

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Chamber Ref: FTS/HPC/PF/18/3186

153 Garthland Road, Dennistoun, Glasgow, G31 2SQ (“The Property”)

The Parties:-

**Mrs Fiona Nixon,
153 Garthland Road, Dennistoun, Glasgow, G31 2SQ
 (“the Homeowner”)**

**Hacking and Paterson Management Services,
1 Newton Terrace, Glasgow, G3 7PL
 (“the Property Factor”)**

**Tribunal Members:
Martin J. McAllister, Solicitor, (Legal Member)
Linda Robertson, (Ordinary Member)
(the “tribunal”)**

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as “the Act”; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as “the Code”; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as “the Rules” and the First-tier Tribunal for Scotland (Housing and Property Chamber) is referred to as “the Tribunal” and Hacking and Paterson Management Services is referred to as “Hacking and Paterson.”

Decision

It was determined that, in respect of the application, the Property Factor had complied with Section 2.4 of the Code.

Background

The application made by the Homeowner had been received by the Tribunal on 27TH November 2018.

The application contended that the property factor had not complied with the property factor's duties and that it had not complied with sections 2.4 of the Code.

On 27th December 2018 a legal member of the Tribunal, acting under delegated powers, referred the application to the tribunal for determination.

On 11th December 2018 the Property Factor had written to the homeowner in response to matters of concern raised by her. A copy of this letter was sent to the Tribunal.

Hearing

A Hearing was held on 18th February 2019 in the Glasgow Tribunals Centre. Mrs Fiona Nixon was present and gave evidence. She was supported by her husband Tom Nixon.

Mr Gordon Buchanan of the Property Factor was present and gave evidence.

Preliminary Matters

Mrs Nixon confirmed that her application was in respect of Section 2.4 of the Code and was limited to that although there were other matters of concern she had which were not part of the application before the Tribunal although they were referred to in her written representations.

Mr Buchanan said that the position of the Property Factor is that it managed the property and the others in the tenement by custom and practice. He said that his position was that the property factor had complied with Section 2.4 of the Code.

Matters of Agreement

Parties agreed that the Property is one of eight flats in a tenement at 153 Garthland Road, Dennistoun which was purchased by the Homeowner and her husband in 2012. The Property Factor has carried out factoring duties in the tenement for many years.

Homeowners' Position

Mrs Nixon agreed that the issue she had was focused. She said that the Property Factor had visited the tenement and had instructed a roofing contractor to do work which was not necessary and which had not been authorised by the proprietors of the flats in the building. She said that the total cost amounted to £200.36 and that the cost attributable to her property was £26.05.

Written Representations

The Homeowner and Property Factor submitted written representations which were respectively received by the Tribunal on 25th and 29th January 2019.

Productions

The Homeowner had lodged productions with her application and written representations and The Property Factor had lodged productions with its written representations.

The Alleged Failure of the Property Factor

The homeowner's position is that the property factor did not comply with Section 2.4 of the Code:

Section 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).

The tribunal makes the following findings in fact:

1. The Homeowner, with her husband, is the owner of the second floor tenement flat at 153 Garthland Drive, Glasgow, G31 2SQ ("the Property").
2. The Property Factor instructed Hugh Scott, roofing contractor, to investigate a leak at the rooflight situated in the roof of the tenement and to effect a repair if minor.
3. The invoice from Hugh Scott was for the sum of £200.36.
4. The share of the repair due by the Homeowner was £26.05.
5. The Property Factor's written statement of services contains the following as described as core factoring services:

"Arranging and administering maintenance of common property by appointing contractors and service suppliers "and

"Attending the property periodically (these visits can be arranged to suit homeowners)."
6. The repair to the rooflight and roof amounting to a total cost of £200.36 was part of the core services provided by the property factor.

7. No additional charges or fees in addition to the core service were imposed by the Property Factor.

Evidence

Ms Nixon said that the proprietors of the building hold regular close meetings and that there had been three such meetings in the previous year. She said that the purpose of such meetings was to discuss matters of concern which they had with the factoring service and to make arrangements to move the factoring to another company.

