

Housing and Property Chamber

First-tier Tribunal for Scotland



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

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

**Chamber Ref: FTS/HPC/LM/18/2026
FTS/HPCLM/18/2031
FTS/HPC/LM/18/2032
FTS/HPC/LM/18/2033**

**3 Chandlers Lane, Dundee DD1 3DH
("the Property")**

The Parties:-

Mr Joseph Duffy, 3 Chandlers Lane, Dundee DD1 3DH, Mrs Lynn Hood, 10 Chandlers Lane Dundee DD1 3DH, Mr Tomasz Kamusella, 12 Chandlers Lane Dundee DD1 3DH and Mr Samit Majumdar, 14 Chandlers Lane, Dundee DD1 3DH

**(represented by Mrs Lynn Hood 10 Chandlers Lane Dundee DD1 3DH)
("the Homeowners")**

**SGL Property Limited, Top Floor, India Buildings, 86 Bell Street, Dundee DD1 1HN
("the Factor")**

Tribunal Members:

Graham Harding (Legal Member)

Helen Barclay (Ordinary Member)

DECISION

The Factor has failed to carry out its property factor's duties.

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with sections 2.1, 2.5, 3.3, 5.1, 6.1 and 6.4 of the Code

The decision is unanimous

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors 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"

The Factor became a Registered Property Factor on 8 November 2013 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

1. By Applications dated 10 August 2018 the Homeowners complained to the Tribunal that the Factor had failed to comply with its duties under the 2011 Act and was in breach of Sections 1, 2.1, 2.5, 3.3, 4.4 - 4.7, 5.1, 6.1, 6.4, 6.5, 7.1, 7.2 and 7.4 of the Code.
2. The Homeowners submitted copies of email exchanges with the Factor, minutes of meetings, accounts and title deeds in support of their complaints.
3. By Minute of Decision dated 3 October 2018 a Convenor with delegated powers considered the applications and referred them to a Tribunal.
4. A hearing was arranged to take place on 4 December 2018 at Dundee Carers Centre, 132-134 Seagate Dundee. Intimation of the hearing was given to all parties. The homeowners lodged further productions on 23 November 2018. The Factor did not lodge any productions or written submissions.

Hearing

5. The hearing was attended by the Homeowners representative Mrs Lynn Hood supported by her Husband and also in attendance were two other Homeowners Mrs Jane Duffy and Mr Tomasz Kamusella. There was no appearance by the Factor.
6. The Tribunal, being satisfied that the Factor had been given notice of the application and the hearing in accordance with Rule 24(1) determined in accordance with Rule 29 that the hearing should proceed in the absence of the Factor.

Summary of submissions

7. At the commencement of the hearing Mrs Hood confirmed that the Homeowners were no longer seeking to complain that the Factor had breached Section 1 of the Code. She explained that the Factor did have Written Statement of Services that complied with the Code and the problem was that there was a failure to comply with what was in the statement of services and with the Code.
8. Mrs Hood explained the background to the Factor being appointed was that the development which consisted of 73 residential properties had previously been factored by a company called Factors4You. That Factor had been the subject of complaint to the Homeowners Housing Panel in 2014 and had been found not fit for purpose although they had carried on as factors until 2016.

