

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Decision on Homeowner's application: Property Factor (Scotland) Act 2011
Section 19(1)(a)

Chamber Ref: FTS/HPC/PF/21/2798

The Parties:-

Derek Burns, 38 Condie Crescent, Calderwood Village, Coatbridge, ML5 4WL
("the Homeowner")

Hacking & Paterson, 1 Newton Terrace, Glasgow, G3 7PL ("the Factor")

The Tribunal:-

Melanie Barbour (Legal Member)
Elizabeth Dickson (Ordinary Member)

DECISION

The Factor failed to comply with its property factor duties. The decision is unanimous.

INTRODUCTION

1. In this decision the Property Factor (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factor (Scotland) Act 2011 Code of Conduct for Property Factor is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules".
2. By application dated 10 November 2021 the Homeowner complained to the Tribunal that the Factor was in breach of its property factor duties namely that:-

They have failed in their duties set out in their terms of service and delivery standards, sections 3.2 and 5.7. All I am looking for is fairness, transparency and value for money.

Hacking and Paterson have invoiced residents' mystery charges for the Community Hub, they cannot / are refusing to explain these charges in particular from dates 1/1/2020 - 31/10/2020.

I have made an official complaint after no response to my many emails. I was told I would receive a final response w/c 19 July 2021 but to date I have received nothing.

This has caused me unnecessary stress and anxiety.

A simple explanation would resolve the problem.

3. By Notice of Acceptance dated 22 March 2000 a legal member of the Tribunal with delegated powers accepted the application and a case management discussion was assigned to take place on 1 June 2022.
4. The Homeowner advised that he did not intend to participate in the case management discussion. The Property Factor sought further clarification about the complaint, stating that a bald reference to section 3.2 of the written statement of service did not provide sufficient notice as to what the complaint against the Property Factor was. Two directions were issued one seeking clarification of certain matters and the other confirming that the case management discussion would be discharged.
5. Both parties submitted written representations in response to the direction.
6. The tribunal members discussed the terms of the papers and written representations and determined that it would issue a further direction to the developer, as the members considered that there remained information outstanding which it wished to understand prior to proceeding to determine the Homeowner's application. Accordingly, a draft direction was first issued to the parties, to ascertain if they wished to seek any information or clarification from the developer.
7. On 14 July 2022 a direction was issued to the developer seeking information from them. On 27 July 2022 the developer responded to the direction.
8. The developer's response was issued to the parties, No further response was received from the property factor. On 23 August the Homeowner provided comments on the response from the developer. The homeowner indicated that he remained dissatisfied with the response received about the Hub , its use and the charges for the use of it by residents in Calderwood Village..

CONSIDERATION

9. The homeowner had submitted copy emails and invoices in support of his position. These included an invoice from 1 March 2021 to 28 May 2021 for "community hub costs" from 1/1/20 – 31/10/20 for £12.73.
10. The homeowner had written to the Property Factor on 8 May 2021 asking for a detailed schedule of the charges/costs for the Community Hub which totalled £4,086.60 for the period stated. He had been asked to pay his share

of that charge, as the Community Hub was common property for the development. He also asked the factors if the Hub should still not be the responsibility of Dundas (the developers) as it was being used as part of their sales office and had not been handed over to residents yet.

11. On 25 May 2021 the Property Factor sent the Homeowners an invoice from Dundas dated 17 November 2020 to the property factors setting out the costs of the Hub from 1/1/20-21/10/20. Costs included rates, insurance, waste disposal, security, landscaping, cleaning and boiler maintenance.
12. On 25 May 2021 the Homeowner wrote back to the Property Factor asking that they forward this year's breakdown and answer the question in his previous email, i.e., was Dundas not still responsible for the Hub. He also asked for a copy of the factor's written statement of services.
13. On 2 June 2021 the Property Factor advised the Homeowner, that if Dundas had told the Homeowner that the Homeowner would not be fully charged for the maintenance of the Hub until it was fully handed over, then the Homeowner should raise that with Dundas.
14. On 3 June 2021 the Homeowner wrote to back to the factor advising that he did not recall Dundas telling him anything about the Hub. He restated his previous question and stated "*I am asking Hacking and Paterson the question as you are **supposedly** the professional estate management team. I have no reason to contact Dundas. I am assuming that you don't know the answer to this question and if this is the case then this is very concerning and also why are you invoicing the residents for the Hub. I would also question the over inflated charges for assumed services in the invoice. I would like to open an official complaint.*"
15. On 9 June 2021 the property factors wrote back acknowledging the complaint; and advising that they had placed the Hub invoice in a "dispute for charges" at that time. They also advised that they had approached Dundas for their responded comments and would revert once they had further details. They apologised for any confusion and would ensure that they had resolved the matter promptly.
16. On 13 July 2021 the Property Factor advised that they were still waiting for a response from Dundas.
17. On 17 August and 28 September 2021, the Homeowner chased up the Property Factors no response had been received at that time.
18. On 1 October 2021 the Property Factor wrote to the Homeowner, referring to the title deeds and advising that the charge was for the part of the Hub that the owners could use, and that the developers were not charging of the rest of the Hub which they were using, and if they had done so the costs would have been nearer £100 per homeowner.

