



**Decision of the Homeowner Housing Committee issued under Section 19(1)(a)
of the Property Factors (Scotland) Act 2011 and the Homeowner Housing
Panel (Applications and Decisions) (Scotland) Regulations 2012**

HOHP reference: HOHP/PF/16/0015

Re: 70 Dunblane Drive, East Kilbride G74 4ED ('the property')

The Parties:

Thomas Simpson, residing at 24 Castleview Road, Strathaven ML10 6HD ('the homeowner');

and

South Lanarkshire Council, Council Offices, Almada Street, Hamilton ML3 0AA ('the property factor')

Decision by a Committee of the Homeowner Housing Panel in an application under section 17 of the Property Factors (Scotland) Act 2011('the Act')

Committee members:

George Clark (chair) and Scott Campbell (housing member)

Decision

The Committee has jurisdiction to deal with the Application.

The property factor has failed to comply with its duties under section 14 of the 2011 Act.

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”; and the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 as “the 2012 Regulations”. The Homeowner Housing Panel is referred to as “HOHP”.

The property factor became a Registered Property Factor on 17 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Committee had available to it and gave consideration to: the application by the homeowner received on 18 February 2016, with supporting paperwork; a letter, with supporting paperwork, from the homeowner to the property factor dated 18 March 2016, setting out the grounds on which he believed the property factor had failed to comply with the Code and had failed to carry out the Property Factor’s duties; a copy of the property factor’s Written Statement of Services and a copy of the homeowner’s Land Certificate, both sent by the homeowner to HOHP on 16 March 2016.

Summary of Written Representations

The following is a summary of the content of the homeowner’s application to HOHP:- The property factor had failed to comply with Sections 2.1, 2.2, 2.5, 3.3, 4.9 and 6.4 of the Code and had failed to carry out the Property Factor’s duties.

In relation to Section 2.1 of the Code, the homeowner’s contention was that the property factor had repeatedly changed the description of work claimed under repair reference 214107353. The homeowner had initially been told that the charge of £26.51 related to the replacement of light bulkhead fittings on the middle and top landings for the six flats in the stair. When he had sent photographs showing that none had been renewed, he had been told that the repair did not relate to new fittings, but to replacement of 14 starters and 14 bulbs on the middle and top landings. This was also incorrect in that there are only 3 light fittings in this area, with a total of 6 bulbs. He had then been advised by an employee in the property factor’s repairs section that the charge had been for one bulkhead fitting at a cost of £110 and the replacement of 14 starters at a cost of £48.44 on 13 October 2015. This was also misinformation.

The property factor had maintained the same charge for the work under repair reference 214107353, but had changed fundamentally the description of the works and had later reduced the charge from £26.51 per flat to £19.34 per flat, as per a letter from the Head of Property Services dated 11 November 2015. In that letter, the property factor had wrongly

stated that the overcharging had been caused by an IT issue, but in earlier correspondence, the property factor had stated that the tradesperson carrying out the work had been unable to enter on his handheld Personal Assistant Data device the correct Schedule of Rates (SOR) code for replacing the fluorescent tubes and had chosen to enter a similar code (the code for repairing bulkhead fittings with 60 watt lamps). The employee of the property factor had chosen to enter a wrong and more expensive code and the property factor's claim that the error was due to an IT malfunction was false.

The property factor had also stated, in an e-mail dated 28 October 2015 from the Technical Officer, Mr Jerry Fawbert, that each fitting had been checked but, in his letter dated 11 November 2015, the Head of Property Services had stated that there were 10 individual light fittings in the block. It was clear, however, that the electrician had not checked or replaced any starters or fluorescent tubes outside the front and rear entrances of the close, so it was false for the property factor to claim that all light fittings had been checked.

In relation to Section 2.2 of the Code, the homeowner submitted that the property factor had sent threatening and intimidating correspondence, namely debt investigation visit letters to his home address. He had complained about the harassing nature of these letters, by e-mail dated 13 October 2015, and stated in that e-mail that he continued to dispute the claimed repair reference number 214107353.

In relation to Section 2.5 of the Code, the homeowner stated that the property factor had failed to respond by letter or email within prompt timecales, having taken more than 4 months to reply to his email concerning repair number 214107353, its response being contained in a letter of 14 September 2015.

