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/PF/23/2641
FTS/HPC/PF/23/2645

Re: 15 Park Manor, Crieff, Perthshire PH7 4LJ

Parties:

Mr Peter Boyle, 15 Park Manor, Crieff, Perthshire PH7 4LJ ("the Applicant")

Newton Property Management Ltd, 87 Port Dundas Road, Glasgow g4 0HF ("the Respondents")

Tribunal Member:

Graham Harding (Legal Member)
Sandra Brydon (Ordinary Member)

DECISION

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

The Respondent has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with the preamble to section 3 of the 2011 Code and OSP 2, 4,6 and 11 and Sections 2.7, 3.1 and 3.2 of the 2021 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 2011 Code" and the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors July 2021 as "the 2021 Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

The Respondent became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By emails dated 7 August 2023 the Applicant submitted applications complaining that the Factor had failed to carry out its property factors duties and was in breach of Sections 1 C7, 3.1, 3.2, and 5.3. of the 2011 Code and OSP 2, 3, 4 and 11 and Sections 1.C(7), D(14), 2.6, 2.7, 3.1, 3.2, 3.5 and 5.3 of the 2021 Code. In particular the Applicants complained that the Respondent had (i) failed to resolve issues regarding the supply of electricity to the development in which the property is located; (ii) failed to reply to emails; and (iii) made payment to a contractor in breach of an undertaking to not pay until all work had been completed. The Applicant also complained about the failure of the Respondent to properly apportion insurance premiums and provide a final accounting but these complaints were subsequently withdrawn.

2. By Notice of Acceptance dated 30 August 2023 a legal member of the Tribunal with delegated powers accepted the Applicant's applications and a Case Management Discussion ("CMD") was assigned.

3. By email dated 13 November 2023 the Respondents submitted written representations to the Tribunal. On the same date the Tribunal received further written representations from the Applicant.

4. By email dated 6 December 2023 the Respondent submitted further written representations.

5. A CMD was held by teleconference on 28 January 2024. The Applicant attended in person supported by his wife Mrs Pauline Boyle. The Respondents were represented by Mr Lewis Littlejohn.

6. The Tribunal determined to continue the applications to a full hearing as given the complexity of the issues it would be preferable to have an in-person hearing.

7. On 29 January 2024 the Tribunal issued Directions to the Respondents.

8. By email dated 29 February 2024 the Respondent submitted a response to the Tribunal's Directions.

9. By correspondence received on 14 May 2024 the Applicant submitted further written representations to the Tribunal.

10. By email dated 14 May the Respondent advised the Tribunal they would not be attending the hearing.

The Hearing

11. A hearing was held at Inveralmond Business Centre, Perth, on 8 October 2024. The Applicant attended in person supported by his wife Mrs Pauline Boyle. The Respondents did not attend nor were they represented.

12. The Applicant explained that the Respondents factored the development for about five or six years and there were no issues for the first three or four years. The Applicant explained that he received a quarterly invoice from the Respondents but never received any invoices from the energy company for the energy used for the common supply.

13. The Applicant went on to say that in 2021 whilst on holiday he was told by another owner that someone from the energy company wanted to switch off the meter so he had contacted SSE to find out what was going on. The Applicant said he was told that the supplier could not talk to the owners so he contacted the Respondents accounts department. The Applicant said he contacted the Respondents a week later and they denied receiving the call but that he provided the name of the lady he had spoken to. The Applicant then said that it had taken a further three months to obtain copies of the energy company's invoices after making a complaint.

14. The Applicant said that to say the billing was in a mess was being kind. He said the owners had overpaid for 10000 kilowatt hours (kwh) of electricity mainly from being overcharged for usage on the night storage meter. The Applicant explained that each flat in the development had its own meter for power in each flat and there were two communal meters for the communal lighting and the lift and a night meter for the storage heaters in the bottom landing. The Applicant went on to say that the storage heaters were only used for five months of the year over winter. He said the owners had overpaid for 8800 kwh on the night meter and 1200 kwh on the day meter as meter readings were not being provided to the supplier.

