

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Property Factors (Scotland) Act 2011 (“the Act”), section 17(1)

The First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017, as amended (“the 2017 Regulations”)

Chamber Ref: FTS/HPC/PF/20/1396

**47/6 Bavelaw Road, Balerno, Edinburgh, EH14 7AA
 (“the Property”)**

The Parties: -

Mr and Mrs Graeme and Alison Banks, residing at 14 Big Sand, Gairloch, IV21 2DD (“the Homeowners”)

RMG Scotland Ltd, Unit 6, 95 Morrison Street, Glasgow, G5 8BE (“the Factor”)

Tribunal Chamber Members

Maurice O’Carroll (Legal Member)

Andrew Taylor (Surveyor Member)

Decision of the Chamber

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) unanimously determined that the Factor has failed to comply with the factor duties contained within sections 2.5, 4.1, 4.3, 4.8, 4.9, 6.1, 7.1, 7.2 and 7.4 of the Code of Conduct for Property Factors (“the Code”) as required by section 14(5) of the Property Factors (Scotland) Act 2011 (“the Act”).

Procedural background

1. By application dated 9 April 2020, the Homeowners applied to the Tribunal for a determination as to whether the Factor had failed to comply with various duties as set out in sections 2, 4, 6 and 7 of the Code as imposed by section 14(5) of the Act. They also sought to complain that the Factor had failed to comply with other duties not specifically provided for in the Code.
2. By decision dated 28 August 2020, a Legal Member acting on behalf of the President of the Tribunal (Housing and Property Chamber) decided to refer the application to a Tribunal for a hearing.
3. The Homeowners made formal notification of their concerns regarding the alleged failures in duty on the part of the Factor by means of a pro forma

notification letter with a detailed Paper Apart running to 5 pages dated 18 July 2020, in compliance with the requirements of section 17(3) of the Act.

4. The Factor made an application to the Tribunal on 29 September 2020 to postpone the hearing set down to consider the application so that the Homeowners could commence a complaint in terms of the Factor's procedure as set out in its Written Statement of Service. That application was refused by the Tribunal.
5. The Factor appended brief representations to its letter dated 29 September 2020. Otherwise, the Factor did not provide any documentation to the Tribunal for it to consider.
6. A hearing of the Tribunal was held at 10 am on 22 October 2020 by means of a telephone conference call. Both Homeowners appeared on the call and gave evidence. The Factor was represented by Mrs Lisa Pieper, Operations Manager for the Factor, assisted by Miss Melissa Syme, Property Manager. Evidence for the Factor was predominantly provided by Mrs Pieper.

Tribunal findings

The Tribunal made the following general findings in fact pursuant to rule 26(4) of the 2017 Regulations in relation to the factual background to the dispute:

7. The Homeowners are a married couple. Where necessary, they will be referred to individually by name. They own the Property which is within a four storey (ground and three floors) block which is rented out to tenants. There is a car park to the rear of the Property. The block may be accessed from the rear by means of a key fob which is an electronic device which permits entry via an electronic key pad. Otherwise entry is obtained by going around a more circuitous route via the front of the block which is less convenient for occupants of the block wishing to use the car park.
8. The Factor took over management of the block in which the Property is located in or about April 2018. It issues quarterly invoices for its services and charges made to the block. Quarterly invoice statements dated 9 January 2019 and 10 October 2019 were provided to the Tribunal. From the invoices provided, it can be seen that the Factor's management fee amounted to £32.50, rising to £39 per quarter. The Homeowners paid their invoices by means of a monthly direct debit based on a calculation of overall likely annual charges.
9. The Homeowners had a single key fob. Three tenants took occupancy of the Property in or about April 2018. As a consequence, a further three key fobs were necessary and these were requested from the Factor at that time.
10. The Property Manager (Lizzie Halpin) contacted by the Homeowners initially insisted that a conventional key was required, despite the Homeowners telling her that this was not the case. A simple walk around inspection by the Factor upon taking over the management of the block would have avoided this initial source of delay. Three phone calls were made by the Homeowners in order to

follow up the request for the three key fobs which required to be sourced and programmed by the Factor prior to use by the tenants.

