

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 ("the Act") and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, in an application made to the Tribunal under Section 17 of the Act

Chamber reference: FTS/HPC/PF/19/2326

The Parties:

Mr Edmund Curran, Flat 0/1, 695 Hawthorn Street, Springburn, Glasgow G22 6AZ ("the homeowner")

And

NG Property (Scotland) Limited, incorporated in Scotland (SC251415) and having its Registered Office at Ned Donaldson House, 50 Reidhouse Street, Springburn, Glasgow G21 4LS ("the property factors")

Property: Flat 0/1, 695 Hawthorn Street, Springburn, Glasgow G22 6AZ

Tribunal Members – George Clark (Legal Member/Chairman) and Sara Hesp (Ordinary Member)

Decision by the Housing and Property Chamber of the First-tier Tribunal for Scotland in an application under section 17 of the Property Factors (Scotland) Act 2011('the Act')

The Tribunal has jurisdiction to deal with the application.

Decision

The property factors have not failed to comply with their duties in terms of the Code of Conduct made under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act"). The property factors have not failed to carry out the Property Factor's duties.

The Tribunal does not propose to make a Property Factor Enforcement Order.

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 as “the Code of Conduct” or “the Code”; and the Housing and Property Chamber of the First-tier Tribunal for Scotland as “the Tribunal”.

The property factors became a Registered Property Factor on 7 December 2012 and their duty under Section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Tribunal had available to it and gave consideration to the application by the homeowner received on 24 July 2019, with supporting documentation, namely a copy of the Written Statement of Service, copies of e-mail correspondence between the Parties, a quarterly Invoice dated 30 July 2019, photographs of the common close at 695 Hawthorn Street, Springburn, Glasgow, further written representations from the homeowner received on 26 October 2019 and written representations from the property factors, received by e-mail on 18 September and 28 October 2019.

Summary of Written Representations

(a) By the homeowner

The following is a summary of the content of the homeowner’s application to the Tribunal:

The homeowner’s complaint was that the property factors had failed to comply with Sections 3.3, 6.4, 6.8 and 6.9 of the Code of Conduct and had failed to carry out the property factor’s duties by not carrying out the annual cleaning of the gutters.

Section 3.3 of the Code of Conduct requires property factors to provide to 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.

Section 6.4 of the Code of Conduct states that if the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, the property factors must prepare a programme of works.

Section 6.8 of the Code of Conduct obliges property factors to disclose to homeowners, in writing, any financial or other interests that they have with any contractors appointed.

Section 6.9 of the Code of Conduct states that property factors must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided.

An Invoice dated 11 April 2018 had related to a job carried out to the roof of the block of which the Property forms part on 15 January 2018 at a cost of £443.96. When it was disputed, the cost had been cancelled and the property factors had written to the homeowner on 27 April 2018 to say that with “immediate effect” the annual cleaning of the gutters in the block would take place. A second job had been carried out in March/April 2018, relating to another downpipe being blocked outside the homeowner’s window. Again, the owners were not asked to pay, as it had been caused by the gutters not being cleaned. A third job had then been carried out on 19 December 2018. It was similar to the first one. The property factors should be made to pay for this as, once again, it was necessary because the gutters had not been cleaned. The homeowner could not understand why a full inspection of the roof was not carried out when the first job was carried out, bearing in mind that the property factors were aware that the gutters had not been cleaned for several years. The photographs provided with the application showed a considerable build up of moss on another part of the roof and they clearly showed dampness on the ceiling of the common stair. The homeowner presumed that this too would soon have resulted in another downpipe being blocked and another bill for the owners to pay.

The homeowner stated that the evidence showed that the property factors were still not carrying out the annual cleaning of the gutters, as the latest incident (now rectified) had been 13 months after the property factors’ letter of 27 April 2018. The e-mails submitted with the application showed that the homeowner had requested a cost for the annual cleaning of gutters, but the property factors were reluctant to provide this.

Buildings insurance was costing each owner nearly £150 per annum, but all six owners had to pay when either of the two top flats had a leak. When the homeowner had a leak into his flat from the flat above, he had to claim from his own insurance. The failure to clean the gutters had clearly contributed to the repairs having to be carried out, whether or not any damage was due to storms.