9. Mrs Hood explained that the development consisted of 46 flats in two blocks with lifts, 9 other flats and 27 townhouses. There were common areas, paths and car parking.
10. Mrs Hood went on to say that an owner of six of the properties in the development Mr Sean Lewis had arranged a meeting of owners in 2016 with a view to finding new factors. He was the owner of a property company SGL Property Limited. According to Mrs Hood, Mr Lewis said at the meeting that his company had been registered as a factor since 2012 but that this had subsequently been disproved and it had in fact been registered in 2016. According to Mrs Hood the company had in fact no previous credentials in running as a property factor. It was a property letting business.
11. Mrs Hood said that at the meeting of owners Mr Lewis made a great presentation. He had explained that he would not be running the business that would be done by his sister Aimi Lewis.
12. Mr Kamusella said that at the meeting of owners they were told that all the other factors who had been interested in quoting for the business had pulled out and he queried whether in fact they had been asked at all.
13. Mrs Hood said that some of the owners had been concerned that there could be a conflict of interest as Mr Lewis owned six of the properties and a decision was made to appoint the Factor for a two year period. It was also decided to form a property owners committee. She said that the Common parts committee was still active but had not met for some time. She said that the different blocks had also set up their own owners' associations as they had different interests.
14. Mrs Hood went on to say that she and the other applicants felt they had been misled by Mr Lewis. His company was not a property factor at all and it had no other developments it was factoring. She also spoke of correspondence being sent to Mr Kamusella being quite offensive and referred the Tribunal to the productions lodged on 23 November 2018 and the email from Mr Lewis to Mr Kamusella dated 23 September 2016.
15. With regards to the alleged breach of Section 2.1 of the Code, Mrs Hood referred the Tribunal to an email from Mr Lewis to Mr Kamusella and Mr Majumdar dated 4 March 2016 in which it was stated that SGL was the property manager and factor of Mr Lewis' portfolio as well as many other clients, providing factoring services throughout Scotland since 1993. Mrs Hood pointed out that in the email Mr Lewis claimed that SGL had been registered as a property factor soon after the Property Factors Register was established in 2012 when she had established that it had not been registered until March 2016. In the Homeowners submission the information provided by SGL in order to acquire the Homeowners business had been false and misleading.
16. With regards to the alleged breach of Section 2.5 of the Code, Mrs Hood submitted that the Homeowners had submitted documentary evidence to

show that throughout the period in which the Factor had been managing the development there was evidence to show that it did not answer Homeowners enquiries and did not give timescales in which answers would be provided. She said that sometimes a Homeowner would receive a reply but that a pertinent point would be ignored.

17. In this regard Mr Kamusella pointed to his email of 17 September 2016 to Aimi Lewis at SGL in which he raised issues about Chandlers Lane bollards emergency access, receipts for factoring fees, an inspection walk across Panmure, a report on the takeover from Factor4You, Common parts Chimney Maintenance Plan and contact with VCS the parking contract company. According to Mr Kamusella He never received an answer to a single question. He said he had also asked questions about the money paid by residents for the sea wall but again had received no reply but it had been confirmed by Rae Clark of Dundee Ports Authority that no payment had been made.
18. Mrs Hood advised the Tribunal that she had received an email on 28 November advising that the funds that had been allocated to meet the debt due for the dock wall had in fact been used to pay for electricity. Mrs Hood did not know if this was true or not.
19. With regards to the alleged breach of Section 3.3 of the Code Mrs Hood referred the Tribunal to the accounts that had been provided by the Factor. She submitted that they did not provide homeowners with a clear picture of how the funds were being used and despite repeated requests for original invoices none were ever produced. Mrs Hood also explained that there were seven electricity meters serving the development, five for the flats and two for the common parts but the homeowners were being charged a 1/73 share of the total cost of the electricity. This had been challenged with the Factor but nothing done and it now appeared that funds paid by Homeowners for the dock wall to be paid to Forth Ports had been used by the Factor to pay for electricity.
20. Mrs Hood explained that there had been an issue over the street lights at the development not operating for over a year from February 2017 until March 2018. She explained that she had written to Miss Lewis on 22 February 2017 and had been advised that repairing the lighting would be costly. Despite requests no meeting of owners was called until September 2017. Throughout the winter of 2017 the walkway between Chandlers Lane and Unicorn was quite dark and dangerous. Owners had to use a torch to see where they were going. Mrs Hood went on to say that owners eventually offered to pay £50.00 per head to pay for the lighting to be fixed and 42 owners paid. This had been enough to cover the cost of replacing 40 new bulbs. The Homeowners had requested sight of the work being signed off by a qualified electrician and a copy of the invoice but this had never been forthcoming. Also, the lighting in the walkway had not been fixed.
21. Mrs Hood said that she thought there was a lack of transparency in the accounts provided by the Factor. Mr Kamusella said that he did not believe that the Factor was not making any money from the parking contract and was

concerned that the Factor refused to provide the owners with copies of the invoices.