11. A repair report dated 12 June 2018 was eventually generated by the Factor in respect of the request for key fobs. Further email correspondence ensued between the parties dated 15 June, 16 June, 20 June, 21 June, 25 June, 27 June, 9 July, 27 July, 31 July, 15 August, 24 August and 29 August, all 2018. Most of the correspondence were reminder emails sent to the Factor by the Homeowners, chasing up the request for three key fobs. The key fobs were eventually provided to the Homeowners on or about 29 August 2018.
12. The central part of the correspondence between the parties was a formal complaint written by Mr Banks to Elaine Bald (Mrs Pieper's predecessor as Operations Manager for the Factor) dated 24 August 2018 (although a clear complaint in an email dated 31 July 2018 had also been sent by him prior to that). It was described in its own terms as an escalated complaint. Aside from expressing dissatisfaction that such an apparently straightforward request had taken to so long to resolve, Mr Banks also made a wider complaint.
13. The wider complaint concerned the Factor's lack of internal controls and a failure to comply with its own internal procedures for response times to correspondence as set out within the Written Statement of Services ("WSS") provided to the Homeowners. The complaint also suggested the compensation might be paid to their tenants who had been inconvenienced during the previous four months as well as to the Homeowners themselves for the time and inconvenience they had suffered in requiring to engage in multiple correspondence which they had to constantly chase up as it had not been responded to.
14. In evidence, Mr Banks confirmed that not only was he seeking an apology for the delay in providing the key fobs, but also an assurance regarding the Factor's own systemic failures in terms of its internal procedures and communication, both internally and with homeowner clients, in order to ensure that there was no repeat of the episode in the future. For that reason, he also intimated in his formal letter of complaint that he had cancelled his direct debit to the Factor in order to make it pay attention and to force it to effect the changes in its internal controls which he sought.
15. An email dated 29 August 2018 was received from Carri in the Factor's customer services department letting the Homeowners know that the key fobs were now in stock and ready for collection and apologising for the delay on the Factor's part. That email did not emanate from Elaine Bald (although it was copied to her) and did not make reference to Mr Bank's letter of complaint of 24 August 2018 or deal with the issues raised within that letter of complaint.
16. The Homeowners ceased paying their invoices from August 2018 to the date of the hearing and accrued arrears in the region of £2400 (the total amount being disputed for reasons which are explained below).

17. Although, the Homeowners had expected that their non-payment of invoices would have brought swift action, their complaint was not in fact progressed. Matters remained static for over a year until the Homeowners received the quarterly invoice dated 10 October 2019 which included a debt recovery administrative fee for £120 in respect of 'Court action.'
18. This development revived the original formal complaint and commenced a fresh source of complaint against the Factor by the Homeowners. Letters of complaint dated 14 October 2019 were sent to Mr Paul Hitchen, Head of Property with the Factor and Mr Hugh McGeever, its Managing Director, by way of further escalation. No direct response to those letters was received from either Mr Hitchen or Mr McGeever, although Mrs Pieper did engage in correspondence with the Homeowners thereafter.
19. In the middle of November 2019, the Homeowners entered the Property upon the changeover of tenants in that month. At that point, they discovered a formal letter before action dated 4 April 2019 from the Factor's solicitors, Messrs Hardy Macphail, seeking payment of outstanding sums due to the Factor under threat of court action if they did not comply.
20. The lawyer's letter had been sent to the Property, rather than the Homeowner's residential address (as had been the case with quarterly statements). It had been sent via second class mail and required payment within 7 days of the date of the letter, failing which court proceedings would be raised. Even if the letter had been sent to the correct address, there would have been almost no time to comply with the demand. This led to a large degree of alarm on the part of the Homeowners: for all that they knew, court proceedings had already been instigated with the result that the legal consequences outlined in the letter would already have been realised such as a charge over the Property, judicial debt, legal expenses and an adversely affected credit rating.
21. A letter dated 18 November 2019 was sent to Messrs Hardy Macphail by the Homeowners refuting the debt and raising other matters in relation to the complaint. No response was received by the Homeowners from Messrs Hardy Macphail in response to that letter or at any other time. Mrs Pieper confirmed in evidence to the Tribunal that she had placed the Homeowner's account on hold on or about November 2019 and that no court proceedings were in fact instituted against them.
22. The Homeowners received a letter from Mrs Pieper on 15 November 2019 which was responded to by the Homeowners on the day it was received, 20 November 2019. Despite two requests for it to be re-sent, the Factors did not supply the letter of 15 November to the Homeowners in order to enable them to include it with the correspondence supplied to the Tribunal. However, from the terms of the Homeowner's response, it had apparently been stated by Mrs Pieper that Mr Bank's formal complaint had effectively been lost and therefore not actioned due to the fact that Elaine Bald had since left the Factor's employment. This was reiterated in an email from Mrs Pieper dated 3 December 2019 which was produced to the Tribunal.