Mr Buchanan said that either he or one of his colleagues were in touch with proprietors of the tenement from time to time. He agreed with Mrs Nixon that this was not as a group. Mr Buchanan said that a meeting of proprietors had been arranged for a date in December 2018 but that it had been cancelled because Mr Joshua Alexander of Hacking and Paterson had left. He said that no arrangements had been put in place for another meeting but said that he would be open to any such meeting being held in the future. Mrs Nixon said that no attempt had been made by the Property Factor to set up another meeting.

Mr Buchanan said that an email group with the proprietors had been established but that Mrs Nixon did not participate. Mrs Nixon said that this was because she did not agree with the unstructured nature of the group. Mrs Nixon said that the Property Factor had sent a letter on 10th April 2018 which stated that the tenement building had been visited by Mr Alexander of Hacking and Paterson and that this letter made no reference to a repair being required.

She said that a month later a letter with an estimate for a repair at "the cupola" was sent to homeowners and that this estimate was dated 30th April 2018. She said that, sometime after, homeowners were sent a letter with an accompanying invoice for a repair to the roof at "the cupola" which was for work separate to that referred to in the earlier invoice which had been sent to her. and that the date of the invoice was 30th April 2018. Mrs Nixon said that the Property Factor should not have gone ahead with the repair without authority from the proprietors and that it was wrong that the invoice for the repair was sent out after the estimate which had been dated the same day. She said that the Property Factor had not properly communicated with her.

Mr Buchanan said that the Property Factor makes periodic visits of the properties it manages. In the case of 153 Garthland Road he said that he and a colleague called Josh (Mr Joshua Alexander) had visited to investigate a report of inadequate cleaning of the common areas which proved to be unfounded. He said that when he was there he walked to the top of the tenement and noticed a puddle of water on the landing floor below where there was a rooflight or roof window above which allowed light into the close. He said that he suspected water ingress and asked Hugh Scott, contractor to investigate. He said that in circumstances such as this the instruction to the contractor would be to investigate and to repair if minor and advise if major. Mr Buchanan said that this was a more economic way of dealing with such matters. He said that the contractor had carried out the work on 25th April.

He said that the contractor had carried out a temporary repair which was described in the invoice as “clean out vegetation from behind cupola. Dry area then coat with Evercyl.” Mr Buchanan conceded that there was no cupola and said that the contractor had not described it correctly and that it should have been a rooflight or roof window. Mr Buchanan said that the contractor had submitted an estimate for a more extensive repair of the area in question. Mr Buchanan said that the Property Factor had received the invoice from the contractor on 4th May 2018. When asked why both the invoice and the estimate dated 30th April had not been dealt with at the same time Mr Buchanan said “it had been lost in the wash.”

Mr Buchanan denied that any visits he or members of his staff made to the Property had been done in secret and he said that properties are visited on a regular basis.

Mrs Nixon indicated that the proprietors in the tenement have regular meetings about problems they were having with factoring and that they were trying to change property factor. She said that there was not yet a majority for such a change but was hopeful that one would be achieved.

Mrs Nixon said that she was not happy with the Property Factor visiting the Property on what she described as “touting visits” for repairs. Mr Buchanan did not accept that this was the nature of any visits made to properties managed by his company. He said that it was important that there is flexibility when dealing with management issues such as in emergency situations.

Mrs Nixon maintained that any repairs being carried out by the Property Factor should have specific authority from homeowners and that this did not occur on this occasion. She said that it would have been different if a proprietor had given authority.

Mrs Nixon said that the work done on the rooflight was outwith the Property factor’s Core Services.

In response to questioning by Mrs Nixon, Mr Buchanan said that Hacking and Paterson got no benefit from instructing a contractor and received no payment or commission.

The members of the tribunal were directed to the Property Factor’s productions number 3, 4 and 5. These were all letters written by the Property Factor to the Homeowner and other proprietors of the tenement.

