

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (formerly the Homeowner Housing Panel) issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 in an application under section 17 of the Property Factors (Scotland) Act 2011 ('The Act').

Chamber Ref:FTS/HPC/PF/16/1011

Flat 3/2, 7 Radnor Street, Glasgow, G3 7UA ('the Property')

The Parties:

David Shields, 11 Denbeath Court, Ferniegar, Hamilton, ML3 7TR ('the Homeowner')

Apex Property Factor Limited, 46 Eastside, Kirkintilloch, East Dunbartonshire, G66 1QH ('the Factor')

Committee members:

Jacqui Taylor (Chairperson) and Carolyn Hirst (Ordinary Member).

Decision of the Tribunal

The Tribunal determines that the Factor has failed to comply with to comply with sections 1, 2.4; 2.5; 3.1; 3.3 and 6.1 of the Code of Conduct.

The decision is unanimous.

Background

1. The Factor's date of registration as a property factor is 1st November 2012.
2. The Homeowner bought his property Flat 3/2, 7 Radnor Street, Glasgow, G3 7UA in September 2005 and sold the property on 27th August 2016. Apex Property Factor Limited factored the Property from 26th September 2014 to April 2016.
2. By application dated 1st December 2016, and received by the First-tier Tribunal on 5th December 2016, the Homeowner applied to the First- tier Tribunal (Housing and Property Chamber) for a determination that the Factor had failed to comply with the following sections of the Property Factor Code of Conduct ('The Code of Conduct').

- Section 1: Written Statement of Services.
Section 1.1a, 1.1b
- Section 2: Communications and Consultation.
Sections 2.4 and 2.5
- Section 3: Financial Obligations.
Sections 3.1, 3.2 and 3.3
- Section 6: Carrying out Repairs and Maintenance
Sections 6.1, 6.3 and 6.6
- Section 7: Complaints Resolution.
Section 7.1

3. The application had been notified to the Factor.

4. By letter dated 3rd February 2017 Maurice O'Carroll, Convener of the First-tier Tribunal (Housing and Property Chamber) rejected the application as the Homeowner did not own the Property Flat 3/2, 7 Radnor Street, Glasgow, G3 7UA at the date of his application. The Homeowner sent an email to the Tribunal seeking permission to appeal the decision. By Decision dated 23rd February 2017 Maurice O'Carroll rejected the application as incompetent. The Homeowner applied to the Upper Tribunal who found in his favour in terms of the Decision by AF Deutsch and the Homeowner's application was remitted to the First-tier Tribunal to proceed to determine the application.

5. Thereafter by Minute of Decision by Maurice O'Carroll as Convener of the First-tier Tribunal (Housing and Property Chamber), dated 10th July 2017, he intimated that he had decided to refer the application (which application paperwork comprises documents received in the period of 5th December 2016 to 16th January 2017) to a Tribunal.

6. An oral hearing took place in respect of the application on 3rd October 2017 at Wellington House, 134-136 Wellington Street, Glasgow, G2 2XL.

The Homeowner appeared on his own behalf. The Factor was represented by Neil Cowan, Legal Manager and Saira Ali, Property Manager.

The details of the application and the parties' written and oral representations are as follows:

- Section 1: Written Statement of Services.

The Code of Conduct for Property Factors ('The Code of Conduct') requires the Factor to provide their written statement of services to the Homeowner within one year of initial registration as a property factor. However it must be supplied before that time if they are requested to do so by the Homeowner.

The Homeowner's complaint:

The Homeowner explained that he did not receive a written statement of services from the Factor. He did not receive the letter from the Factor dated 18th July 2014 which was sent to 10A Lowton Road, Temple Patrick, Belfast, BT39 0HD.

The Factor's response:

Neil Cowan explained that the Factor sent the Homeowner a letter dated 18th July 2014 and enclosed with that letter a welcome pack which included the written statement of services. The letter also enclosed a mandate for the Homeowner to sign and return however he was unable to confirm if the Homeowner had returned the signed mandate. He also advised that the letter was sent to the Homeowner at the address 10A Lowton Road, Temple Patrick, Belfast, BT39 0HD as this is the Homeowner's address detailed on his Land Certificate. He confirmed that the letter had not been returned to them and consequently he had assumed that it had been delivered to the Homeowner.