23. Further correspondence ensued between the parties in December 2019 and into the following year. A letter with enclosures consisting of the proposed application to the Tribunal with explanatory pages apart was sent to Mr McGeever on 26 February 2020 via recorded delivery post. Accordingly, the Factor was aware of the complete terms of the Homeowner's complaint to this Tribunal as of that date and prior to it being submitted to the Tribunal.
24. In an email dated 21 July 2020, an employee of the Factor, who referred to herself as Catherine S, told the Homeowners that: "our records do not indicate that a formal complaint has previously been raised [in respect of the Property] as per the Written Statement of Services" and invited the Homeowners to complete that first, enclosing the necessary forms for them to do so. A lengthy response to that email was sent by Mrs Banks on 22 July 2020 providing a deadline date of 11 August 2020 for the Factor to resolve matters. No satisfactory response was received.
25. The formal notification of an intention to bring matters before the Tribunal dated 18 July 2020 was sent to the Factor as noted above. The Factor therefore had a further three months to resolve matters with the Homeowners prior to the date of the hearing.

Tribunal findings in relation to the Code of Conduct

The Tribunal makes the following specific findings in fact in relation to the breaches of the Code of Practice by the Factor based upon the findings in fact above and on the documents supplied to it.

Section 2.5

26. This section of the Code requires factors to deal with enquiries and complaints within prompt timescales. Homeowners should be informed if factors require additional time to respond.
27. The WSS provides timescales for responses to customer enquiries and complaints at sections 6 and 7 respectively. At section 6, the WSS states that in the event that its Customer Service Centre cannot address an enquiry over the telephone, the customer's Property Manager will return the call within 2 working days. It is further stated that for general requests, the Factor will send an acknowledgement within five working days of receipt and would provide a timescale for resolution of the query. These standards were not complied with.
28. At section 7 of the WSS, 4 stages of dispute resolution are set out. At each stages of the procedure, it is stated that a response will be provided within 10 working days. The formal stages in terms of section 7 of the WSS were never initiated by the Factor.
29. The correspondence between the parties provided in evidence in relation to the fob issue has been set out in full above. The Tribunal found that there was an unacceptable delay in dealing with this issue. Further, when Mr Bank's formal email of complaint dated 24 August 2018 was sent to the Factor, it ought to

have registered the complaint at that time in accordance with its own procedures.

30. There is nothing in the Act which requires homeowners to fill in a form prescribed by property factors, only that they notify the factor of their concerns (section 17(3) of the Act). That was done unequivocally by Mr Banks on 24 August 2018 and thereafter. Nonetheless, the Factor persisted until as late as 29 September 2020 to attempt to require the Homeowners to submit to that formality which could only have the effect of frustrating a clearly stated formal complaint which ought to have been acted upon at the appropriate time.
31. Thereafter, once the prospect of a potential court action became an issue between the parties, the Factor failed to address the Homeowner's concerns, despite the fact that the Homeowners made it frequently clear in correspondence that they were willing at any time to pay the outstanding invoices once their concerns had been addressed in the manner set out above. The Factor failed to do this, even after formal notification of the Homeowners' complaint in full in July 2020, and having already been provided with the terms of the Homeowners' application to this Tribunal in February 2020.
32. All of the above fell far short of the service standards set out in Sections 6 and 7 of the WSS and also the requirements of the Code to respond to enquiries and complaints within prompt timescales.
33. The Tribunal therefore finds that the Factor breached section 2.5 of the Code.

Section 4.1

34. This section provides that factors must have a clear written procedure for debt recovery which outlines a series of steps which they will follow unless there is reason not to. The procedure must be clearly and consistently applied.
35. The Tribunal was provided with the Factor's debt recovery procedure which does indeed set out a series of three steps, commencing with a reminder notice, before moving onto Sheriff Officer, Solicitor or Debt Recovery Agent and then Court Proceedings as a final step.
36. The Surveyor Member noted that Stages 1 and 2 have administrative charges associated with them. Stage 1 incurs a charge of £34 and Stage 2 incurs a referral fee of £50. Stage 3, Court Proceedings, attracts an associated administrative charge of £120. The Homeowners denied having received any reminder notices in relation to any stage of the debt recovery procedure. Mrs Pieper stated that such notices had been sent, but none were provided in evidence. Without that evidence, on the balance of probabilities, the Tribunal accepts the oral evidence of the Homeowners on that point.
37. Further, neither of the quarterly invoices provided to the Tribunal had charges for either £34 or £50 stated within them as having been applied. Again, Mrs Pieper stated that these charges had been levied, but provided no separate vouching to support that statement in oral evidence before the Tribunal. Again,

the Tribunal, on the balance of probabilities, accepts the evidence of the Homeowners that no such charges were levied.