In relation to Section 3.3 of the Code, the homeowner contended that this section had been breached by the property factor undermining his trust in the way in which repairs were charged, not being clear on the reason for charges, then varying the charges and making repeated improper requests for payment. The property factor had failed to provide a competent and detailed financial breakdown and reliable description of works carried out under repair number 214107353.

The homeowner also alleged a failure by the property factor to comply with Section 4.9 of the Code by acting in an intimidating and threatening manner and by carelessly misrepresenting its authority, in that, by letter dated 6 October 2015, the property factor had claimed that the homeowner had failed to clear factoring arrears totalling £80.23. This claim was false, as it included the disputed charge relating to repair number 214107353 and the letter also contained an unreasonable threat, namely that a Debt Investigation Officer would contact the homeowner and might visit his home to discuss repayment and potential recovery action.

In relation to Section 6.4 of the Code, the homeowner referred to the letter from the property factor dated 11 November 2015, which made reference to “preventative maintenance” through the replacement of light fittings that had not failed, without the preparation of a programme of works or a programme of cyclical maintenance. The property factor had not sought or been given authority for the replacement of light fittings on a preventative maintenance basis and was not authorised to undertake such work by any deed or other document.

In his application, the homeowner added that he was of the view that the property factor had failed to carry out its duties or legal responsibilities by attempting to make charges or excessive charges under repair number 214107353 for work that had not been undertaken.

The Committee did not receive, in advance of the hearing, any written submissions from the property factor. The homeowner’s written submissions included, amongst the supporting paperwork, a copy of a letter to the homeowner from the Chief Executive of South Lanarkshire Council dated 4 April 2016, which recognised that the homeowner had exhausted the property factor’s complaints process and stated that, as he had made an application to HOHP, the Council would await contact from HOHP and respond accordingly.

THE HEARING

A hearing took place at Wellington House, Wellington Street, Glasgow on 22 June 2016. The homeowner was present at the hearing. The property factor was represented at the hearing by Mr David Keane, Factoring Manager and Jerry Fawbert, Senior Technical Officer with South Lanarkshire Council’s Repair Centre.

Summary of Oral Evidence

The chairman told the parties that they could assume that the Committee members had read and were completely familiar with all of the written submissions and the documents which accompanied them. He then invited the homeowner to address the Committee with reference to his complaints under each Section of the Code and in relation to the alleged failure to carry out the Property Factor’s duties. When the homeowner concluded his evidence, the representatives of the property factor were invited to respond. For ease of reference, this Summary combines the homeowner’s evidence and the response of the property factor under each head of complaint.

Section 2.1 of the Code states that property factors must not provide information which is misleading or false. The homeowner told the Committee that his position was that the photographs which formed part of his written submission showed that it was not true that 14 starters and lights had been fitted. He referred the Committee to a number of

photographs showing blackening of the fluorescent tubes, which would not be there had they been recently fitted. He also referred the Committee to an email of 15 October 2015 from Mr Fawbert to Mr Keane (a copy of which was also included with the homeowner's written submission), in which he said the error in the rate being claimed was "likely due to a short term IT issue we had with the hand held PDA systems operated by the tradesman which wouldn't accept certain SORs". This, the homeowner contended, was misleading, in that the property factor was stating as a fact that it was an IT error.

The property factor responded to the homeowner's evidence relating to Section 2.1 of the Code, telling the Committee that there was a rate code for each type of bulb. The correct code in this instance was 032210, but the code that had been entered by the tradesman was 032201. That had been an error, resulting in homeowners being charged for bulbs rather than tubes. There were 10 light fittings in the common areas, 2 external and 8 internal, and each fitting had 2 tubes and 2 starters. The electrician had replaced 14 of them. As soon as the error in charging had been recognised, the property factor had apologised and adjusted homeowners' bills.

Mr Keane also directed the Committee to the email of 15 October 2015 and pointed out that it also contained the comment "Or it could have been due to an admin error when inputting the rate code". The email, he said, clearly contemplated 2 possible causes. Mr Fawbert added that, in this email, which he had sent following an email from the Mr Kenny Law, the Building Services Co-ordinator, who was in charge of the team that carried out repairs, he was really thinking out loud and had given his initial thoughts, not any definite conclusion. Mr Fawbert had, earlier that day, emailed Mr Law to check with the electrician whether he remembered the particular repair, as the report from the homeowners had been that there were problems with the lights on the middle and top landings, but it appeared that 14 lamps and starters had been replaced. Mr Law had replied less than two hours later to say that the electrician had advised that he had visited the location to check the lights complained about on the middle and top floors, but had found that the lights on the ground floor were dim and the ends were blackened and that he had made the decision to renew them as well to save returning within a few days or weeks. The contents of these emails had not been relayed to the homeowner at the time, so they were not misleading. They were internal communications, pointing out that the homeowners had been overcharged, so that the charge could be corrected. The property factor had at one time had thousands of different rate codes, but had decided to rationalise them and, during this process, the relevant rate for the fittings replaced in this particular case had been deleted in error. As a result, the tradesman carrying out the work had been unable to input the correct rate code on his PDA when reporting the works and materials used.