15. The Applicant went on to say that the development had been on a fixed tariff with the energy supplier from January 2019 until January 2021 and that this had been arranged by the Respondent's previous property manager. The Applicant went on to say that the Development had then been out of contract from January 2021 for nineteen months until a new contract was arranged by Indigo Swan on 1 October 2023. The Applicant said that in January 2022 he had been advised in an email (ref. 20-2) from Chantelle at the Respondents that Indigo Swan were involved.

16. The Applicant also explained that when he purchased the property there was a maintenance man, Mr Henderson who he believed submitted the meter readings to the Respondent. The Applicant said that subsequently the bills issued were predominantly on estimated readings. He said that the Factor

had said they were acting in a treasury role but they were the only people that could submit meter readings to the energy supplier.

17. The Applicant went on to say that as the development had built up a credit of kwh on its account, he had wanted the credit to remain as a credit in order to fund usage at the development up until 2026 or 2027 but when the Respondents ceased to act as factor the funds at credit were returned to owners as a monetary amount and this would not be sufficient to meet the energy cost for the development for the same period. The Applicant said he had raised this with the Respondents but had not had a reply until September 2023. The Applicant said that the 8000kwh monetary credit was far less as the owners now pay 25p per kwh for electricity and during spikes paid 50p per kwh. In response to a query as to what other owners had requested the Applicant said that they had left matters to him.

18. The Applicant said that during the period that the development was out of contract with the electricity supplier, Chantelle had accused him of complicating matters. He said that he had asked her when she had spoken to SSE and shortly after that she had mentioned working with Indigo Swan and that they could look into what the best deal would be. The Applicant also said that the bills charged should have been exempt from climate change and feed-in tariff charges and had also been charged wrongly at the 20% rate of VAT. He submitted that no-one had been doing their job. He submitted that if the Respondents had done their job properly the cost of electricity would have cost just over half of what had been charged and referred the Tribunal to the calculations in his written submissions. The Applicant said that SSE had confirmed that no-one had contacted them to address the contract and that it was not part of their remit to look after an energy account in a party's name. The Applicant had said that SSE had also said that meter readings would be taken by them only every two or three years and that the only people who could submit readings were the Respondents. The Applicant also said that he had taken photographs of the meter readings and sent them to the Respondents and Indigo Swan.

19. With regards to the alleged breach of Section 3.5 of the 2021 Code the Applicant said this was no longer relevant as he had received a final accounting from the Respondent in January 2024, one year after the Respondent had ceased to be the factor for the development.

20. With regards to the alleged breach of Section 2.6 of the 2021 Code, the Applicant said that no consultation took place before appointing the energy brokers Indigo Swan and despite being advised that there would be no cost implication for owners this was incorrect as there is a tariff uplift charged by the energy supplier

21. With regards to the alleged breaches of Section 3.2 of the 2012 and 2021 Codes the Applicant submitted the Respondents had failed to protect homeowners' funds. The Applicant said that at the time of awarding the contract for the roof works Alastair Buchanan had been the Respondents' property manager. The Applicant went on to say that Bluestone Surveyors

had been appointed to prepare tender documents for roof repairs at the development. The Applicant said that quotes in the region of £70000.00 were obtained. He went on to say that Mr Malcolm Logan who had carried out some gardening and other work at the development previously and who was known to Alastair Buchanan as they played golf together was asked to provide a quote for the work and he had offered to do the job for £25000.00. The Applicant said that he had queried how the work could be done without scaffolding as the roof was 17 metres high but had been told that Mr Logan would use a cherry picker. The Applicant said that a majority of owners were in favour of appointing Mr Logan to do the roof works and he was instructed to proceed and the funds for the cost of the repairs were paid to the Respondents. The Applicant advised the Tribunal that he had received an email from the Respondents confirming that Mr Logan would not receive any payment until the works had been completed. The Applicant also advised the Tribunal that the surveyor from Bluestone declined to work with Mr Logan. The Applicant confirmed that his share of the cost of the repairs amounted to £1750.00.