The Tribunal's Decision:

Section 1 of the Code of Conduct states that a factor must provide the written statement of services to new homeowners within four weeks of agreeing to provide services to them.

The Tribunal were unable to determine if the letter from the Factor to the Homeowner dated 18th July 2014 had been successfully delivered to the Homeowner. It was the Homeowner's position that he never received the letter and the Factor's position that they posted the letter to the Homeowner, even although they were unable to produce a copy of the mandate that was enclosed with the letter, signed by the Homeowner, which would have been evidence that the letter had been delivered to the Homeowner. Notwithstanding this difficulty the Tribunal noted that the letter from the Factor to the Homeowner dated 18th July 2014, which enclosed the Welcome Pack and written statement of services, predated the date the Factor started factoring the development, namely 26th September 2014.

Accordingly, notwithstanding the fact that the Tribunal were unable to determine if the letter from the factor dated 18th July 2014 had been delivered to the Homeowner the Tribunal determined that the Factor had not complied with Section 1 of the Code

of Conduct as the written statement of services had not been provided to the Homeowner within four weeks of their appointment as factors.

Section 2: Communications and Consultation.

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 emergencies).

The Homeowner's Complaint:

The Homeowner explained that as he did not receive the written statement of services from the Factor he did not know what services above the minimum level were to be provided by the Factor. He also stated that he never received a supplementary statement which specifically detailed the core services for his development. However he confirmed that he received a copy of the factor's written statement of services with their written representations.

He advised that matters came to a head in relation to a roof repair that was required early in 2015. He telephoned the Factor to advise that the roof was leaking and had to repeatedly chase the Factor to provide the quotations. As there was a delay in having the repair carried out he instructed the Factor to arrange a temporary repair on 17th April 2015 for which he was charged £440. He was sent a receipt for the temporary repair which was the breakdown provided by G D McFall limited dated 21st July 2015 and stamped received 21st April 2015, which had been produced to the Tribunal.

The Factor's Response:

Neil Cowan explained again that the written statement of services had been sent to the Homeowner with their letter dated 18th July 2014 and they would also have sent the Homeowner a separate statement listing the core services particular to his development. He acknowledged that this separate statement had not been produced to the Tribunal and was not referred to in their letter of 18th July 2014.

He also explained that the Core Services that they provide to this development are cleaning of the communal close and maintenance of the common courtyard. Works beyond these core services would require prior approval of the residents before the particular works would be instructed.

In the Factor's written representations they stated that the Homeowner had been kept informed on the progress of maintenance works. They referred to their letters

dated 2nd October 2014, 21st October 2014, 18th November 2014, 23rd April 2015, 6th October 2015, 2nd December 2015, 16th December 2015, 13th April 2016 and 16th March 2017, which had been produced to the Tribunal.

The Tribunal's Decision:

Section 2.4 of the Code of Conduct provides that the Factor '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.'

The Factor's written statement of services contains a general statement that 'services and works in addition to core services are arranging and carrying out improvements and adaptations to communal areas where authorized by the requisite number of owners of the development.' It also states 'where there is no maintenance fund, 100% of the expected cost of the work must be received by the factor in advance of instructing the work'.

The more detailed statement referred to by Neil Cowan in his evidence had not been produced to the Tribunal and was not referred to in the letter the Factor sent to the Homeowner dated 18th July 2014.

The Tribunal determined that the Factor had failed to comply with section 2.4 of the Code of Conduct as the written statement of services does not detail a procedure to consult with the homeowners and seek their written approval before providing work or services and no evidence was produced to the effect that there is in place a level of delegated authority to incur costs up to an agreed threshold. The Tribunal acknowledged that this procedure and the level of delegated authority may be contained in the detailed statement but this has not been produced to either the Tribunal or the Homeowner.

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 times should be confirmed in the written statement.'

The Homeowner's Complaint:

The Homeowner explained that the Written Statement of Services does not contain details of the Factor's response times.

Also the Factor did not respond to the following:

- The email he sent to the Factor dated 26th April 2015 requesting the definitive roof repair to be cancelled. He pointed out that no response had been received even although the email asked three questions:

'Could you cancel the definitive roof repair with this contractor please? Also, could you arrange 2 further quotes please? You don't need to come to the block for a contractor to quote, so I don't understand why you would need to charge me £60 for this?'