38. The only administrative charge which was vouched was the £120 added to the quarterly invoice of 10 October 2019. It was this that prompted the renewed correspondence from the Homeowners to Messrs Hitchen and McGeever. This adds credibility to the position that the prior charges had not been applied, otherwise they would have been noticed by the Homeowners and acted upon. The Tribunal finds that this was the only administrative charge, or 'referral fee' as it is called, levied on the Homeowners. Since it was established during the hearing that no court action had in fact been commenced against the Homeowners, that charge ought not to have been raised at all without the earlier two stages having been completed.
39. The Tribunal therefore found that the Factor did not follow its Debt Recovery Procedures and, separately, did not apply them clearly and consistently. The Factor therefore breached section 4.1 of the Code.

Section 4.3

40. This section states that charges imposed must not be unreasonable or excessive.
41. The Tribunal has already found in respect of section 4.1 of the Code that the £120 charge in respect of court proceedings was not warranted at all, given the absence of actual court proceedings or any prior steps having been undertaken pursuant to the Factor's debt recovery procedure. It was therefore unreasonable and excessive.
42. The Tribunal therefore finds that the Factor breached section 4.3 of the Code.

Section 4.8

43. This section stipulates that factors must not take legal action against a homeowner without taking reasonable steps to resolve the matter, and without giving notice of their intention.
44. The letter before action from Messrs Hardy Macphail came "out of the blue" as far as the Homeowners were concerned. They had stated repeatedly in correspondence that they were willing to pay the outstanding invoices once their concerns had been satisfactorily addressed. As accepted in evidence by Mrs Pieper, Mr Bank's formal email of complaint of 24 August 2018 was effectively lost following the departure of Elaine Bald from the Factor's organisation.
45. The Tribunal therefore found that the solicitor's demand letter, in the absence of the prior steps having been taken, did not provide adequate notice of the Factor's intention. It also found that as a result of what has been stated above, that the Factor did not take reasonable steps to resolve the matter because it

did not address the concerns clearly raised in Mr Bank's formal email of complaint dated 24 August 2018 prior to instructing a solicitor.

46. The Tribunal therefore finds that the Factor breached section 4.8 of the Code.

Section 4.9

47. This section stipulates that when contacting debtors, Factors, or parties acting on their behalf must not act in an intimidating manner or threaten them – apart from a reasonable indication that you may take legal action.
48. In relation to the second part of the proscribed conduct underlined above, the Tribunal found that the statement within the letter from Hardy Macphail that court proceedings might be raised which could thereafter result in a Notice of Potential Liability were not threatening within the meaning of the Code. It is legitimate to state that legal action might be taken and the lawful consequences which might flow from that.
49. However, in relation to the first part underlined above, the Tribunal found that the manner of the demand letter from the solicitors, in being sent via second class post with a short notice period of one week from the date of the letter, having been sent to wrong address, was conduct likely to be intimidating to a potential debtor. In addition to those shortcomings, the letter was dated 4 April 2019 and stated that the solicitors were instructed to proceed with legal action for recovery of the sum due without further notice. Mrs Pieper did not suspend action on the Homeowner's account until November 2019.
50. As a consequence, the Homeowners were under a reasonable apprehension that they might already have been found liable for a debt following judgment in court proceedings in their absence. The Homeowners gave evidence that they did in fact find the solicitor's letter intimidating in those circumstances. The letter was sent by solicitors acting on behalf of the Factor as their agent. The Factor is liable for those acting as principal. The Code also refers expressly to "any third party acting on your behalf."
51. Accordingly, the Tribunal finds that the Factor breached section 4.9 of the Code.

Section 6.1

52. This section of the Code requires factors to have in place procedures to allow homeowners to notify of matters requiring repair, maintenance or attention. Factors are required to inform homeowners of progress of this work, including estimated timescales.
53. The WSS has such procedures in place and these are set out in Sections 3 and 4 of that document. Response times are indicated at the end of Section 4. These are divided into emergency and routine categories. Even assuming the key job request to have been a routine issue, the longest example response time provided (in respect of roofing) is 15 days.