Mr Keane said that the fact that the bill was incorrect was not disputed and admitted that it had not been discovered until the homeowner complained, but the property factor had

then corrected the error and had apologised for it. Mr Fawbert repeated that the work carried out had now been correctly charged to the homeowners.

Mr Fawbert told the Committee that when an electrician is on site in response to a complaint about a lighting issue, he will check all the light fittings, to save residents being charged for multiple call-outs to replace single lights. Such call-outs would usually be at night as that was when the fault would be reported, and would attract premium rates. There had been 2 call-outs in 2012 and, at that time, quite a number of lights had been replaced. As a result, it had not been necessary to return to the block for 3 years and no further call-outs had been required since January 2015, when the works which were the subject of the homeowner's complaint were carried out.

The homeowner asked the Committee to find that, on the balance of probabilities, the property factor had been guilty of overcharging.

Section 2.2 of the Code states that property factors must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that the property factor may take legal action) and **Section 4.9 of the Code** states that, when contacting debtors, property factors must not act in an intimidating manner or threaten them (apart from reasonable indication the property factor may take legal action). The homeowner did not provide any additional evidence at the Hearing and the Committee has determined this complaint on the basis of his written submission and supporting documentation. This includes a letter from the Executive Director of Housing and Technical Resources at South Lanarkshire Council to the homeowner dated 6 October 2015, which states that despite a previous reminder the homeowner has failed to clear his factoring arrears and includes the statement "To avoid further action, you must contact us within seven days to pay your arrears or agree a repayment arrangement with us. Failure to make payment or contact us will result in your debt being passed to Stirling Park the Council's Debt collection partners. A Debt Investigation Officer will contact you and may visit your home to discuss repayment and potential recovery action".

Section 2.5 of the Code provides that property factors must respond to enquiries and complaints received by letter or e-mail within prompt timescales. No additional evidence was provided at the hearing and it was for the Committee to determine whether or not to uphold the complaint as specified in the application and supporting papers.

Section 3.3 of the Code requires that property factors must provide to homeowners 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 requests, property factors must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. The homeowner did not provide any evidence at the Hearing which was

additional to his written submission, but he did stress that it was very difficult to work out from the bills what was being charged for and that he felt that bills for standard charges and repair items should be presented separately. The written submission included a copy of a letter from the property factor to the homeowner dated 28 October 2015, written in response to the homeowner's complaint and forming the property factor's response under Stage 1 of its complaints procedure. In that letter, the property factor confirmed that each owner has an individual account with an account number and that all charges in respect of factoring and common repairs are added to that account. The property factor also stated that separate accounts could not be set up for common repairs and factoring charges, but if a homeowner was disputing a charge, that homeowner's account was held in dispute for the amount he was querying and no follow up action would be issued until the query was resolved. Mr Keane told the Committee that recovery of the sum due under the disputed Invoice would have been put on temporary hold on 7 September 2015, when Mr Fawbert wrote to the homeowner, then reinstated when the Director of Housing and Technical Resources wrote to the homeowner on 6 October and again put on temporary hold when the homeowner complained to the property factor on 22 October.

Section 6.4 of the Code states that if the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then property factors must prepare a programme of works. At the Hearing, the homeowner referred the Committee to the words "preventative maintenance" which were used by the property factor in the letter of 11 November 2015 to explain why it was not only the bulbs which had failed that were replaced and repeated to the Committee the statement in his written submission that the property factor had not sought authority to replace light fittings on such a basis. If the property factor wanted to replace things that had not already failed, it should have the agreement of the homeowners to such a programme. Mr Keane referred the Committee to Article 16th of the Deed of Conditions for the block and stated that the property factor's view was that this gave it the authority to carry out such renewals when it decided it was appropriate to do so.