Production 3 was a letter to homeowners from Mr Joshua Alexander of Hacking and Paterson which stated that he had visited the tenement at 153 Garthland Drive and inviting proprietors to contact him if there were any matters they wanted to discuss.

Production 4 was a letter to homeowners from Mr Alexander stating that “further to a recent property visit... it was noted that the cupola was leaking during a period of rainfall.” The letter went on to state that the Property Factor had instructed Hugh Scott Builders and Slaters to attend to investigate the issue and the letter enclosed an estimate for the contractor dated 30th April 2018 for a total sum of £2,215 plus VAT.

Production 5 was a letter to homeowners from Mr Alexander dated 5th June 2018 which stated that, during the inspection of the property, the contractor had carried out a repair which he had been unaware of when he had written the previous letter. The letter went on to state that, because of the temporary repair, the “major repairs previously suggested are less necessary at this juncture.....” The letter enclosed a copy of the invoice for the temporary repair and homeowners were advised that the

apportioned share of the cost would be £25.04. Mr Buchanan also referred the tribunal to production number 1 which consisted of a number of copy factoring statements showing a number of items of maintenance which had been instructed by the Property Factor. Mr Buchanan said that these were examples of items of work being carried out without specific authority of the homeowners and in terms of the written terms and conditions. He referred the tribunal to the written statement of services which states that the following are part of the core services provided to homeowners: “arranging and administering maintenance of common property by appointing contractors and service suppliers and attending the property periodically.” Mr Buchanan said that this is what happened in this situation with the repair to deal with water ingress at the rooflight. The tribunal noted the terms of Mr Buchanan’s letter to Mrs Nixon dated 22nd October 2018 and which had been submitted by her with the application. This letter detailed twelve items of expenditure undertaken by the Property Factor on behalf of homeowners from 2014 to 2018 and which did not have their specific authority.

Written Representations:

Property Factor:

The letter of representation of the Property Factor dated 28th January 2018 referred to the Property Factor’s Terms of Service and Delivery Standards. The letter states that the Property Factor has a procedure for consulting with homeowners for approval before providing additional services and that no such request for additional services had been made by the homeowners. The letter states that the Property Factor cannot therefore be guilty of breaching that part of Section 2.4 of the Code.

The letter states that, since no additional services had been provided and that no additional charges had been made and that it was not needed for there to be any level of delegated authority requiring to be agreed. The representations said that Section 2 of The Code does not relate to the instruction of contractors to carry out repairs and maintenance and that this is regulated by Section 6 of the Code.

The letter of representation states that the Property Factor considers that the actions of the Property Factor were consistent with its duties under its Terms of Service and Delivery Standards and also with good property factoring practices.

Homeowner:

The Homeowner submitted productions which alluded to the Property Factor not knowing the difference between common and mutual repairs.

The representations made by the Homeowner state that there is no evidence that there is an agreement in place for works to be instructed by the Property Factor and that the homeowners’ opposition to that is well documented. The representations also state that the assertion that the factoring is being carried out by custom and practice is far-fetched and that the historical explanation of the Property being managed on this basis was not acceptable.

Submissions:

Mrs Nixon said that the repair in question should have been agreed with the homeowners before it was carried out. She said that she did not accept that Hacking and Paterson should be managing the tenement because it could not produce any information with regard to its appointment by proprietors. She said that she had been told that the Property Factor was acting on the basis of custom and practice and that the original appointment would have been by unspecified persons sometime after

1963. Mrs Nixon said that Hacking and Paterson need to write to homeowners with a suggested level of authority. She said that it was difficult to work a household budget when it was not known what would be contained in the next Hacking and Paterson bill especially in relation to invisible repairs which she didn't see.

Mr Buchanan said that he considered that the Property Factor had behaved in the best practice of managing properties. It had visited a property, realised that there was an issue, had it investigated and resolved.