19. On 6 December 2021 the Homeowner wrote a formal complaint to the property factor.
20. On 21 December 2021 the Property Factor wrote to the Homeowner apologising that they had not responded sooner and “*The deeds are clear that this*”
21. *HUB is to be managed by homeowners. however, we have written to the developer regarding this situation. 20-30 Questions have been asked, all in which are questions asked by homeowners. We have also asked whether or not there are any viable alternatives. Therefore, we will update you and your neighbours once in possession of any response/update.”*
22. On 26 January 2022 the Homeowner contacted the Property Factor for an update and for a copy of the 20-30 questions which had been asked.
23. On 19 May 2022 the Homeowner responded to the first direction in the following terms:-

That the dispute was that the factors had allowed the site developer to use the Hub as a sales office, whilst billing residents for its maintenance.

That the Homeowners sought full clarification from the factors as to their agreement with Dundas regarding the use of the Hub as a sales office; what financial benefit they gained; and is the Hub the responsibility of residents at this time.

That the factors had breached their written statement of services in relation to the fact that they bill residents for works on the estate; that they have allowed a third party access to the estate and billed residents for works that should have been referred to the third party; they have breached their contractual obligations.

That the Hub was currently being used by Dundas as a sales office.

That Dundas were still completing parts of the estate.

24. On 26 May 2022 the Property Factor responded to the first direction issued by the tribunal, their response advised as follows:-

That they considered the dispute related to the charge submitted by Dundas Estates pertaining to the Hub; a concern that the factor was allowing the developer to use the Hub. They denied this was the case.

That the Hub was a separate building to the sales office; there were two cottages, and the Hub was the upper cottage, and the sales office the lower cottage.

They had asked the developer for a further breakdown of their costs, but none was forthcoming.

That Dundas were going to issue a credit note for the full sums in their invoice.

That the property named in the application should be the Homeowners' property address and not the Hub.

That the Homeowner was not speaking for all other homeowners.

That the Hub was lying empty. It had not been handed to the factors for maintenance by the developer.

25. On 31 May 2022 the Homeowner wrote to the tribunal. He queried that that the Hub and sales office were separate properties.
26. As noted above the tribunal considered that there was further information that was required in order to determine the matter. The tribunal therefore issued a direction seeking information from the developer.
27. The developer responded to the direction by email on 27 July 2022. The developer advised, *inter alia*:-
 - a. That the Community Hub is situated in plot 102. The title has been reduced by each of the units that have been sold to residents in the development.
 - b. The development is a 320 unit private housing development. It commenced 10 years ago.
 - c. The community hub was part of the development; it officially opened in February 2014.
 - d. The majority of the ground level of the building is used as a sales centre. The top floor is the Hub.
 - e. The Hub is used by local resident groups including after school, nursery groups, running club, yoga classes. It holds Halloween parties and Christmas parties. It is also booked for private resident's parties including birthday and christening parties and on one occasion a wedding party left from the Hub.
 - f. The running costs are to be met in accordance with the deed of conditions.
 - g. Dundas Estates have covered the running costs since it opened. The developers decided not to bill the residents until there was a sufficient number of units occupied in the development. They advised that this occurred during their financial years 2018/2019. The development is now 98% occupied. All plots have now been sold.
 - h. Running costs include utility bills, insurance, cleaning service and safety checks, landscaping and maintenance costs.
 - i. The property factor was aware that charges were going to start being levied for the costs of the Community Hub. The property factor asked the developer to raise an invoice. The developer raised an invoice.

- j. The property factor and developer agreed that the invoice would apportion costs between The Hub are and the sales area. The sales area remains the responsibility for the developer.
- k. Dundas Estates took the decision to withdraw the invoice when it became apparent that the residents had not been made aware of the charges which they were now being asked to pay prior to the residents being sent the invoices.
- l. Dundas estates considered that the residents should have been made aware of the costs for the Hub prior to the invoices being issued. As this had not been done Dundas Estates had taken the decision to withdraw the invoice.

