

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

Decision: Property Factors (Scotland) 2011: Section 19(1) (a)

Chamber Ref: HOHP/LM/16/0162

11 East Barns Street (“The House”)

The Parties:-

**Mrs Anne McCormick,
11 East Barns Street, Clydebank, G81 1DA
("the homeowner")**

**West Dunbartonshire Council,
Aurora House,
3 Aurora Avenue, Queens Quay,
Clydebank,
G81 1BF
("the property factor")**

**Tribunal Members:
Martin J. McAllister (Legal Member)
Ahsan Khan (Ordinary Member)**

DECISION

The property factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with section 2.5 of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors..

The decision is unanimous

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the tribunal") considered matters and determined that, in relation to the application before it, the property factor had not complied with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors (the Code). The Tribunal proposed to make a Property Factor Enforcement Order in the following terms.

Within fourteen days of service of the Property Factor Enforcement Order, the property factor will pay the sum of £200 to the homeowner as compensation

Background:

The application is dated 28th November 2016. The tribunal assumed responsibility for it on 1st December 2016. The homeowner is alleging that the property factor did not comply with section 2.5 of the Code of Conduct for Property Factors.

On 19th December 2016, a legal member of the tribunal, acting under delegated powers, referred the matter to the tribunal to determine.

The tribunal had made a determination on the application then subsequently reviewed it in terms of Section 43(2) of the Tribunals (Scotland) Act 2016. The Tribunal determined that the application should be considered afresh.

Direction.

The Tribunal issued a Direction in the following terms:

(One) directs both parties to provide written representations on details of what services, if any, the property factor provided to the homeowner in respect of management of the house or common areas associated with the house from 1st October 2012 to the date of this Direction and

(Two) directs the property factor to produce copies of all invoices, if any, rendered to the homeowner since 1st October 2012 in respect of work carried out by the property factor in respect of management of the house or common areas associated with the house.

In response to the Direction the homeowner wrote:

“Since this house was purchased including from 1.10.12 to the date of this direction the property factor did not provide any services in respect of management of the house and there is not any common areas associated with the house.”

In response to the Direction the property factor wrote:

(One) As 11 East Barns Street is an end- terraced house, the Council has provided no factoring services of any kind to the owner of number 11 after 1 October 2012. The Council as benefitted proprietor in terms of the title deeds, does arrange for common buildings insurance. However, this is in relation to a title condition and is separate and distinct from any factoring service.

(Two) There have been no invoices rendered to the homeowner since 1 October 2012 for the reasons referred to above.

The Hearing:

The property factor was represented by Mr Young, solicitor, an employee of West Dunbartonshire Council ("the Council"), who said that the matter had been dealt with by his colleague Mr Anderson but that he did not work on Thursdays and could not attend the Hearing. Mr Young said that he had been given the file the previous day. The homeowner had indicated that she did not intend to be present at the Hearing.

The tribunal had before it the application which included copies of the correspondence between the homeowner and the property factor together with the parties' responses to the Direction and their written representations.

It was noted that the matter arose out of the removal of trees at what was described by the homeowner as the boundary of property owned by the homeowner and that owned by the Council. The application was about a possible breach of Section 2.5 of the Code. In these circumstances the tribunal did not need to consider the question of whether or not the property factor should have carried out the tree removal but would need to consider the ownership of the trees to allow it to properly determine the application. The applicant's concerns surround the property factor's alleged failings in responding to her.

The facts are straightforward and have not been disputed by the property factor.

The homeowner is proprietor of an end terraced house at 11 East Barns Street, Clydebank, registered in the Land Register of Scotland under Title Number DMB71200. On 11th and 12th August 2016 a group of trees and hedges were removed by the Council. The trees were situated between 9 and 11 East Barns Street, Clydebank.

The homeowner was not happy with the work being done and the manner in which it had been carried out and wrote to the Council on 21ST August 2016. A copy of the letter was before the tribunal. The letter opened with the words "I would like to lodge a complaint regarding tree felling on my boundary hedge shared with 9 East Barns Street....." The tribunal had a copy of the Council's reply dated 24th August 2016. This letter stated that the homeowner's enquiry had been forwarded to another department of the Council for a response. The homeowner wrote again on 27th September 2016 indicating that she still awaited a reply. This letter also made reference to the Council's written statement of services under the Property Factors (Scotland) Act 2011. The Council sent a response dated 17th October 2016 indicating that the Council aimed to respond within five working days and that, if a response could not be sent within that period, the homeowner would be contacted to explain why and what the next procedure would be. On 24th October, the property factor wrote and gave reasons why the trees were removed and it indicated that it would have been better if the homeowner had been treated more courteously with regard to the matter. The letter offered apologies and invited the homeowner to contact the Council's Customer Relations department if she wanted to discuss matters further. On 3rd November 2016 the homeowner wrote to the homeowner housing panel and on 21st November 2016 the homeowner sent a pro forma to the property factor detailing her concerns and referring to the property factor's written statement of services. This document referred to the homeowners housing panel which at that time was the appropriate forum for dealing with any applications under the Act.

