

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 Refs: FTS/HPC/PF/23/1246

1/ 4 17 Springfield Gardens, Glasgow, G31 4HT ("the Property")

Parties:

Petr Berka, 1/ 4 17 Springfield Gardens, Glasgow, G31 4HT ("the Homeowner")

**Newton Property Management Ltd, 87 Port Dundas Road, Glasgow ("the
Property Factor")**

Tribunal Members:

Josephine Bonnar (Legal Member) and Mary Lyden (Ordinary Member)

DECISION

**The Tribunal determined that the Property Factor has not failed to comply with
OSP 6 of the Property Factor Code of Conduct as required by Section 14(5) of
the Act.**

The decision of the Tribunal is unanimous.

Background

1. The Homeowner lodged six separate applications in terms of Rule 43 of the Tribunal Procedure Rules 2017 and Section 17 of the 2011 Act. The applications state that the Property Factor has failed to comply with the 2021 Code and failed to carry out their property factor duties. Documents were lodged in support of the applications including copies of emails and letters addressed to the Property Factor. The written statement of services was also lodged.
2. A Legal Member of the Tribunal with delegated powers of the President referred the applications to the Tribunal. The parties were notified that a case management discussion ("CMD") would take place on 20 June 2023 at 10am

at Glasgow Tribunal Centre.

3. Following service of the first application (PF/22/4041), the Property Factor lodged written representations. They indicated that they did not wish to attend a hearing on the applications. They referred to previous applications determined by the Tribunal and said that the new applications contained a number of similarities. They also referred to the language used by the Homeowner in his correspondence with the Property Factor, which included allegations of criminal behaviour by both the Property Factor and the Tribunal. The Tribunal noted that Mr Berka had submitted a letter from the Property Factor dated 7 December 2022 with the application. This letter indicates that, due to the excessive number of emails received from Mr Berka, the Property Factor had decided that they would not respond to future correspondence. They would continue to act on reports of an emergency nature but could not provide responses as it was having an adverse impact on their ability to manage the property. They referred to the WSS, which makes provision for this decision. On 30 May 2023, the Property Factor lodged a response to this application and some photographs of the bin store. This was overlooked by the Tribunal and only considered when it was re-submitted at a later stage.
4. The CMD took place on 20 June 2023. The Homeowner attended. The Property Factor was not represented. Although he participated in the CMD, Mr Berka did not have a copy of his applications, which limited his ability to address some of the issues raised by the Tribunal.

Summary of Discussion at the CMD

5. This application is dated 13 April 2023 and refers to OSP 6 and property factor duties. The complaint relates to a failure by the contractor to clean the bin store and the Property Factor to respond to his complaint about this. The application is accompanied by photographs of the bin store and the signing schedule signed by the contractor after each clean. There are also two property factor duties letters (which appear to relate to one of the other applications) and a Code letter dated 16 March 2023 in relation to the bins. There is no duties letter in relation to the bins and no evidence that the Code letter was sent.
6. Mr Berka said that he could provide the email of 16 March 2023 which sent the Code letter to the Property Factor. He told the Tribunal that the photographs lodged by him were taken after the contractor had allegedly attended and cleaned the bin store. They were taken on 15 March and the complaint sent on 16 March. The contractor is due to attend every Wednesday.
7. Following the CMD the Tribunal issued a direction to the Homeowner in connection with all the applications. Although a response was provided, this did not address point 5 in the direction which required Mr Berka to provide evidence that the Property Factor was notified of both the Code and property

factor duties complaints.

8. The parties were notified that a hearing would take place at Glasgow Tribunal Centre on 6 November 2023. Mr Berka attended. The Property Factor was not represented.

The Homeowner's evidence and submissions

9. In response to questions from the Tribunal about point 5 on the direction request, Mr Berka showed the Tribunal an email on his phone. It is dated 16 March 2023 and has an attachment, he stated that the notification letter lodged with the application had been sent with this email. He told the Tribunal that the bin store is supposed to be cleaned every week. He referred to the photograph of the cleaning schedule which is in the bin store, and which indicates that it had been cleaned on 15 March. He said that the photographs he had lodged, and which show the bin store covered in rubbish and debris, had been taken either on the 15th or on the 16th, which was the day that he sent the complaint to the Property Factor. He got no response. Recently, there have been no issues with the cleaning of the bin store. There has been a change within the Property Factor and a new manager was appointed. There has been no recurrence of the bin store issues although it had happened before the March incident. However, he is unhappy that they did not respond to his complaint. Mr Berka told the Tribunal that the Property Factor do not respond to his complaints or enquiries unless he goes through their formal complaint process. He stated that they are not entitled to refuse to respond in this way.
10. The Property Factor did not participate in the hearing and their submissions were brief. These state that the application is premature, as the Homeowner did not go through the Complaints procedure. They also advise that the bin store is cleaned every week and is kept clean and tidy. Sometimes, there is a build up of debris which is caused by the Council operatives handling techniques or wind blowing rubbish about. In addition, some residents don't bag the rubbish before depositing it although they are supposed to do so. The Property Factor provided a photograph of a clean and tidy bin store, which they said was taken on 26 May 2023.