THE TRIBUNAL MADE THE FOLLOWING FINDINGS IN FACT

- 28. The Homeowner is the owner of 38 Condie Crescent, Calderwood Village, Coatbridge, North Lanarkshire ("the Property").
- 29. The Factor performed the role of the Property Factor for the Property.
- 30. That the Factor's duties were determined by the terms of the title deeds and the written statement of services dated 9 December 2019 and updated on 30 August 202.
- 31. The Homeowner sent an email letter of complaint to the Factor on 3 June 2021.
- 32. The Homeowner sent a further email letter of complaint to the Factor on 6 December 2021.
- 33. No response was received by the Homeowner to the complaint of 6 December 2021.
- 34. That the title deeds for the Property set out that there is a "community hub building" and provide a land certificate number for it LAN101910; and that in terms of rule 7 of the deeds of conditions each of the plots of land will be responsible for a share of the maintenance and running cost of The Hub.
- 35. That for around 10 years there has been use of at least the first floor rooms of the Community Hub by residents in Calderwood Village
- 36. That for around 10 years there have been services and maintenance costs incurred for the first floor room in the Community Hub.
- 37. That for around 10 years the developers of the estate Dundas Estates have met the services and maintenance costs for the Community Hub.
- 38. That on around 17 November 2020 the Property Factor issued an invoice to residents for the services and maintenance costs of the first floor rooms of the Community Hub.

39. That the Property Factor had not given prior notice to the residents that they were now going to be invoiced for at least a proportion of the Community Hub.

REASONS FOR DECISION

40. The homeowner in the application dated 10 November 2021 alleged breaches of sections 3.2 and 5.7 of the written statement of services.

41. We would first address several preliminary issues:-

42. We consider that the written statement of services being relied on for the purposes of this application is dated 9 December 2019. There are some differences in the later statement of services however for the purposes of this decision the sections complained about are not different but have slightly different numbering.

43. The tribunal considers that the complaint we are entitled to consider is that set out by the terms of the application. We have set out the details of the Homeowner's complaint above at paragraph 2.

44. The tribunal considers that the Homeowner's application is made on his own behalf, and that he is not acting for other homeowners in this matter, albeit it may be that he has discussed the matter with other owners, and they are interested in the outcome of this application. We come to this conclusion as we have not had sight of any authority from other homeowners that the Homeowner is acting on their behalf.

45. The tribunal considers that the application should be made in the name of the Homeowner's property. His right to bring the application arises from that right of ownership, his right of common property in the Hub arises from his right of ownership in his own property.

46. Turning now to the actual terms of the Homeowner's complaint, namely the invoice which was issued by the Property Factor in relation to charges for common property, the Hub and his complaint that,

They have failed in their duties set out in their terms of service and delivery standards, sections 3.2 and 5.7. All I am looking for is fairness, transparency and value for money.

Hacking and Paterson have invoiced residents' mystery charges for the Community Hub, they cannot / are refusing to explain these charges in particular from dates 1/1/2020 - 31/10/2020.

I have made an official complaint after no response to my many emails. I was told I would receive a final response w/c 19 July 2021 but to date I have received nothing.

47. The concern which this invoice raised with the Homeowner was that he was being charged for something which he did not have the use of. He believed the Hub to be a property which is owned in common with other owners in the estate; and which will be capable of use by the estate owners, as a type of community building. It was not initially clear from the papers provided by the Homeowner or the Property Factor whether or not the Hub had been used by residents. However, the correspondence from Dundas Estates confirms that it has been used by residents, or at least the upper floor has been used, for around the last 10 years. It appears that the lower floor in the Hub is currently being used by the developers of the estate, Dundas Estates for the purpose of marketing other properties for sale in the estate.
48. It appears therefore that for a 10 year period the Hub has been used for the communities' benefit. It also appears that at no point during the last 10 years was the community invoiced for the cost of its upkeep even though they had been able to use it for a variety of activities. The tribunal notes all that is said by the developers about the use that the Hub has been put to over the last 10 years and it in our opinion it appears to have been a useful community resource.
49. While it is not confirmed in the papers or responses provided, we think that it may be assumed, that the Hub will in due course also include the lower cottage area.
50. We note that the community has not been charged for any of its upkeep. The title deeds make provision for the residents to pay a contribution for the upkeep of the Hub. We also note that the developers had decided that a charge should now be imposed for its upkeep. This does not appear to us to be unreasonable. We note that the developers had sent the invoice to the property factors, and the invoice sought payment for part of the overall costs of the Hub, and did not include the lower portion as it was being used by the developers. We can see no issue with invoices being raised to cover the costs of the upper floor.
51. Considering the developers' response, the issue which appears to have led to the Homeowner's complaint arises from a failure to communicate to residents that they were going to be invoiced for these costs. We agree with the developer that it would have been appropriate to give prior notice of the costs for the Hub. It was the failure to provide timely notice which appears to have caused the Homeowner concern and frustration; and the subsequent failure to respond and explain to the Homeowner why these charges were now being levied added to that frustration.
52. It appears to us that there had been a lack of practical information provided to the Homeowner in relation to costs that the developer was entitled to seek for the Hub.
53. Considering the complaint and the papers before us, we find that the Property Factor has breached its duties at section 3.2 (3.1 on 30 August 2021) where it states,