- The email he sent to the Factor dated 5th September 2016, which was his complaint email.
- The letter of notification he sent to the Factor dated 12th January 2017.

The Factor's Response:

Neil Cowan referred the Homeowner and the Tribunal to the section of the written statement of services 'Customer Service Standard'. This section states:

'We aim to acknowledge all communications received within 14 working days of receipt. Our aim is to respond fully to enquiries within 21 working days. This response will advise owners what action we will take to deal with their enquiry and give a reasonable timescale.

Repairs will be carried out as quickly as possible. Any work which is considered an emergency will be dealt with as a matter of urgency.

Planned work and major repairs will be carried out as quickly as possible following receipt of payments and owners approval to proceed.'

In connection with the email from the Homeowner dated 26th April 2015, he did not consider that it merited a response.

The Tribunal's Decision:

The Tribunal acknowledge that the Factor's response times were detailed in their written statement of services.

The Tribunal determined that the Factor had failed to comply with section 2.5 of the Code of conduct as they had failed to reply to the Homeowner's emails dated 26th April 2015 and 5th September 2015 also his letter of notification dated 12th January 2017, which specifically requested that the Factor acknowledge receipt.

3.1: 'If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).'

The Homeowner's Complaint:

The Factor ceased being factor of the development in April 2016. The Homeowner sold his property on 27th August 2016. A Notice of Potential Liability had been registered over the title of his property by the Factor without a prior invoice or bill being produced. The fact that a Notice of Potential Liability had been registered without consultation caused the Homeowner to suffer stress and inconvenience at the time he was selling his property. Had he been made aware of the outstanding account in advance he would have settled it without there being any need to register a Notice of Potential Liability.

The Homeowner sent the Factor an email dated 3rd August 2016 asking for a breakdown of costs and received a reply dated 5th August 2016 which provided a figure of the total amount that was outstanding but did not give a detailed breakdown. The details provided were:-

1. Cleaning/ground maintenance October 2014 to May 2016	£870.12
2. Maintenance 2014	£38.22
3. Maintenance 2015	£56.63
4. Maintenance 2016 and legal expenses	£274.27

The Homeowner's mother paid the sum of £1239.24 to the Factor on 15th August 2016. She sent an email to Neil Cowan dated 11th August 2016 asking for a refund of the sum of £437.50, which had been paid for the roof repair, and also a refund of the float of £100.

The Homeowner also explained that he had paid £200 towards the temporary roof repair and £137.50 towards the final roof repair, which was never carried out.

The Factor's Response:

Neil Cowan explained that their business had suffered a major IT failure in October 2014 which affected the regular invoicing. This problem was compounded by the fact that their Director had been absent due to a long period of bad health and she was the only person within the company who could issue invoices.

When they became aware that the Homeowners' property was being sold they estimated the sums that would be due and issued a Notice of Potential Liability. Their written statement of services explains that where appropriate a Notice of Potential Liability will be put in place.

Neil Cowan acknowledged that the Homeowner had not been given prior notice of the Notice of Potential Liability. He explained that the details would have been provided to his solicitor when they were advised of the sale of the Homeowner's property. He confirmed that the homeowners had not been advised of the invoicing

difficulties or the fact that the invoices that had not been issued and they were accumulating a debt.

In connection with the request from the Homeowner's mother for the sum of £437.50 to be repaid he confirmed that he is happy to refund the sums of £137.50 and £100.

Neil Cowan also explained that the final bills have still to be correctly calculated. There are a total of 18 properties in the development. Two of the properties are commercial properties. The title deeds contain the details of the correct percentage contributions due by each property but the correct contributions have not yet been calculated. The sums due by the Homeowner include a charge of £120 which is their administration charge for preparing the Notice of Potential Liability and the Registration dues of £60 to register the Notice in the General Register of Sasines.

Neil Cowan accepted that had there been better communication with the Homeowner there would not have been any need for the Notice of Potential Liability to be registered over the Property.

