 14 December 2015 comprised a number of separate job reference numbers, including the additional production, number 26. Job number 20755591 (Production 26) related to a telephone call received by the council as an emergency situation on 17 November 2015 at 9.16pm which have resulted in a joiner attending to inspect a reported water ingress through the kitchen ceiling which could affect the electrics. The Council had acted on this report in order to maintain and preserve its own property. This particular element did not form part of a common repair and was related solely to the Council's flat, which is why it had not previously been referred to in the context of this case. This had been followed up on 18 November 2016 with job number 20757821 (factor's

Production 1) which was the investigation of the same leak on 18 November 2015 which identified the need for a tower wagon. Thereafter job number 20842372 had been raised for the completion of the repair on 14 December 2015. These separate and distinct jobs all formed part of the same repair and did not involve any duplication of work. Job references 20980564 and 20956835 dated 2 June 2016 and 27 January 2016 respectively shown on the table at factor's Production 24 related to separate and distinct necessary repairs.

22. Mr New explained that where there were a number of job numbers raised in respect of any particular issue, for example if materials required to be ordered if external contractors were used, the charge to homeowners was not imposed until the conclusion of the work which could result in delays between: required repairs being reported; materials being ordered, obtained and paid for by the Council; the work being completed; and the charge being imposed. This also resulted in the job numbers not necessarily appearing in chronological order on factoring statements.
23. Mr New emphasised that these roof repairs have been necessary because of particularly stormy weather in the area at that time.
24. Mr New acknowledged to the tribunal that the allocation of individual job numbers to every step taken in respect of necessary work can be confusing to someone unfamiliar with such procedure.
25. The factor advised that the discrepancy identified by the homeowner in respect of the dates referred to in Ms McGourty's email of 25th May (factor's Production 24) relative to job number 2090564 was a typing error. They referred to the invoice from Wm Murchlands dated 25 March 2016 (factor's Production 25) under explanation that the charge for the "lorry mounted cherry picker" which had been included by the contractor in error had been deducted from the total before division resulting in the apparent discrepancy. They also advised that due to an oversight the charge of £94.73 had been omitted from the July statement and had not, in fact been charged to the homeowner. The factor confirmed that they would not be passing this charge on to the homeowner.
26. The tribunal questioned Mr New as to whether the roof repairs carried out in November 2015 might not be regarded as the subject of storm damage insurance claims. Mr New explained that the Council's insurance involved an excess of £100 per flat and accordingly it would not be economic for a claim to be made as the individual shares per flat would not exceed that limit. He said that it would be the responsibility of the homeowner to make any claim she might wish on her own insurance policy and the Council would provide no detail, help or assistance in such a matter. He said that the council were not in the habit of drawing homeowners' attention to the possibility of insurance claims. He did however point out that where larger claims were involved the prior notification as shown in the example in his letter dated 19 April 2015 (factor's Production 10).

Code of Conduct: section 3.3

27. The homeowner complained about a lack of adequate documentation relating to the jobs itemised on the factor's statement, after requesting this. She referred to her correspondence with the factors throughout the period since she raised the issue following on the March 2016 statement.
28. In response the factors acknowledged that the information which could have been provided to the homeowner at an early stage could have been clearer. They said that they were learning from their experience, particularly in this case and that they were actively seeking ways of improving the information which was provided. For example, they explained that they had now come to an agreement with their contractors that a more detailed description of works would be included in their invoices. They also referred to their letter dated 9 June 2015 by way of an example of an explanation of necessary work which had been identified and in respect of which prior notification was provided to homeowners.

Code of Conduct: section 6.9

29. The homeowner complained that 3 repairs had been done on one roof in quick succession, so repairs were likely inadequate, or not prepared under warranty and contract are not pursued to remedy the defect of repair. Again the homeowner referred to her correspondence throughout the period since she had raised the issue following the March 2016 statement.
30. The factor referred to the explanation provided at paragraph 21 above and confirmed that the various jobs carried out in respect of the repair starting with the report on 17 November 2015 and the work being concluded on 14 December 2015 were all separate steps in the one repair which was carried out. There was neither: duplication of work; nor work which had been carried out inadequately by the contractor.
31. The factor referred to the photograph lodged at Production 22 and explained that it had been an attempt to identify the various parts of the roof which had been the subject of the job numbers referred to in the photograph to show the location of the repairs carried out.

Code of Conduct: section 7.1

32. The homeowner complained that the complaint at Stage 1 had not been acknowledged – a reply after 21 days and not 5 as stated in the factor's Complaints Procedure; complaint at Stage 2 sent on 12 June – acknowledged, but no reply otherwise, also no negotiation to extend the deadline of 20 days.
33. On behalf of the factors, Ms McGourty explained that the homeowner's complaint had been dealt with as a Stage 1 complaint in order to provide her with an opportunity to have a review carried out of any decision arrived at Stage 1 through the Stage 2 procedure. She explained that this was the normal process for all complaints handled by the Council under their Complaints Handling Procedure at Production 23.

Determination and Reasons for Decision:

Code of Conduct: Section 2

Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes.