22. The Applicant said that Mr Logan had used a cherry picker to strip the about half to two thirds of the existing gravel and insulation from the roof and also carried out some minor repointing work that he had previously been paid for but not completed. The Applicant estimated that there had been two men on site for six days for about five hours per day, a total of sixty-man hours together with the cost of hiring the cherry picker. The Applicant said that Mr Logan had then submitted an invoice for £10000.00 in July 2021 which was immediately paid by the Respondents without advising the Applicant and in contravention of the agreement that no funds would be disbursed until the works were completed.

23. The Applicant went on to say that at a meeting that took place in August 2021 to discuss a change in the specification of the roof no mention was made of the payment having been made and that the Applicant had suggested that there should be a reduction in the cost although this was not agreed. The Applicant went on to say that the work then did not progress as Mr Logan had been unable to source the new insulation even although the Applicant said that a local firm in Perth said it could have a delivery in two weeks. The Applicant went on to say that with winter approaching owners were advised that the works could not be done until the following spring because of the damp and humid weather and a decision was taken to reinstate the materials that had been previously removed to protect the development.

24. The Applicant explained that although Mr Logan's invoice was paid in July it was not shown on the Applicant's quarterly invoice in August and only appeared in the November 2021 invoice.

25. The Applicant went on to say that Mr Logan did not do any further work at the development and the balance of £1000.00 was repaid by the Respondents to the Applicant. The Applicant went on to say that the surveyor appointed by the owners at the development had advised that what had been proposed by Mr Logan had not been fit for purpose. Subsequently he said the

Respondents had advised the owners that they no longer wished to factor the development. The Applicant went on to say that the new factor had instructed surveyors to tender for the roof repairs this year and the costs had increased substantially.

26. The Applicant confirmed that he was no longer insisting on his complaint in respect of the alleged breach of Section 5.3 of the Code.

27. The Tribunal having heard from the Applicant only had the limited response to its directions and the oral submissions of Mr Littlejohn together with the Respondents' earlier written submissions on which to assess the Respondents' position. The Tribunal therefore determined to give the Respondent a further opportunity to submit further written representations to the Tribunal and issued further Directions to the Respondent dated 20 October 2024.

28. By email dated 9 October 2024 the Applicant submitted further written representations to the Tribunal.

29. By email dated 27 October 2024 the Applicant submitted further written representations to the Tribunal commenting on the terms of the Hearing Note dated 20 October 2024.

30. By email dated 18 November 2024 the Respondent submitted a response to the Tribunal's directions of 20 October 2024.

31. By email dated 3 December 2024 the Applicant submitted further written representations to the Tribunal in response to the Respondent's written submissions.

32. The Tribunal then determined that a further hearing was not required and proceeded to determine the application on the basis of the documents submitted, the written representations and the evidence provided at the hearing.

Findings in Fact

33. The Homeowner is the owner of 15 Park Manor Crieff PH7 4LJ which forms part of a flatted development at Park Manor, Crieff ("the development")

34. The Respondent was the factor at the development from about May 2014 until February 2023.

35. The Respondent's then Property Manager, Martin Henderson arranged a fixed term contract with SSE for the supply of electricity to the communal areas at the development for the period from the beginning of February 2019 until the end of January 2021.

36. The Respondent did not arrange a further fixed term contract when the contract ended in January 2021 and the development was charged for electricity on the standard tariff.

37. At some point towards the end of 2021 the Respondent instructed an energy broker, Indigo Swan to manage its energy supplies at its developments.

38. Indigo Swan opened a case file in respect of billing issues with SSE at the development on 21 January 2022.

39. Between the end of January 2019 and March 2022 the Development was charged for more electricity than it had used.

40. In March 2022 SSE refunded the cost of the electricity overcharged to the development.

41. It would have been possible for the credit on the development account until the Respondent terminated its contract in February 2023.

42. By not entering into a further fixed term contract for the supply of electricity at the development from February 2021 the development was charged for electricity a higher rate than it would have had a fixed rate been in place.