The Tribunal's Decision:

The Factor's contract for factoring the Homeowner's property was terminated in April 2016. The Homeowner only received invoices for the management charges for the period October 2014 to May 2016 in March 2017, some nine months after termination of their services. The Factor has incorrectly apportioned some of the common charges and the correct accounts have still to be issued.

The Factor's position is that they had a good reason for the delay as it was caused by IT failures and the ill health of one of their Directors. The Tribunal does not accept these reasons as being good reason in terms of section 3.1 of the Code of Conduct. The Code gives the example of a good reason for the delay being awaiting final bills for contracts that were in place. A delay in this situation is understandable as the Factor would not have details of the final bills to enable the final accounts to be completed. However in this situation the invoicing information was known to the Factor, they could have made alternative arrangements for the accounts to be issued and they could also have made alternative arrangements to enable invoices to be issued and authorized whilst the Director was on sick leave. The Tribunal were most concerned to learn that the final accounts have still not been issued. They accepted the evidence of the Homeowner that the significant delay in issuing the accounts caused him inconvenience and stress which could have been avoided.

The Tribunal determined that the Factor had failed to comply with section 3.1 of the Code of Conduct as all the financial information had not been provided to the Homeowner within three months of the date they ceased to be factor of the Homeowner's Property.

3.2: 'Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor.'

The Homeowner's Complaint:

The Homeowner explained that he is due a refund of £437.50, being the float and the excess payment that he had made. This should have been paid to him following the sale of his Property on 27th August 2016.

The Factor's Response:

Neil Cowan confirmed that £237.50 would be paid to the Homeowner. The delay in settling the final account due to the Homeowner was a result of the high level of debt in the development. He advised that they are close to resolving the position and acknowledged that the 70% of the debt position that has arisen was due to the delay in issuing the back dated invoices for the management fees.

The Tribunal's Decision:

The Tribunal determine that the Factor has not failed to comply with section 3.2 of the Code of Conduct as the final account has still to be issued.

3.3: 'You must provide homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise) a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also 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.'

The Homeowner's Complaint:

The Homeowner advised that he had not received yearly breakdown of fees and charges. He also did not receive a description of activities charged for. No details were provided in adequate time. The invoices dated March 2017 were sent to his address in Hamilton and related to the period October 2014 to March 2016. He also explained that the email the Factor sent to him dated 5th August 2016 provided details of the sums due in connection with the Notice of Potential Liability but did not give a detailed breakdown of the sums that were due.

The Factor's Response:

Neil Cowan advised that the requirement to provide a full breakdown does not apply until the invoices are submitted. The monthly invoices are transparent. There was a delay in issuing the monthly maintenance charges dues to the exceptional circumstances already explained. The Homeowner has been provided with full details of all maintenance carried out and has been provided with copy invoices.

The Tribunal's Decision:

The preamble of section 3 of the Code of Conduct explains that transparency is important and the homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.

The Factor did not provide a detailed financial breakdown to the Homeowner of the charges made and a description of activities and works carried out and charged for once per year, as required. The invoices were issued in March 2017 for the period October 2014 to March 2016. The Tribunal determined that the Statement of Account dated 23rd May 2017 is not detailed or transparent. Whilst the Statement of Account details the charges for the deposit, insurance and management expenses it does not detail the costs that relate to the larger repairs that were carried out during the period of the account and it does not include the correct apportionment of the charges.

Consequently the Tribunal determined that the Factor has not complied with section 3.3 of the Code of Conduct.

6.1: You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.'

The Homeowner's complaint:

The Homeowner explained that a leak developed in the roof above his property and he telephoned the Factor on a number of occasions advising them that a repair was necessary. As the Factor delayed in arranging the permanent repair he accrued a bill of £440 for a temporary repair that was carried out. He understands that the permanent repair was never instructed by the Factor. He never received progress reports regarding the repair from the Factor.

The Factor's response: Neil Cowan explained that the Factor is unable to arrange repairs to be carried out until they have received funds from all of the owners. If the owners do not pay the proportion of the cost they are responsible for the repair cannot proceed. The position is clarified in the Written Statement of Services. The paragraph which details their customer service standard states:

'Repairs will be carried out as quickly as possible. Any work which is considered an emergency will be dealt with as a matter of urgency.'

