

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) issued under Section 19(1)(a) of the Property Factors (Scotland) Act 2011

Case reference: FTS/HPC/PF/18/3226

Re:- Flat 2/2, 26 Battlefield Avenue, Glasgow G42 9RJ

The Parties:-

Ms Sarah Hepworth, residing at Flat 2/2, 26 Battlefield Avenue, Glasgow G42 9RJ ('the homeowner');

and

W M Cumming, Turner & Watt, Property Managers, 40 Carlton Place, Glasgow G5 9ST ('the respondent')

Tribunal Members:

Richard Mill (legal member) and Elaine Munroe (ordinary member)

Decision

The Tribunal unanimously determined that the respondent has breached Sections 2.5 and 4.8 of the Code of Conduct for Property Factors.

Background

By way of application dated 26 November 2018, the homeowner complains about the respondent having breached the Code of Conduct for Property Factors ("the Code"). No complaint is raised against the respondent's failure to carry out their duties. The homeowner's complaints about the Code are in respect of Sections 2.2, 2.5 and 4.8.

Documentation submitted into evidence

The written application by the homeowner which sets out the relevant complaints was accompanied by correspondence exchanged between the parties in relation to

the homeowner's complaints. The homeowner's formal intimation to the respondent for the purposes of Section 17(3) of the Act was also provided.

Following Notices of Referral and Hearing being issued to the parties on 18 January 2019, the respondent lodged written representations together with a number of additional documents under cover of 31 January 2019.

Hearing

A Hearing was held in the Glasgow Tribunals Centre, Room 111, 20 York Street, Glasgow G2 8GT at 10.00 am on 7 March 2019.

The homeowner attended personally and presented her own case.

The respondent had indicated by way of Notice dated 31 January 2019 that they would not attend the hearing.

The homeowner confirmed that she received all the relevant documentation submitted by the respondent. The Tribunal invited her to state her case orally. The Tribunal asked additional questions for clarification. The Tribunal clarified the homeowner's complaints. The Tribunal then explored the Sections of the Code which were put at issue in the application. The Tribunal then explored other more broad issues relating to the management of the homeowner's property by the respondent. The homeowner was afforded the opportunity of making final concluding submissions and clarifying the remedy she sought. The Tribunal reserved their decision.

Homeowner's Complaints

Enquiry regarding gutter cleaning

The homeowner states that she enquired to the respondent by phone in January 2016 and thereafter in an email of 12 March 2016 as to when the gutters of the property were last cleaned. She was not concerned about any particular state of disrepair, but had an interest in this aspect of the property's maintenance. She states that enquiry was not answered for over 16 months and then a letter from the respondent's office dated 20 June 2017 (but not received until July 2017 as a copy with a letter dated 21 July 2017) which stated that there was no record of the gutters having been cleaned for 4 years. This letter advised the homeowner that the property would be checked "in the next couple of days" to see if the gutters required to be cleaned. No such check was undertaken.

The homeowner states that she then emailed again two months later for an update on 4 September 2017 to ask when the inspection had taken place and what the conclusion was. No answer was received.

Following the passing of a further number of months the homeowner was advised, on 2 February 2018 (in answer to a telephone call of 29 January 2018 and follow-up email) that the property had been checked "this week" and that a contractor would be checking gutters in connection with other work. This was contradictory and there

was no clarity whatsoever regarding the checking of the gutters or any work required as a consequence.

The homeowner maintains that no further communications have been received and the only clarification is contained within the respondent's representations of 31 January 2019 when it is stated that "We have enclosed for your perusal copies of photographs taken of 26 and 24 Battlefield Avenue no 30 January 2018. As you can see these photographs were taken from street level and can see no sign of vegetation hanging over the gutters". This was over a year ago. There is no indication that a proper inspection of the gutters has taken place. This means that they have not been inspected for some 7 years.

Enquiry and complaint regarding delay in progressing work related to water ingress

The homeowner identified water ingress into her property in early 2016. In particular she had noted damp within her bathroom. Her property is on the second floor. She was aware that there had been problems in the upper floor and the lower floor. There is an internal downpipe which passes through all of the flats. A visit by a plumbing contractor on 22 February 2016 was inconclusive and the homeowner was informed that a report would be sent to the respondent's office with suggestions as to what to do next. The homeowner emailed the respondent on 12 March 2016 to request an update. No response was received and the homeowner sent a further email on 29 March 2016. On 1 April 2016 the homeowner received an email advising that the plumbers had now been put in contact with the owner of the property above the homeowner's property. The applicant states that this response was only after her partner had hand delivered a paper copy of her two emails sent in March to the office of the respondent.