No inspections had been carried out by the property factors either before or after the three repair jobs. Whenever work was carried out by the property factors’ contractors, the homeowner had had to make a complaint because the work had not been satisfactory. He instanced an issue when the intercom system was fitted.

The homeowner did not understand why law abiding owners had to pay towards solicitors’ costs that the property factors accrued when recovering outstanding debts due by other owners who did not pay their bills. These should be met by the defaulting owners.

The homeowner wanted a guarantee that a member of the property factors' staff such as a clerk of works would check all major works after they had been carried out. He also wanted to know in advance the cost for the annual cleaning of the gutters and an explanation as to why he had to pay a fee which was included in the Management Fee to go towards solicitors' costs which arose when other owners did not pay their bills.

The homeowner's representations of 26 October 2019 related to a separate issue in relation to the close doors. This issue had not formed part of the original application, and referred to a matter which had arisen after the date of the application, so was not considered further by the Tribunal. They also included, however, an e-mail dated 27 October 2019 from a neighbour in a top flat in the block to the homeowner, stating that the property factors had told her that cleaning of the guttering had taken place earlier in the year, but that she had no proof of this having happened.

(b) By the property factors

The following is a summary of the written representations made by the property factors and received by the Tribunal on 18 September and 28 October 2019:

The representations received on 18 September 2019, sought certain clarification of the application and advised that some of the issues had been rectified before the application had been intimated to them. The substantive written representations were contained in the property factors' e-mail of 28 October 2019.

In response to the complaint of failure to comply with Section 3.3 of the Code of Conduct, the property factors stated that they issue quarterly invoices which provide a detailed breakdown of charges made and a description of the activities and works carried out. It appeared that the complaint related to homeowners paying a percentage of their management fee towards solicitors' costs that the property factors accrue when a homeowner refuses to pay their share. The Property factors' position was that the factors that they use to determine their management fee are entirely a matter for them. They incorporate business costs when determining the fee and do not spread the legal fees of debt recovery action against all homeowners. The property factors' position was that they had complied with Section 3.3 of the Code of Conduct and that the Tribunal should reject this aspect of the complaint.

In relation to the complaint under Section 6.4 of the Code of Conduct, the property factors attached their programme of works in connection with the cyclical guttering and, contending that they had a programme of works, invited the Tribunal to reject this aspect of the complaint.

With regard to the complaint under Section 6.8 of the Code of Conduct, the property factors stated this aspect of the complaint lacked specification as to the nature of the alleged breach, but that they have no financial or other interest in the contractor

appointed. The contractor appointed to undertake the cyclical guttering works was procured via a public procurement framework.

The complaint under Section 6.9 of the Code of Conduct was lacking in specification. It made no reference to inadequate works or services provided by a contractor. Accordingly, the property factors did not have fair notice of the case against them in this regard and the Tribunal should find that there has been no breach of Section 6.9 of the Code.

Under the heading of failure to carry out the property factor's duties, the property factors accepted that the Property was, for unknown reasons, removed from their contractors' planned programme of works in connection with gutter cleaning. They agreed that that was unacceptable and that the block ought to have been included in the programme, but they had taken steps to resolve the error and the block is included in the next scheduled gutter cleaning.

The applicant had complained that he was required to pay for a repair to the roof which would not have been created if the annual cleaning of the gutters had been carried out. The property factors understood this to be a repair carried out in December 2018, owing to water ingress. This repair, however, had been to the roof tiles, so did not result from a failure to carry out annual gutter cleaning.

The homeowner had complained regarding works required to the inside of the close in connection with dampness. The property factors understood this to be repairs effected in the ground floor common close entrance between May and June 2019. Following a report made by the homeowner, the property factors had attended to inspect the common close entrance and the flat roof above it. The ceiling of the flat roof appeared to have historic water marks and flaking paint. The property factors had then immediately instructed works to remedy the problem, including cleaning of the flat roof and gutters, scraping and repainting of the ceiling. The homeowners had been advised that there would be no charge to them in connection with these works.

The view of the property factors was that the homeowner had not suffered a detriment as a result of the failure to undertake annual gutter cleaning and they invited the Tribunal to make a finding that a Property Factor Enforcement Order was unnecessary. They had acknowledged their error, effected repairs at no cost to homeowners and taken steps to ensure the block is included in future.