Planned work and major repairs will be carried out as quickly as possible following receipt of payments and owners approval to proceed.'

He also explained that they provide annual progress reports to the homeowners but acknowledged that they had not provided a copy of a progress report with the productions. He explained that the annual progress reports would usually be prepared in March/ April but this was not done for this development as their contract had been terminated.

The Tribunal's Decision:

The Tribunal determined that the Factor had not kept the Homeowner advised of the progress they were making in arranging the roof repair. They noted that their written statement of services does not include a cost threshold below which progress reports are not required.

Consequently the Tribunal determined that the Factor has failed to comply with section 6.1 of the Code of conduct.

6.3: 'On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff.'

The Homeowner's complaint: The Homeowner explained that as far as he was aware the Factor had only obtained one quote for the roof repair. However he acknowledged that he had not directly asked the Factor why they had appointed the roofing contractor.

The Factor's response: Neil Cowan explained that the roof repair was a minor repair. Usually they would only obtain two quotes for minor repairs and proceed with the most competitive. Once all the owners had paid their contribution they would obtain up dated quotes and instruct the repair.

The Tribunal's Decision:

As the Homeowner had not directly asked the Factor how and why they appointed the roofing contractor the Tribunal determined that the Factor had not failed to comply with section 6.3 of the Code of Conduct.

6.6: If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection on request, free of charge. If paper or electronic copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance.'

The Homeowner's complaint: The Homeowner explained that he had not been provided with details of the two quotations the Factor had obtained for the roof repair and had not specifically asked the Factor for copies of the two quotations.

The Factor's response: Neil Cowan explained that they provide the contractor with a specification of the works required to avoid too many site visits having to be carried

out. In connection with the roof repair they had obtained two quotations but the second quotation was too expensive.

The Tribunal's Decision: The Homeowner had not specifically asked the Factor to see the two quotations. His email to the Factor dated 26th April 2015 did not ask to see them. The Tribunal determined that the Factor had not failed to comply with section 6.6 of the Code of Conduct as the obligation on the Factor to exhibit tendering documentation only applies if the Homeowner has requested the documentation.

7.1: You must have a clear written complaints 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.

The Homeowner's complaint: The Homeowner explained that he did not receive a copy of the Factor's complaints procedure. However he did acknowledge that he had received a copy of the written statement of services with the Tribunal productions.

The Factor's response: Neil Cowan explained that they had provided the Homeowner with a copy of their written statement of services on 18th July 2014 and he had also provided a copy with written representations that had been sent to the Tribunal. The written statement of services includes details of their complaints procedure.

The Tribunal's Decision: The Tribunal confirmed that the Factor's written statement of services details their complaints procedure accordingly the Tribunal determined that the Factor had not failed to comply with section 7.1 of the Code of Conduct.

Property Factor Enforcement Order.

In all of the circumstances narrated above, the Tribunal finds that the Factor had failed in its duty under section 17(1)(b) of the 2011 Act, to comply with Sections 1; 2.4; 2.5; 3.1; 3.3 and 6.1 of the Code of Conduct. They also determined that it is reasonable for the Homeowner to receive compensation for the stress and inconvenience that he has suffered.

The Tribunal therefore determined to issue a Property Factor Enforcement Order.

Section 19 of the 2011 Act requires the Tribunal to give notice of any proposed Property Factor Enforcement Order to the Property Factor and allow parties an opportunity to make representations to the Tribunal.

The Tribunal proposes to make the following Order:

(First) The Factor is directed to pay the Homeowner the sum of £607.50 (being the reimbursement of the sum of £237.50 plus £120 legal expenses the Homeowner had been charged for the preparation and registration of the Notice of Potential Liability

and £250 compensation for the stress and inconvenience suffered by the Homeowner). The said sum should be paid from their own funds and at no cost to the Homeowner within 28 days of the communication to them of the Property Factor Enforcement Order.

(Second) The Factor is directed to prepare an accurate Statement of Account detailing all sums charged and payments received from the Homeowner, during the whole period they factored his property, including the final account. The Factor is also directed to reimburse any balance due within 28 days of the communication to them of the Property Factor Enforcement Order.

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.

J Taylor

Signed

.....Date 22nd October 2017

Chairperson