A written letter was subsequently issued to the homeowner dated 20 June 2017 (well over 1 year) in which it was acknowledged that in error the respondent had not passed on information quicker to the plumbing contractor. At that time there was an indication that as a gesture of goodwill the respondent was prepared to deduct "a couple of Management Fees" from her common charges. The respondent also asserts in their written submissions of 31 January 2019 that in the middle of May 2018 they suffered a virus attack on their computer systems and they lost all relevant information regarding the property repairs, including at 26 Battlefield Avenue, and accordingly had no further information on the matter. The respondent has reported within their written representations of 31 January 2019 that Amey roofing visited the property on 22 and 23 November 2017 to rectify the water ingress. A copy of the relevant accounts and photographs received from them were produced. Amey roofing are also said to have visited the property on 25 October 2018 to clear vegetation around the chimney. Again relevant copies of the accounts and photographs were produced.

The homeowner accepts that the water ingress difficulties have been resolved. The complaint is specifically in relation to the delay between 22 February 2016 and 1 April 2016.

Failure to provide clarification around invoicing

The homeowner reports that since early 2016 she has been concerned about the respondent's actions. This has led her to withhold her management fees. She has however paid all other relevant common charges, being third party invoices and insurance payments and the like. She has calculated that to date she has retained the sum of approximately £290. Management fees for the property are low. In early 2016 they were £28 per quarter plus VAT and are now £31 per quarter plus VAT. Despite numerous queries having been raised with the respondent, the homeowner has not received a clear indication as to all of the charges which have appeared on her account. She has persistently asked for clarification and this has not been forthcoming. As at November 2018 it was alleged that her account was in arrears to the extent of £661.75. The most recent quarterly invoice produced is that which is dated 28 November 2018 which shows an alleged arrears of £554.35 and a total due of £661.75, but the typewritten account has then been amended by hand stipulating that the total correct amount due is £357.80. The written submissions from the respondent dated 31 January 2019 state that the homeowner's balance as at 28 November 2018 is £357.80. There is no clear explanation nor accounting as to how that figure has been produced. The respondent are aware of the homeowner's challenge to the historical arrears and has done nothing to explain what this is comprised of.

The issuing of a letter threatening the homeowner with Court action in respect of arrears

This issue follows on from the former complaint. The appellant states having made repeated requests for information regarding the items which the respondent believed were outstanding. She subsequently received a letter dated 1 November 2018 advising that her account was in arrears to the extent of £661.75 and advised that in the event of non-payment a Court action would be initiated against her.

In written representations of 31 January 2019 the respondent apologises for the letter of 1 November 2018 threatening Court action. Reference is made to arrears letters being dealt with by a different department in the office and the letter had been sent in error.

Findings in Fact

1. The homeowner is the heritable proprietor of Flat 2/2, 26 Battlefield Avenue, Glasgow G42 9RJ ("the property").
2. There are eight flats within 26 Battlefield Avenue, Glasgow. They are equally responsible in common with one another for the upkeep of the property and common repairs. The homeowners are responsible for a $\frac{1}{8}$ th share which equates to a 12.5 % share.
3. The respondent is a registered property factor. The respondent is the property factor for 26 Battlefield Avenue, Glasgow. An undated Written Statement of Services has been provided to the homeowner by the respondent. The respondent is under an obligation to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

4. The homeowner commenced enquiries with the respondent in January 2016 as to the maintenance of the gutters of the property. More than 3 years has elapsed and there has continued to be a lack of clarification from the respondent about any professional inspection which has been undertaken. The respondent has persistently delayed in providing a clear response to the homeowner about this issue.
5. The homeowner has expressed concerns to the respondent since January 2016 about the detail of her account and in particular the assertion that her account is in arrears. The respondent has persistently delayed in providing clear information to the homeowner about the charges which are alleged to have created the arrears. There continues to be a lack of clarity in this regard. The extent to which the homeowner is said to be in arrears has differed from time to time. The respondent has failed over a lengthy period of time to provide any detail as to the justification for the assertion that the homeowner's account is in arrears.
6. Following reports of water ingress to the homeowner's property the respondent failed over from 22 February 2016 to 1 April 2016 to provide necessary information to a plumber to advance their enquiries.
7. Despite knowing that the homeowner was challenging the arrears of her account, the respondent issued a final red demand letter dated 1 November 2018 indicating that Court action would be commenced on 9 November 2018.
8. The respondent accepts that they have failed in a number of respects. An apology has been tendered to the homeowner. She has also had two management charges cancelled which total approximately £60 though there is no clear specification of this within any invoices produced to the homeowner by the respondent. Invoicing produced by the respondent is inaccurate and lacks transparency.

Reasons for Decision

The Tribunal has had regard to all of the documentary and oral evidence placed before it. The Tribunal is satisfied that it had sufficient evidence upon which to reach a fair determination of the reference.

The Tribunal had regard to the overriding objective to deal with the proceedings in a manner which was appropriate to the complexity of the issues and the resources of the parties.

The Tribunal considered the Sections of the Code put at issue:-

- i. Section 2.2

"You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action)."