Written Representations

The property factor made written representations on 15th August 2017 and also 23rd May 2017. The property factor's representations can be summarised by it stating that it is not a property factor, that it does not accept the trees were on the boundary and that the homeowner requires to establish this, that the issue is a private property dispute to be dealt with in the civil courts or by the Scottish Public Services Ombudsman.

The Homeowner made written representations on 5th August 2017 and also provided copies of correspondence passing between the Council and her. The homeowner's representations can be summarised as her stating her concerns about the actions of the property factor in removing the trees and the Council failing to address her concerns.

The property factor's representations at the Hearing

Mr Young referred the tribunal to the written representations of the property factor dated 15th August 2017 and also its letter of 23rd May 2017.

Mr Young agreed with the suggestion of the tribunal that it deal with matters in the following order- Is the Council to be considered a property factor in relation to the property? If it is, was it acting as a property factor when it removed the trees? Were the trees the property of the Council as a property owner of 9 East Barns Street or were they part of common property and owned by the proprietors of numbers 9 and 11 East Barns Street?

Before matters were dealt with Mr Young asked if there could be a short adjournment to allow him to telephone Mr Anderson. This was after the tribunal had referred to Section 2 of the Act and Mr Young indicated that he was unaware of its terms and did not have a copy of the Act with him. The tribunal furnished him with a copy so that he could acquaint himself with its terms during the adjournment.

After the hearing reconvened, Mr Young submitted that the Council was not a property factor in relation to the homeowner's property. He referred the tribunal to the terms of the responses to the Direction which were lodged by both parties. The Council stated that they did not provide factoring services but that, as benefitted proprietor, did arrange common insurance in terms of the title deeds. The homeowner was clear that no factoring services were provided. Mr Young was referred to Section 2 of the Act which defines the meaning of "property factor." Section 2(d) states that a property factor includes

"a local authority or housing association which manages or maintains land which is available for use by-

- (i) the owners of any two or more adjoining or neighbouring residential properties, or*
- (ii) the local authority or housing association and the owners of any one or more such properties,*
but only where the owners of those properties are required by the terms of the title deeds relating to the properties to pay for the cost of the management or maintenance of that land."

In response to a question of why the homeowner had been sent a written statement of services Mr Young said that he had asked that of Mr Anderson in his telephone call to him and he had said that the homeowner had asked for it and it had been sent to her. Mr Young made no submissions on the fact that the homeowner had referred to the homeowner housing panel in the correspondence with the Council and the fact that the correspondence before the tribunal did not demonstrate that the Council had challenged this.

Mr Young said that the Council, in cutting the trees down, was acting as the property owner of 9 East Barns Street. He said that the burden of proving that the trees were common lay with the homeowner and that she had produced no evidence to support her contention. Mr Young was referred to the Title Sheet of the property which stated that included in "Common Parts" were "any mutual division walls, gable, hedges or fences....." He was also referred to the terms of the Council's letter to the homeowner dated 24th August which states "I am writing to you regarding your recent letter about the removal of trees and hedges from the boundary between yourself and 9 East Barns Street, Clydebank."

In summary Mr Young said that the Council was not acting as a property factor when the trees were cut down and that the Council thought that the trees were on its property when it made the decision to cut them down. Mr Young did not, in any way address the homeowner's contention that the property factor had not complied with section 2.5 of the Code.

Mr Young again apologised for Mr Anderson's absence. He indicated that Mr Anderson knew more about the case. The tribunal advised that, had Mr Anderson informed the tribunal of his working arrangements, it would have been possible to schedule the Hearing for one of his working days.

Discussion and Determination

The members of the tribunal considered that it first had to consider whether or not the Council was acting as a property factor or as an owner of the adjoining property.