2.1. You must not provide information which is misleading or false.

34. The tribunal recognised that the factors had not intentionally sought to mislead the homeowner or to provide her with false information. However the systems and processes used by the factor may have been familiar to them but no effort had been made to explain or describe these operations to the homeowner in sufficiently clear and detailed ways which might have avoided the ongoing difficulties. In particular, the fact that so many different job reference numbers were allocated to what really in lay terms amounted to the same "job" without any such explanation was confusing and misleading. The situation became more confusing for homeowner by the job numbers not appearing on the statements in chronological order. The tribunal considered that the fact that further information and explanations of the situation was required right up to the date of and indeed at the hearing demonstrated the extent to which there had been significant failures on the part of the factor to comply with Section 2 of the Code of Conduct.
35. The tribunal found that the efforts made by the Council to provide suitable explanations to the homeowner of the circumstances surrounding her enquiries were entirely ineffective.

Code of Conduct: Section 3

While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.

The overriding objectives of this section are:

- *Protection of homeowners' funds*
- *Clarity and transparency in all accounting procedures*
- *Ability to make a clear distinction between homeowners' funds and the property factor's funds*

- 3.3 *You must provide to the homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and the description of the activities and works carried out which are charged for. In response to reasonable requests, you must 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.*
36. The tribunal was satisfied that the factors had complied with this section of the Code of Conduct. The factors provided homeowners with regular statements providing a financial breakdown of charges. They had also supplied the homeowner with such documentation as was available to them in connection with her enquiries. However the explanations and detail relating to these activities had

been inadequately explained to her which is a matter which was covered by the factor's failings under Section 2.

Code of Conduct; Section 6

This section of the Code covers the use of both in-house staff and external contractors.

6.9 You must pursue the contractor or supplier to remedy the defects in any inadequate workforce service provided. If appropriate, you should obtain a collateral warranty from the contractor.

37. On the evidence before it, the tribunal was satisfied that the 3 separate job references in respect of the repair carried out between 18 November and 14 December 2015 were not duplications of any work but were different elements required to be carried out, some of which incurred charges which are passed on to the homeowner and others which were not.

Code of Conduct: Section 7

Section 17 of the Act allows homeowners to make an application to the homeowner housing panel for the determination of whether the property factor has failed to carry out the factoring duties, or failed to comply with the Code.

To take a complaint to the homeowner housing panel, homeowners must 1st notify their property factor in writing of the reasons why they consider that the factor has failed to carry out their duties, or failed to comply with the Code. The property factor must also have refused to resolve the homeowner's concerns, or have unreasonably delayed attempting to resolve them.

It is a requirement of Section 1 (Written statement of services) of this Code that you provide homeowners with a copy of your in-house complaints procedure and how they make an application to the homeowner housing panel.

7.1 You must have a clear written complaint resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.

38. The tribunal took account of the East Ayrshire Council Complaints Handling Procedure in which it was clear that Stage 1 involved the frontline resolution of straightforward issues which are easily resolved and require little or no investigation. Tribunal found that the complaint raised by the homeowner in this case was incapable of being resolved under this process. It is clear from the homeowner's email dated 24 May 2016 that this was also her understanding of the complaints procedure.

39. The email from Mr New dated 24 May 2016 explained that as the initial enquiry was a request for documentation as opposed to a complaint, the complaints procedure only came into effect when the homeowner contacted the customer services section on 26 April 2016. The tribunal accepted this position but found that no response had been provided to the homeowner until 24 May 2016, which was well out with the 5 day timescale outlined in the Procedure for a Stage 1 complaint.

40. The tribunal also considered Ms McGourty's explanation that the matter had been dealt with under Stage 1 to provide the homeowner with an opportunity to have the issue reviewed under Stage 2 in the event that she was not satisfied with the Stage 1 response. However the tribunal found no justification for the factor departing from the published Complaints Procedure which had clearly confused the situation for the homeowner. The practical effect of this approach had been to delay the homeowner's ability to refer the matter to the homeowner housing panel. In addition, and in any event, the factor had failed to implement properly the Complaints Handling Procedure by: failing to agree an extension to the 5 day response period with the homeowner; and obtaining the agreement of a senior manager. Ms McGourty said that she was that senior manager, but the tribunal did not accept that such a situation would be in accordance with the published procedure.

Property Factor Enforcement Order:

41. Having determined that the factor has failed to comply with the Code of Conduct, the tribunal was required to decide whether to make PFEO.
42. The tribunal was of the view that as the failings had mainly related to the effectiveness of the communication between the factor and the homeowner, there was nothing that could be done to rectify the situation apart from providing a proper explanation.
43. The tribunal was of the view that the factor had not followed the Complaints Procedure but there was nothing that the factor could, in practical terms, be ordered to do which would rectify that failing.
44. The tribunal did determine that the homeowners should be compensated for the time, effort and stress occasioned by the factor's continuing inability to provide clear information and explanation in response to her enquiries or to communicate essential information. The tribunal took account of the volume of correspondence which had resulted as well as the time and effort involved in making the application to the First Tier Tribunal and consider that the sum of £250 would be appropriate compensation for the homeowner

Right of Appeal:

In terms of section 46 of the Tribunals (Scotland) Act 2014, a homeowner or 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.

D Preston

Chairman Date: 18 January 2017