43. In correspondence from the Respondent to the Applicant dated 15 April 2021 the Respondent undertook to retain all funds for common roof repairs until the works were completed and that the contractor would only be paid upon satisfactory completion of the instructed works.

44. The contractor, Malcolm Logan issued an interim invoice dated 20 July 2021 for £10000.00 to the Respondent and this was paid by the Respondent on the same day.

45. The contract with Malcolm Logan was subsequently terminated.

Reasons for Decision

46. The decision-making process has not been helped by the Respondent's decision not to attend the in-person hearing. Providing written submissions in response to the Tribunal's directions provides some assistance to the Tribunal but in its response dated 18 November 2024 to the Tribunal's directions of 20 October 2024 the Respondent provided somewhat conflicting evidence. Its response to Direction 1 was that although they were unable to provide an exact date when they arranged for Indigo Swan to manage the energy supply at the development it was thought to be around the end of 2021. However, in its response to Direction 3 they say the broker would look at the supply from the end of the fixed term contract which was in January 2021 suggesting the broker had been involved then. On balance the Tribunal

concluded that it was more likely that the Respondent did not involve Indigo Swan until late 2021.

47. The Respondent submitted that "There is no requirement for us to be in fixed term contracts for all our supplies so there will be times where one contract doesn't roll into another for a variety of reasons." That may well be correct but it does not explain why in February 2021 the Respondent did not either try to obtain a further fixed term contract with SSE or another supplier or explain to the development owners why it was not possible to do so or would not be a suitable option. The statements issued by SSE were to the Respondent and only they could negotiate with SSE as the Homeowner established when attempting to communicate with the supplier. It may be that at the commencement of the contract with the owners of the development it was envisaged that the Respondent would primarily be acting in a treasury role but it is clear from their actions that it had developed well beyond that given that the electricity supply was in the Respondent's name and the fixed term contract had been entered into by the previous property manager, Mr Henderson. The Tribunal considers that the Respondent ought to have at least investigated the appropriateness of continuing the development on a fixed term contract for its electricity supply but there is no evidence to suggest this was ever considered. The Homeowner submitted calculations as to the difference in the cost of electricity for the period from the end of January 2021. These were neither accepted or challenged by the Respondent in their written submissions. The Homeowner acknowledges in his written representations that the figures submitted are estimates. The Tribunal is unable to say how accurate the figures are but has concluded it is likely that the Homeowner was charged for electricity at a higher rate on the variable tariff than he would have been had the development been on a fixed tariff.

48. It is clear from the documents submitted by the Respondent that once Indigo Swan were instructed by the Respondent they commenced in January 2022 to engage with SSE over billing issues at the development. Although these were ongoing until about February 2023, they did result in a monetary credit being allocated to the Homeowner's account in April 2022. The Homeowner submitted that rather than be given a refund the account should have remained in credit as this would have allowed the development to have avoided paying for electricity until 2027. Although the Tribunal can see the logic in this course of action and does not accept the explanation for the refund given by the Respondent in its response dated 28 February 2024 the Tribunal is not satisfied that a wrongly charged payment for kilowatt hours could be carried forward in the manner proposed by the Applicant. At best the monetary credit on the development account could have remained until the Respondent ceased to act as factor in February 2023 a period of a further 10 months.

49. It is apparent from the evidence of the Applicant and from the minute of the meeting of owners held on 11 August 2021 that opinion of owners was divided about Mr Logan. Mr Logan had long standing connections with the development and was well thought of by some owners while others including

the Applicant had some misgivings particularly about his ability to carry out the proposed roof repair. It may well be that the very substantial difference in cost between Mr Logan's quote for the repair and the next higher quote swayed some owners. Whatever their reasons it was important certainly to the Applicant that Mr Logan was only to be paid on completion of the repairs and the Tribunal was satisfied that his approval for the employment of Mr Logan was given and most importantly received on that basis. The letter from Mr Buchanan to the Applicant of 15 April 2021 could not be clearer in its terms: "*Please be assured that all funds lodged will be held until the works are completed and the contractor will only be paid upon satisfactory completion of the instructed works."* Nevertheless, despite giving the Applicant the comfort of this undertaking the Respondent then, at the request of Mr Logan when the works were only partially completed in July 2021, made a payment of £10000.00 to Mr Logan without first making any enquiry of owners or raising the issue at the owners meeting on 11 August 2021.