On one view the matter was straightforward. Both parties in response to the Direction had stated that factoring services were not provided. If the tribunal accepted this position the application of the homeowner could proceed no further. The tribunal considered that it did, however, need to consider the terms of the Act and, in particular Section 2 (d) (ii). The Council accepted that it arranged insurance for 11 East Barns Street. The Act states that a local authority was a property factor if it manages or maintains land where properties are obliged, in terms of the title deeds to pay for the cost of management or maintenance of land. The tribunal considered that it required to consider if the Council arranging insurance comprised "management or maintenance of land."

Schedule 1 of The Interpretation and Legislative Reform (Scotland) Act 2010 states: "*land* includes buildings and other structures, land covered with water, and any right or interest in or over land." The tribunal determined that the Council is a property factor in relation to the homeowner's property. The tribunal considered that arranging

insurance for a building amounted to management. The Council had also provided the homeowner with a written statement of services.

Since the tribunal found that the Council is a property factor in terms of the act it could then consider whether or not it had complied with Section 2.5 of the Code. This relates to the property factor's obligation to communicate appropriately with the homeowner. Whether or not the trees were common was to some extent irrelevant to the tribunal's consideration of matters raised by the applicant in her application but the tribunal did find that the trees were common. Mr Young's submission was that the homeowner had not proved them to be so but the title is clear on the matter and the Council, in its correspondence with the homeowner referred to the trees being on the boundary. The Council's submission that it was acting as a property owner and not as a property factor was examined by the tribunal. This was, to some extent, irrelevant to the application but the tribunal considered that, on balance, the Council was acting as a property factor. It did not consider that the property factor could "dip in and out" of when it was and was not acting as a property factor. If it considered that if it was not acting as a property factor then it could have made an approach to the homeowner, explained what it intended to do and reinforced the fact that it was not acting as a property factor. It had provided the homeowner with a written statement of services. The tribunal recognised that local authorities had some difficulties in matters such as these because often they had a number of roles such as property factor, property owner and statutory provider of services. That is why it is important for local authorities to be very clear about what role it is carrying out when performing functions. The Council could have issued a restricted written statement of services setting out the limitations of the factoring services it intended to provide.

The tribunal finds that the Council is the homeowner's property factor. The Council has to comply with the Code.

Section 2.5 of the Code states:

"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."

The Council's written statement of services sets out how the Council will deal with a complaint including the name of the officer dealing with it and provide a homeowner with a full response within 20 working days.

The homeowner made her complaint on 21st August 2016 and the Council's final letter in the matter was on 24th October. This did not comply with the timetable set out in the written statement of services and it appeared to the tribunal that the Council did not recognise the homeowner's letter of 21st August 2016 as a complaint. The Council sent a letter of acknowledgement on 24th August 2016 stating that the matter had been passed to another department but the homeowner, having received no letter from the Council, had to write again on 27th September 2017. The Council did not identify the officer dealing with the matter.

The tribunal noted the concerns of the homeowner regarding the removal of the trees but she had restricted her application to possible breach of Section 2.5 of the Code and the tribunal had to restrict its consideration to that.

The tribunal considered that there had been a breach of Section 2.5 of the Code because the Council had not dealt with the homeowner appropriately when she had made her complaint. The Tribunal made no determination on the merits of the complaint made by the homeowner in relation to the trees. It determined that it would be appropriate for the homeowner to be compensated and it proposed that a property factor enforcement order be made requiring the property factor to pay compensation of £200 to the homeowner.

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

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
15th November 2017

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

Proposed Property Factor Enforcement Order ("PFEO"): Property Factors (Scotland) Act 2011 Section 19(2)

Chamber Ref: HOHP/LM/16/0162

11 East Barns Street ("The House")

The Parties:-

**Mrs Anne McCormick,
11 East Barns Street, Clydebank, G81 1DA
("the homeowner")**

**West Dunbartonshire Council,
Aurora House,
3 Aurora Avenue, Queens Quay,
Clydebank,
G81 1BF
("the property factor")**

**Tribunal Members:
Martin J. McAllister (Legal Member)
Ahsan Khan (Ordinary Member)**

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

The property factor is required to pay compensation of £200 to the homeowner and this requires to be paid within twenty one days of service on the property factor of this proposed property factor enforcement order.

Section 19 of the 2011 Act provides as follows:

"(2) 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 it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2) (a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2) (b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Under Section 24(1) of the Property Factors (Scotland) Act 2011, a person who, without reasonable excuse, fails to comply with a property factor enforcement order commits an offence.

Martin J. McAllister, Legal member
15th November 2017