22. Mrs Hood went on to say that in an email from Aimi Lewis to the owners association chairman, Terry Siggins on 22 March 2018 she had said that 54 owners had paid their contribution towards the Dock Wall, an amount totalling £11761.00. These funds should have been remitted to Forth Ports but had not been paid.
23. Mrs Hood advised the Tribunal that in June last year owners had been told that there were 18 owners who were not paying their fees and charges for the development but that in the past year this had risen to 38 this year. The number of non-payers had more than doubled and yet the Factor was saying that most owners were happy with its services.
24. The Tribunal was advised that the owners association chairman had tried to find out if those that were not paying was because they were not happy with the service provided but had not been given any answer. The Factor had used Data Protection Regulations to avoid saying who was not paying.
25. With regards to breaches of Section 4 of the Code, Mrs Hood said that the Factor was not following its debt recovery procedures in its written statement of services despite owners authorising strong action being taken. She thought that some flat owners who were absent landlords did not want to incur additional costs in pursuing debtors. She thought that there was a lack of information being provided by the Factor as to the steps being taken to pursue non-payers.
26. With regards to alleged breaches of section 5.1 of the Code Mrs Hood said that she had requested sight of the Factor's professional indemnity insurance and this had never been provided.
27. With regards to the alleged breach of Section 6.4 of the Code Mrs Hood referred the Tribunal to her earlier comments with regards to the issues over the lighting where after the need for the lighting to be repaired had been flagged up nothing had been done until the owners themselves agreed to pay an additional £50.00 each.
28. With regards to the alleged breach of Section 6.4 of the Code, Mrs Hood was of the view that although there was supposed to be cyclical gardening services included these with the exception of two clear ups that had taken place over the two-year period had never happened. At one point Mrs Hood and other owners had removed weeds from the development themselves.
29. Although a breach of Section 6.5 of the Code had been alleged the Homeowners accepted that this was not something that had been raised with the Factor in advance of the application to the Tribunal.

30. With regards to the alleged breach of Section 7.1 of the Code Mrs Hood explained that despite all the Homeowners sending complaints to the Factor they had not received any proper reply dealing with their complaints.
31. With regards to the alleged breach of its property factors duties, Mrs Hood said that the Homeowners received within the written statement of services a list of services that would be included such as cyclical gardening, lighting management, regular inspections and more but that the Factor had failed to perform its duties. Furthermore, the funds that had been paid by Homeowners in respect of their dues to Forth Ports had been used by the Factor for other purposes and she believed the Factor did not intend to make payment to Forth Ports leaving the owners liable to litigation.
32. The Homeowners said that they felt the Factor was not fit for purpose and should be removed from office. They wanted the money that had been paid by them to be paid to Forth Ports to be paid back. They had suffered sleepless night and worry over the failure of the Factor to perform its duties.

The Tribunal make the following findings in fact:

33. The Homeowners are the owners of 3, 10, 12 and 14 Chandlers Lane, Dundee
34. The Property is a townhouse within the Panmure Development, City Quay, Dundee (hereinafter "the Development").
35. The Factor performed the role of the property factor of the Development.
36. The Factor's director Sean Lewis misled the Homeowners as to the experience his company had in factoring developments such as the Homeowners'.
37. The Factor failed to respond to requests to provide the Homeowners with copies of contracts with Vehicle Control Services and details of income or expenditure incurred, electricity bills in respect of the electricity supply to the development and invoices in respect of repairs to lighting bollards at the development.
38. Common lighting at the development was inoperative for over a year and some lighting is still inoperative.
39. The number of owners at the development who have not contributed to the factoring costs has increased from 18 in 2017 to 38 in 2018.
40. The Factor has failed to account to the Forth Ports Authority for the debt due by the Homeowners despite being placed in funds by them.
41. The Factor has failed to provide the Homeowners with a copy of its Professional Indemnity Insurance Cover despite being requested to do so.

professional indemnity insurance, debt collection and the debt due to the Forth Ports Authority. It appeared to the Tribunal that the Factor had failed to deal with the Homeowners enquiries adequately and outwith the timescales contained within its written statement of services. The Tribunal was therefore satisfied that the Factor was in breach of Section 2.5 of the Code.