50. The Respondent has submitted that Mr Henderson's comment of 15 April 2021 is a stock response and that it is common for contractors to receive interim payments. The Tribunal is somewhat unclear as to what the Respondent means by the phrase "stock response" again if they had attended the hearing, they could have clarified their position. The Tribunal has concluded that the Respondent includes the comment that funds will be retained and a contractor will only be paid on completion of works in all its communications to clients but that in reality it does not mean what it says. If that is the Tribunal's correct understanding then that is entirely misleading and if it is incorrect then it totally does not explain why the payment was made.

51. The Tribunal is satisfied from a comprehensive review of the written submissions and the evidence of the Applicant at the hearing that the Respondent has not been open and transparent in its dealings with the Applicant as can be seen from explanations provided both to the Applicant in email correspondence regarding the employment of Indigo Swan and the failure to renew a fixed term contract for the electricity supply and also in its explanation for making an interim payment to Mr Logan. The Respondent is therefore in breach of OSP2.

52. For the same reasons the Tribunal considers that the Respondent is in breach of OSP4.

53. Although not part of the Applicant's complaint, in the Upper Tribunal decision in Brown v Park Property Management Ltd [UTS/AP/24/0015] the Upper Tribunal decided that in order to arrive at a true interpretation of the legislation a clause must not be determined in isolation but considered in the context of the whole document. The Upper Tribunal found that the First-tier Tribunal ought to have considered all of the overarching Standards of Practice when reaching its decision. To that end the Tribunal has also considered whether the Respondent might be in breach of OSP6 and concluded that the Respondent ought to have ensured that its staff had sufficient training and information to allow them to deal appropriately with the

renewal (or not) of the fixed term contract for electricity at the development. Although the Respondent ultimately decided to delegate this work to Indigo Swan at the end of 2021 that was not the position in January 2021 and the Tribunal finds that the Respondent is also in breach of OSP6.

54. The Applicant has directed the Tribunal to a number of emails and queries where he says the Respondent was slow to answer or simply did not reply at all. The Tribunal accepts that the Respondent did reply to the Applicant timeously on a number of occasions but does also agree that some requests particularly with regards to information for SSE invoices was slow to be received. The Tribunal is satisfied that the Respondent was in breach of OSP 11 and for the same reasons finds the Respondent to be in breach of Section 2.7 of the 2021 Code.

55. The Applicant was overcharged for electricity at the development due to a lack of a system being in place for the submission of correct meter readings resulting in estimated readings being used by the supplier over a long period of time. Although difficult to quantify this was likely exacerbated by the Respondent failing to take any action when the development's fixed term contract ended at the end of January 2021. The Tribunal concluded that it was likely that the development could have paid less for its electricity had the Respondent negotiated a new fixed term contract at that time and the Respondent did not submit any evidence to the contrary. The Tribunal did not accept the Applicant's evidence that the overcharge in kilowatt hours could have been carried forward to potentially 2027. Once the correct meter readings had been provided the monetary credit on the account could have been retained rather than credited back but only until the Respondent ceased to act as factor. Furthermore, the Tribunal considers that the letter of 15 April 2021 to the Applicant was a firm undertaking that funds would not be paid to Mr Logan until the works were satisfactorily completed and payment in July 2021 and not informing the Applicant until November 2021 was a clear breach of that undertaking. The Tribunal is therefore satisfied that the Respondent is in breach of Section 3 0f the 2011 Code and Sections 3.1 and 3.2 of the 2021 Code.

Proposed Property Factor Enforcement Order

56. 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.

Graham Harding Legal Member and Chair

23 December 2024 Date