54. The key fob issue took in excess of four months to resolve. Additional delay was built in at the start because the Factor's property manager did not accept that an electronic key fob, as opposed to a traditional key, was required, despite the Homeowners having knowledge of the Property which they owned. The Tribunal accepts that this was a straightforward matter that should have been dealt with promptly and certainly more swiftly than, for example, a routine roof repair.
55. The reasons for the further delay was explained by Mrs Pieper in evidence to the Tribunal. However, there was no evidence before the Tribunal that the Factor notified the Homeowners of the likely timescale for the task to be completed or the progress in completing that task as difficulties became apparent. On the contrary, the Homeowners required to constantly chase up the Factor by means of telephone calls and emails in order to obtain any progress in obtaining the key fobs.
56. Accordingly, the Tribunal finds that the Factor breached section 6.1 of the Code.

Section 7.1

57. This section of the Code provides that factors must have a clear written complaints resolution procedure in place which sets out a series of steps which they will follow, accompanied by reasonable timescales set out in the WSS.
58. Again, the WSS has such a procedure in place at Section 7 as discussed above. Also, as discussed above, the procedure was not actually followed by the Factor further to Mr Bank's email of 24 August 2018. The terms of that complaint were not registered as a formal complaint pursuant to the WSS procedure. When Elaine Bald left the Factor, the complaint was allowed to fall away without being considered further, until revived by the Homeowners in October 2019.
59. Accordingly, the Tribunal finds that the Factor breached section 7.1 of the Code.

Section 7.2

60. Section 7.2 of the Code provides that when the in-house complaints procedure has been exhausted without resolving the complaint, the final decision in relation to it should be confirmed by senior management before the homeowner is informed in writing. The letter should also provide details as to how the homeowner may apply to the Tribunal.
61. It was a matter of admission from Mrs Pieper that the requirements of this section of the Code had not been complied with. Letters of complaint were sent to Mr McGeever, a member of senior management, but he himself did not engage with the Homeowner's complaint. Attempts to escalate the complaint were ignored by the Factor.

62. The Tribunal therefore finds that the Factor breached section 7.2 of the Code.

Section 7.4

63. In terms of this section, factors must retain all correspondence relating to a homeowner's complaint for a period of three years.

64. As noted above, the departure of Elaine Bald effectively meant that Mr Bank's email of complaint dated 24 August 2018 was effectively lost as internal failings mean that there was no corporate memory of that complaint and internal communication structure meant that it was not taken forward. Prior even to the complaint of 24 August 2018, Mr Banks had written an email dated 31 July 2018 which stated "I wish to register a complaint on how poorly your company is handling the management of the stair in the property I own. This also appears to have become lost following the departure of Elaine Bald.

65. The loss of correspondence relating to the Homeowners' complaints was demonstrated by the email dated 21 July 2020 referred to earlier where the Homeowners were informed that the Factor (a) had no record of their formal complaint and (b) required that they start one afresh in order for it to be considered, nearly two years after the original complaints.

66. In those circumstances, the Tribunal finds that the Factor breached section 7.4 of the Code.

Decision

67. The Tribunal finds that the Factor has breached its duty to comply with the Code in respect that it failed to adhere to the terms of sections 2.5, 4.1, 4.3, 4.8, 4.9, 6.1, 7.1, 7.2 and 7.4 of the Code, all as required by section 14(5) of the 2011 Act.

68. At the hearing, the Homeowners agreed that all of their concerns in relation to property factor duties had been adequately covered under the Code. Consequently, it was unnecessary to consider whether there had been any other breaches not covered by the Code in terms of section 17(1)(a) of the Act.

69. A proposed Property Factor Enforcement Notice accompanies this decision. Comments may be made by either party **in respect of the proposed Property Factor Enforcement Notice only**, within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

70. The Tribunal also notes that the Factor was not assisted by its failure to engage with the Tribunal effectively at earlier stages of the process, quite apart from its failure to engage meaningfully with the Homeowners, despite there having been ample time and opportunity prior to the hearing to do so. On a number of occasions during the hearing, Mrs Pieper offered to provide further correspondence and other documentation which might have been useful. However, such offers came far too late in the day for the Tribunal to take them

into account or for them to be of any assistance to it in carrying out its function. The Tribunal hopes that the Factor will deal differently with any future applications to the Housing and Property Chamber.

Appeals

71. 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 within 30 days of the date the decision was sent to them.

Signed: M O'Carroll
Chairman

Date: 29 October 2020