The property factors denied the complaint of the homeowner that they do not pre and post inspect works. They attend to inspect defects if requested by an owner all in accordance with paragraph 16 of their Written Statement of Services. In terms of post-inspection of works, each contract has an independent rate of inspection. Although periodic inspections are not part of the core service, their clerk of works undertakes a monthly exercise whereby he selects 5% (now 10% following a policy update) of all programmed and repair works to inspect. He visits the contractor to review date and time stamped photographic evidence of the works and, if he is not

satisfied with the works undertaken, the contractor will not be paid and the property factors will undertake an investigation.

The property factors included with their written representations a copy Invoice to the homeowner covering the period from 1 October 2018 to 31 December 2018. This itemised works carried out, as well as including the quarterly management fee and the homeowner's share of the cost of the electricity supply to the close. They also provided a copy of a spreadsheet headed "Gutter Cleaning & Roof Repairs 01 April 2014/31st March 2015" and a copy Repair Report by Clyde Homes in respect of work completed on 19 December 2018, which detailed the clearing out of a valley and re-fitting of 20 roof tiles, together with clearing out of 10 metres of box gutter and re-dressing of 2 metres of lead flashing. The property factors also provided the Tribunal with a copy of an e-mail from Clyde Contracts dated 28 October 2019, in which the contractors confirmed that the issue in December 2018 could not have been caused by failure to undertake gutter cleaning. It had been a roof repair caused by tile puncturing of the lead valley, which was not related to the guttering system.

The Hearing

A hearing took place at Glasgow Tribunals Centre on the morning of 6 November 2019. The homeowner was present at the hearing. The property factors were represented by Mrs Claire Mullen of TC Young, solicitors, Glasgow and by Karen McNaughton, their Property Services Officer.

Summary of Oral Evidence

The chairman told the Parties that they could assume that the Tribunal members had read and were completely familiar with all of the written submissions and the documents which accompanied them.

In relation to his complaint under Section 3.3 of the Code of Conduct, the homeowner told the Tribunal that he had been told that part of the Management Fee included contributions to legal costs of pursuing non-paying homeowners. The property factors' response was that there appeared to be something of a misunderstanding. Their Management Fee narrates what covers the core service and that includes incorporating their business costs. Their quarterly invoices demonstrate compliance with Section 3.3 of the Code. The homeowner said that owners did not receive any proof or photographic evidence to back up the bills.

On the complaint under Section 6.4 of the Code of Conduct, the property factors repeated that there is a planned programme of works in terms of gutter cleaning and the homeowner was not complaining that there was no such programme. The homeowner's issue was failure to implement the programme and the property factors accepted that due to an administrative error, the block of which the homeowner's flat forms part had been removed from the programme. They also directed the Tribunal

to an e-mail from Clyde Contracts dated 28 October 2019, in which the contractors confirmed that the work carried out in December 2018 was repair of damage caused by roof tiles puncturing the lead valley, which was not related to the guttering system.

The property factors explained that if a repair is being carried out to the roof, the gutters are checked and cleaned if necessary. In the absence of a specific repair, the gutter cleaning is carried out annually. The purpose of this approach was to avoid homeowners being charged specifically for cleaning of gutters when the work could have been done in conjunction with a roof repair. The last annual cyclical repair had been in 2014. There had been a repair in 2017, so the gutters would have been checked at that time. Gutter cleaning sometimes involved scaffolding and sometimes was effected by access through a skylight. There would be a visual inspection, then cleaning out by hand with a wire brush and manual removal of the debris.

The homeowner told the Tribunal that when he had set up his Direct Debit for payments to the property factors, he had been told that annual gutter cleaning was included in the Management Fee. This was denied by the property factors.

Regarding his complaint that the property factors had failed to comply with Section 6.8 of the Code of Conduct, the homeowner stated that he was not alleging that the property factors had a financial interest in contractors, but he did not understand the public procurement process to which they had referred in their written representations. The property factors explained that, in relation to the appointment of Clyde Contracts, a specification of works had been put out to tender on the Public Contracts Scotland website. That particular contract had produced two successful contractors, the other one being Carillion, a company that had since been put into liquidation.

The discussion at the Hearing in relation to Section 6.9 of the Code of Conduct related to an issue with the close door entry system, but as this had not been included in the original application, it was not considered further by the Tribunal.