Mr Buchanan invited the tribunal to examine the terms of Section 2.4 of the Code and consider whether they did, in fact, apply to the set of circumstances which were the subject matter of the application. He said that the inspection and repair had been part of the core services provided to homeowners. No additional charges or fees were charged and no additional services were provided. He submitted that the Property Factor had not breached Section 2.4 of the Code.

Reasons for the Decision

The tribunal considered the oral and written evidence in relation to the application.

It noted the terms of the application which were restricted to possible breach of Section 2.4 of the Code. This was confirmed by Mrs Nixon at the outset of the Hearing. Mrs Nixon was clear that the issue to be considered by the tribunal involved the repair/ suggested repair to the rooflight/ roof window of the tenement which it was accepted had wrongly being described as a cupola.

The tribunal accepted that the following series of events occurred:

1. Mr Buchanan visited the tenement and noticed possible water ingress. Although Mrs Nixon said that she had been unaware of such a visit until a letter was received from Mr Alexander, it seemed to the tribunal entirely credible that such a visit had occurred.
2. Mr Alexander wrote to homeowners advising that a visit had taken place. The letter was dated 10th April 2018 and made no reference to possible water ingress.
3. Mr Alexander wrote to homeowners on 4th May 2018 and this letter referred to repairs being required to a leaking cupola. An estimate from Hugh Scott, contractor accompanied the letter and was for a total sum of £1,215 excluding VAT.
4. Mr Alexander wrote to homeowners on 5th June 2018 and this stated that Hacking and Paterson had been unaware that a repair had been carried out and that Mr Alexander did not know this when he had written the letter of 4th May 2018. The letter went on to state that, in view of the repair which had been carried out, the major repairs were less necessary.

The tribunal considered the representations and submissions from the Property Factor in relation to Section 2.4 of the Code.

Section 2.4 states:

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).

The tribunal considered that the terms of this section of the Code require to be analysed.

Written approval must be obtained before providing work or services which will incur charges or fees in addition to those relating to the core service. The tribunal heard no evidence that additional charges or fees were made.

The core service provided by the Property Factor includes “arranging and administering maintenance of common property by appointing contractors and service suppliers” and “attending the property periodically.”

Mr Alexander and Mr Buchanan had attended the property, identified an issue with common property and a contractor had been appointed to resolve the matter.

There was no evidence before the tribunal with regard to any limit of delegated authority but it was persuaded that there was evidence before it that repairs such as the one complained of had previously been carried out by the Property Factor. The tribunal noted the productions lodged by the Property Factor in this regard and also the terms of its letter to the Homeowner dated 22nd October 2018.

The tribunal found that the Property Factor had complied with Section 2.4 of the Code in respect of the matters complained of by the Homeowner.

NOTE

Although it was held that the Homeowner’s application was unsuccessful, the tribunal did have sympathy at the way she had been treated by the Property Factor. It accepted that the Property Factor had behaved responsibly in identifying that an issue had arisen which merited investigation and possible repair but the way it had communicated matters to homeowners was poor. The Homeowner had received a letter stating that Mr Alexander had visited the Property but this made no reference to a repair possibly being required. It would have been reasonable to do so. The next letter received by the Homeowner referred to a repair being required which would have meant a significant liability for her. The estimate which accompanied that letter was the same date as the invoice which accompanied the third letter and it seems a reasonable assumption that this was received on the same day. The third letter was dated one month after the second letter and stated that the repair suggested in the second letter was no longer necessary because the Property Factor had been unaware of the minor repair which the contractor had carried out. The tribunal did not consider that Mr Buchanan’s explanation was sufficient. The Property Factor should have had procedures in place to ensure that full timeous information is provided to homeowners. Clearly the Property Factor had realised that there were matters of concern because a meeting of homeowners had been arranged and this was cancelled because Mr Alexander left the employment of Hacking and Paterson. The tribunal was surprised at the position outlined by Mr Buchanan which was that no replacement meeting had been arranged or was in contemplation.

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.

M McAllister

Martin J. McAllister,
Legal Member of the
First-tier Tribunal for Scotland

4th March 2019