Services Provided

We act as property factor and offer the following core factoring services to the group of homeowners relative to the land/property which the group share in common ownership and / or responsibility (common property):

....

Checking contractor and service supplier invoices when rendered and apportioning amongst the group of homeowners.

[Issuing common charges accounts to you at regular intervals for common works and services, our fee and, if appropriate, insurance premiums.]

Dealing with your communication and enquiries.

...

Handling correspondence, enquiries and reports from professional representatives and others relating to matters arising from the day to day factoring of common property.

54. We consider that the Property Factor could have better explained that the invoices for the Hub were going to be issued, prior to them being sent out. They should also have better dealt with the enquiries which were being made by the Homeowner. We do not consider that the Homeowner was given a proper response, prior to him escalating his complaint to the tribunal. In fairness, to the Homeowner, the tribunal remained unclear about the operation of the Hub and the invoices until we received the further information from the developer.
55. We do not consider that the factor provided a proper or accurate response to the Homeowner in their email of 1 October 2021 and that response contradicts what the factor had submitted in terms of their representations to the tribunal; as the 1 October 2021 email appears to suggest that the building is one building only. We note that the Homeowner originally confirmed he was making a complaint on 3 June 2021, we do not consider that the response of 1 October 2021 was a reasonable response. We also note that the Homeowner had to chase up any response to his emails. It appears that he was also not provided with a copy of the 20-30 questions which had been put to the developer. All in all, we found that there was failure to properly consider the issue being raised by the Homeowner and to properly respond to his enquiries.
56. The terms of the factors' authority to act is as provided for in the title deeds and the written statement of services. The title deeds do not deal with the situation where a developer is using part of the common property belonging to owners. We do not think however that it should have been too difficult for the developers and property factors to clarify with residents in a timely manner questions about the use and payment of the Hub.
57. In terms of the second part of the Homeowner's complaint that there has been a breach of 5.7 of the property factor's written statement of services.

58. Section 5.7 is in the following terms:- *Communication Arrangements* : *We will communicate with you in a polite, courteous and professional manner. We will not communicate with you in a way which is misleading, false, abusive, intimidating or threatening. Our staff are instructed not to deal with abusive or intimidating communication either by telephone or in writing from any homeowner.*

59. We do find that there is a breach under this section but only to the extent that we do not consider that the factor dealt with the matter in a professional manner. We find that the factor did not consider the complaint properly and did not respond to it in a considered way. We refer for example to the letter of 1 October 2021 when they refer to the developer not seeking the £100 as not all of the subjects had been Hub had been transferred at that time. While we can better understand the meaning of this statement, we did not understand it without the developers' letter setting out the detail of the matter.

60. We would observe that early clarification of these matters from Dundas Estates when the Homeowner first raised his concerns with the Property Factor may have resolved the matter, and it is disappointing that an explanation was not available earlier. That said, we are obliged for the detailed explanation that Dundas Estates provided to the tribunal on 27 July 2022.

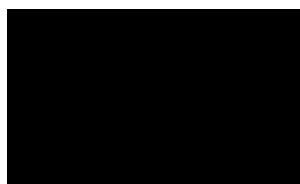
RESOLUTION

61. The homeowner advised that a simple explanation would resolve the problem. We consider that the explanation provided by the developer is sufficient to resolve the matter as it explains why the use of the Hub; the reason why an invoice was raised; and the reason why it was withdrawn.

62. We do not consider therefore that there would be any requirement for a property factor enforcement order to be made in this case.

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.



Melanie Barbour Legal Member and Chair

29 September 2022

Date