The homeowner then addressed the Tribunal in relation to his complaint that the property factors had failed to carry out the property factor's duties. He emphasised the damage caused to the common close that was due to the gutters not having been cleaned out. There were patches of damp in the ceiling outside Flat 2/2 and the brickwork of the common passage had been discoloured and the only matter which had been corrected had been the area below the flat roof.

The property factors responded that they were not aware of any problems outside Flat 2/2 and, had they been made aware of any such issues, they would have dealt with them. They should be allowed to investigate this new matter and to take remedial action. The repairs in December 2018 were not related to the failure to monitor the guttering but, as a goodwill gesture, they had informed homeowners that they would refund the December 2018 charge. The homeowner commented that he

would have expected proof as to what work had been done when he had queried the bill in the first place.

The Parties then left the hearing and the Tribunal members considered all the evidence that they had heard, along with the written representations and all other documentation before them.

Findings of Fact

The Tribunal makes the following findings of fact:

- The homeowner is a homeowner within a block of six flats .
- The property factors, in the course of their business, manage the common parts of the development. The property factors, therefore, fall within the definition of “property factor” set out in Section 2 (1)(a) of the Property Factors (Scotland) Act 2011 (“the Act”).
- The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- The date of Registration of the property factors was 7 December 2012.
- The homeowner has notified the property factors in writing as to why he considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
- The homeowner made an application to the Housing and Property Chamber of the First-tier Tribunal for Scotland (“the Tribunal”) received on 24 July 2019 under Section 17(1) of the Act.
- The concerns set out in the application have not been addressed to the homeowner’s satisfaction.
- On 12 September 2019, the Housing and Property Chamber intimated to the parties a decision by the President of the Chamber to refer the application to a tribunal for determination.

Reasons for the Decision

Section 3.3 of the Code of Conduct requires property factors to provide to 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 request, property factors must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying.

The Tribunal did not uphold this ground of complaint. The Tribunal had seen evidence of quarterly billing which included a financial breakdown and there was no evidence provided that the property factors had failed to comply with any request

the homeowner had made for supporting documentation. The Tribunal accepted that the factors taken into consideration by property factors in determining their management fee are entirely a matter for them and they would be expected to incorporate business costs when determining their fee structure.

Section 6.4 of the Code of Conduct states that if the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, the property factors must prepare a programme of works.

The Tribunal did not uphold this ground of complaint. The Tribunal accepted the statement of the property factors that the core service does not include periodic inspections, although they do, in fact, carry them out. The property factors had also produced to the Tribunal a programme of cyclical maintenance in respect of the gutters.

Section 6.8 of the Code of Conduct obliges property factors to disclose to homeowners, in writing, any financial or other interests that they have with any contractors appointed.

The Tribunal did not uphold this ground of complaint. The Tribunal accepted the evidence, which was not challenged by the homeowner, that they have no financial or other interest in the contractors they have appointed.

Section 6.9 of the Code of Conduct states that property factors must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided.

The Tribunal did not uphold this ground of complaint. The homeowner had provided no evidence in support of his contention that when works were carried out he had had to complain to the property factors as the work had not been satisfactory.

Failure to comply with the property factor's duties

The Tribunal did not uphold this ground of complaint. The Tribunal noted that the property factors had accepted that the gutter cleaning of the block of which the Property forms part had been inadvertently removed from the programme of works, but the Tribunal accepted that, when they had discovered this to be the case, they had taken steps to remedy the situation and the homeowner had not been prejudiced by the administrative error, as they had effected repairs at no cost to homeowners. The contractors had confirmed in their email of 28 October 2019 that the roof repair in December 2108 had not been related to the failure to clean out gutters

The homeowner had contended that gutters had not been cleaned out for at least 13 months after 27 April 2018, but the property factors had told the Tribunal that clearing out of gutters is undertaken if found necessary when roof repairs are being

carried out and the Tribunal had noted that the breakdown of the work carried out in December 2018 had included the cleaning out of 10 metres of box gutter.

Having determined that the property factors had not failed to comply with the Code of Conduct or with the property factor's duties, the Tribunal did not propose to make a Property Factor Enforcement Order.

Decision

The property factors have not failed to comply with their duties in terms of the Code of Conduct made under Section 14 of the Property Factors (Scotland) Act 2011. The property factors have not failed to carry out the Property Factor's duties. The Tribunal does not propose to make a 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.

Signature of Legal Chair

Date 6 November 2019