47. Section 3.3 of the Code

The homeowners had requested clarification of the accounts and copies of various invoices in respect of the electricity supply, lighting repairs, income or expenditure from the parking contract and the dock wall funds. None of this had been provided by the Factor and therefore the Tribunal was satisfied that the Factor was in breach of Section 3.3 of the Code.

48. Sections 4.4 to 4.7 of the Code

The Homeowners were naturally concerned at the increasing level of debt due to the number of owners who were not paying their management fees and outlays. They were also concerned at the apparent inactivity on the part of the Factor to take action against non-payers. Although the tribunal could understand the homeowners concerns in this regard it felt at this stage it had a lack of evidence to say categorically that the Factor was in breach of this section of the Code. It did appear that some funding had been provided by owners to pursue some debtors and therefore it was felt that the Homeowners would need to monitor the situation in this regard.

49. Section 5.1 of the Code

The homeowners had requested sight of a copy of the Factors Professional Indemnity Insurance policy. The Factor had not provided this. The Tribunal considered that this had been a reasonable request and the Factor whilst perhaps having insurance had failed to satisfy the Homeowners it had and was therefore in breach of this section of the Code.

50. Section 6.1 of the code

Although there were procedures in place to allow homeowners to notify the Factor of matters requiring repair, maintenance or attention there was a failure on the part of the Factor to keep homeowners informed of progress or lack of it with for example the lighting bollards being inoperative for a period of one year and only being fixed when funds were provided by 42 owners many months after the problem had been reported to the Factor. The Tribunal was satisfied that the Factor was in breach of Section 6.1 of the Code.

51. Section 6.4 of the code

The Tribunal was satisfied that although the written statement of services provided for periodic inspections and cyclical maintenance there was no evidence that a programme of works had been prepared and the Factor was therefore in breach of this section of the Code.

52. Section 6.5 of the Code

As the homeowners had not raised this complaint in advance with the Factor the Tribunal did not consider it could deal with it as there had not been fair notice.

53. Section 7.1 of the Code

The Tribunal was satisfied that the Factor had a clear complaints resolution procedure contained in its written statement of services and would review contractors annually and therefore the Tribunal was satisfied that the Factor was not in breach of this section of the Code.

54. Section 7.2 of the Code

The Tribunal was unable to determine whether or not the Factor was in breach of this section of the Code as the Factor did not respond to the homeowners in accordance with its own complaints resolution procedure.

55. Section 7.4 of the Code

The Tribunal is unable to determine whether the Factor has retained all correspondence relating to a homeowner's complaint throughout the period it has been Factor as the Factor has not communicated with the Tribunal.

56. Property Factors Duties

Many of the Homeowners complaints have been dealt with under the alleged breaches of the various sections of the Code. However, it did seem to the Tribunal that overall the Factor had adopted a fairly cavalier approach to dealing with the Homeowners enquiries and complaints and that did not sit comfortably with the contractual provisions of the written statement of services that governed the contract between the Factor and the Homeowners. The Factor had a contractual duty to abide by the terms of its written statement of services and it was apparent from the documents before the Tribunal and the evidence from the Homeowners at the hearing that the Factor was failing to provide a service in compliance with the contract. There was a lack of transparency in dealing with the Homeowners funds. There was a lack of clarity in communications with Homeowners regarding complaints and a failure to adequately follow the complaints procedure. There was a lack of clarity in explaining how the number of debtors had increased from 18 in 2017 to 38 in 2018 and whether the Factor was pursuing its own debt collection procedures. The Tribunal was satisfied that the Factor had failed to properly carry out its property factor duties.

57. Although the Homeowners wished the Tribunal to remove the Factor from office that is not within the Tribunal's power. That is a matter for the owners of the development to determine. The Tribunal however is of the view that given the breaches of the Code and its failure to perform its property factors duties it is appropriate to make a Property Factor Enforcement Order.

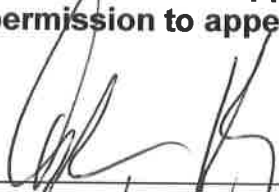
58. The decision of the Tribunal is unanimous.

Proposed Property Factor Enforcement Order

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

Appeals

A homeowner or property factor aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.



28/12/18

Legal Member and Chair

Date