Findings in Fact

11. On 15 or 16 March 2023, the Homeowner took photographs of the bin store at the property. The bin store was covered in rubbish and debris at the time the photographs were taken.
12. On 15 or 16 March 2023 the Homeowner took a photograph of the cleaning schedule which had been signed on 15 March 2023, indicating that the bin store had been cleaned.

13. On 16 March 2023, the Homeowner sent a complaint to the Property Factor about the condition of the bin store. This letter stated that the Property Factor had failed to comply with OSP 6.
14. On 13 April 2023, the Homeowner lodged an application with the Tribunal which stated that the Property Factor had failed to comply with OSP 6 and failed to carry out its property factor duties. The basis of the complaint is that they did not clean the bin store or respond to his complaint about it.

Reasons for Decision

15. Having reviewed the previous decision of the Tribunal in relation Chamber references 1769 and 2026, the Tribunal is satisfied that these applications did not relate to the Homeowner's complaints about the bin store and that the application can therefore be considered. The Tribunal is not persuaded by the Property Factor's statement that the application is premature because the Homeowner failed to use the complaints procedure. On 7 December 2022, the Property Factor told the Homeowner by letter that they "will no longer respond to your correspondence". They added that they would review his emails and "if deemed of an emergency nature we will action these and these alone". They refer to a section of the WSS which allows them to do this. Although the complaints process is not specifically mentioned, the letter makes it clear that only emergency factoring issues will be actioned. It is a reasonable conclusion that the complaints process is included in the decision. At the hearing Mr Berka advised the Tribunal that this is not the case as a recent formal complaint was processed, but he could not have known this in advance, given the terms of the letter. The Tribunal is not satisfied that the Property Factor is entitled to rely on the failure by Mr Berka to activate the complaints process.
16. Section 17 of the 2011 Act states that an application cannot be made to the Tribunal unless, "the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor duties or, as the case may be, to comply with the section 14 duty". The Homeowner lodged a copy of a letter to the Property Factor with the application. It refers to the complaint about the bin store and OSP 6 of the Code. It does not refer to the Property Factor's failure to respond to his complaint or to property factor duties. At the hearing, the email to the Property Factor was produced. The Tribunal is therefore satisfied that the Property Factor was only notified of the complaint about the bin store and OSP 6. As a result, the Tribunal is not able to consider the complaint regarding property factor duties or the failure to respond to the complaint.
17. **OPS6 – You must carry out the services you provide to homeowners using care and skill and in a timely way, including by making sure that staff have the training and information they need to be effective.** Based

on the evidence, the Tribunal is not persuaded that the Homeowner has established a breach of this section. Although he stated that he had complained about the bin store before, he provided no details or evidence. In relation to the photographs lodged, he was unable to confirm whether these had been taken on the 15th or the 16th of March. If it was the 16th, or even some hours after the cleaner had been on the 15th, the existence of debris does not necessarily mean that the bin store had not been cleaned. For the reasons outlined by the Property Factor, the accumulated rubbish may have appeared since the cleaner's visit. However, even if there had been a failure by the cleaner to clean the bin store properly, the Property Factor could not know about this until it was brought to their attention. In their submissions, they deny all knowledge of any complaint, although Mr Berka provided evidence that he had sent them the letter. Although they did not respond, there has been no recurrence of the issue which suggests that either it was an isolated incident or that the Property Factor dealt with the matter and ensured that it did not happen again. In the circumstances, the Tribunal is not persuaded that the Homeowner has established a breach of OSP 6. The Tribunal is of the view that the complaint ought to have been acknowledged and the Homeowner informed that it would be investigated, but that complaint is not under consideration because it was not notified before the application was made.

Decision

18. The Tribunal determines that the Property Factor has not failed to comply with OSP 6 of the 2021 Code.

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.