The homeowner confirmed in the hearing that other than receiving the letter threatening legal action the respondent's behaviour had not otherwise been abusive, intimidating or threatening. The Tribunal found that the threat of legal action itself, though whilst acknowledged to be unfounded, was not a breach of Section 2.2 of the Code in the circumstances.

ii. Section 2.5

"You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response time should be confirmed in the written statement."

The Tribunal had little difficulty in finding that the respondent has breached Section 2.5. Indeed their written representations concede this. This is with particular reference to their failure over the period 22 February 2016 to 1 April 2016 to provide the necessary information to the plumber to enable works to be undertaken to resolve the water ingress to the homeowner's and other adjoining properties. This failure arguably is not caught by the terms of Section 2.5 of the Code (though may be a breach of other elements of the Code), but the Tribunal had little difficulty in concluding that the respondent has repeatedly failed to respond timeously to the homeowner's enquiries and complaints. In particular the respondent has failed in the following respects:-

- To provide clear information to the homeowner about the inspection of the gutters.
- To provide information to the homeowner in respect of her invoices and alleged arrears.

iii. Section 4.8

"You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention."

The respondent has been well aware of the homeowner's concerns about the terms of her account. Instead of seeking to resolve the issue swiftly a red demand letter was issued advising that as a consequence of her alleged arrears a Court action would be commenced. This was unacceptable and irresponsible in the circumstances. Whilst the Tribunal acknowledges that the respondent has apologised, it is quite clear that the terms of the letter received by the homeowner were particularly upsetting and distressing. The Tribunal is sceptical about the explanations made by the respondent to the effect that the arrears

letters were dealt with by different departments. The respondent's organisation is not a large one.

Proposed Property Factor Enforcement Order

Section 19(2)(a) of the Property Factors (Scotland) Act 2011 Act requires the committee to give notice of any proposed Property Factor Enforcement Order to the property factor and allow parties an opportunity to make representations to the committee.

The Tribunal proposes to make the following Order:-

"Within 14 days of this Decision being issued to the parties, the respondent must:-

1. Make payment to the homeowner the sum of £100 in recognition of the anxiety, stress and inconvenience caused to her as a result of the respondent's failings.
2. Cancel all outstanding charges on the homeowner's account to bring the balance to zero as at the current date and thereafter ensure all future invoices issued to the homeowner contains full detail of all charges made against her account.

The respondent is required to produce vouched evidence to the Tribunal of having complied with items 1 and 2 above within 21 days"

The intimation of this Decision to the parties should be taken as Notice for the purposes of Section 19(2)(a) of the 2011 Act and the parties are hereby given Notice that should they wish to make any written representations in relation to the Tribunal's proposed Order that they must be lodged with the Housing Property Chamber within 14 days of the date of this Decision. If no representations are received then the Tribunal will proceed to make the Order proposed. If representations are received they will be considered by the Tribunal prior to the making of any Order.

The property factor should note that failure without reasonable excuse to comply with the Property Factor Enforcement Order is a criminal offence in terms of Section 24 of the 2011 Act. Additionally, Scottish Ministers can take any failure into account in respect of the future registration of the respondent on the Register of Property Factors.

Observations

The Tribunal was unimpressed by the approach taken by the respondent in connection with the application by the homeowner. Little attention appears to have been paid to the genuine complaints raised and the written representations lodged by the respondent failed to focus the relevant issues in dispute. The Tribunal concludes that the respondent's practices fall far short of what is expected from a competent professional property factor. Whilst concessions have been made by the respondent and an apology tendered to the homeowner, the Tribunal has little

confidence that the respondent has learnt anything from this experience and that further problems will not develop in the future. It is perhaps regrettable that the respondent chose not to participate fully in the process and absent themselves from the hearing.

The Tribunal was of the view that there were two additional relevant failures of the respondent which the homeowner had not complained of and had not given notice and intimation of to the respondent. In the circumstances, the Tribunal could not consider these additional concerns to the extent of making a relevant Property Factor Enforcement Order regarding them. Those other two issues are as follows:-

- i. The respondent has clearly failed to comply with Section 3 of the Code of Conduct in respect of their financial obligations. The introduction to this Section stipulates that transparency is important in the full range of a property factor's 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. In particular and furthermore, Section 3.3 of the Code requires property factors to provide to homeowners in writing at least once a year a detailed financial breakdown of the charges made, the description of the activities and works carried out which are charged for. The Tribunal is not satisfied that the respondent has done so. The respondent is expected to put in place steps to ensure that this is not an ongoing breach.
- ii. The Tribunal are also concerned that the respondent has not complied with their general duties. In particular they have failed over a number of years to carry out or instruct an inspection of the gutters of the property to a competent standard. The Tribunal would hope that the respondent will comply with their duties in this respect now.

Appeals

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

R Mill

Legal Member

Date 8 March 2019