The homeowner's application also alleged that there had been a failure to carry out the property factor's duties. No additional evidence was led on this matter, but the complaint in the application was restricted to the matters in the complaint under Section 2.1 of the Code, namely alleged overcharging for repair number 214107353.

The property factor submitted to the Committee at the Hearing a copy of an email sent to the homeowner the previous day (21 June 2016) and a previous email of 15 June 2016. In the earlier email, the property factor was seeking a meeting with the homeowner prior to the Hearing to discuss options, acknowledging that there had been some failings and in the second email, the property factor offered to waive a bill of £19.34 and to make an ex gratia payment of £200 for any inconvenience caused to the homeowner. The homeowner told the Committee that he had written to the Chief Executive of South Lanarkshire Council in

March, but the response had simply been that the property factor would await hearing from HOHP, that the email of 21 June 2016 did not answer his complaints point by point and that the proposed figure of £200 was an insult.

Having concluded giving oral evidence, the parties withdrew and the Committee gave careful consideration to all the evidence before it.

The Committee makes the following findings of fact:

- The homeowner is the owner of the property 70 Dunblane Drive, East Kilbride G74 4EP, part of a block of 6 flatted dwellinghouses erected by the former East Kilbride Development Corporation.
- The Deed of Conditions recorded by East Kilbride Development Corporation on 4 September 1987 relates to the block of 6 flats of which the property forms part. The title deeds confer on the owner of each flat a right of common property with the owners of each of the other flats in the block in, amongst other things, the foundations, outside walls, roof and attic space, common entrance doors, entrance hall and passage on the ground floor, stairways, landings and passages leading to the upper floors, together with common sewers, drains, soil and rain water pipes, water, gas and other pipes. In terms of the Deed of Conditions, each of the owners is responsible for an one-sixth share of the expense of maintaining the common parts.
- Condition SIXTEENTH of the Deed of Conditions provides for the appointment of a property factor, who is entitled “to order to be executed any repairs, renewals, painting or decoration at such parts as are owned in common”. It does not specifically require the property factor to obtain prior consent from the owners.
- The property factor, in the course of its business, manages the common parts of the development of which the Property forms part. The property factor, therefore, falls within the definition of “property factor” set out in Section 2 (1)(a) of the Property Factors (Scotland) Act 2011 (“the Act”)
- The property factor’s duties arise from a written Statement of Services, a copy of which has been provided to the Committee.
- The date from which the property factor’s duties arose is unknown, but it is not disputed that it was prior to the date of the homeowner’s application.
- The property factor was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a Property Factor.
- The date of Registration of the property factor was 17 December 2012.
- The homeowner has notified the property factor in writing as to why he considers that the property factor has failed to carry out its duties arising under section 14 of the Act.

- The homeowner made an application to The Homeowner Housing Panel (“HOHP”) received by HOHP on 18 February 2016 under Section 17(1) of the Act.
- The concerns set out in the application have not been addressed to the homeowner’s satisfaction.
- On 19 April 2016, a Convener of HOHP with delegated powers decided to refer the application to a Homeowner Housing Committee. This decision was intimated to the parties by letter.

Reasons for the Decision

The Committee considered the application, with its supporting papers, the written representations of the homeowner and the property factor and the evidence given by the parties at the hearing. The Committee made the following findings:

1. The Committee is unable to determine how many starters and lights were replaced in the block in January/February 2015. It cannot conclude from the photographs provided by the homeowner that some of the starters and lights were not replaced at that time, as all of the fluorescent tubes photographed show some degree of blackening and the Committee is not able to speculate on whether the blackening is consistent with age and, therefore, whether the number of starters and light replaced was 14 or fewer.
2. The property factor has acknowledged that there were errors in the description provided to the homeowner of works carried out under repair number 214107353 when the homeowner queried the Invoice, but the Committee notes that the Invoice itself, dated 16 April 2015, merely refers to “Close Light Out”. The Committee accepts the evidence of the homeowner that he was initially advised by the property factor on 7 May 2015 that the bill was for new bulkheads and starters on the middle and top landings and that this statement was incorrect, but Mr Fawbert, in his letter to the homeowner dated 14 September 2015 stated, as he believed to be the case, that the work had involved replacing 14 starters and 14 bulbs. He also apologised for having taken so long to respond to the homeowner’s enquiry. In a letter dated 20 October 2015, the property factor advised that the cost calculated for the repair works was incorrect, in that lamps had been charged for, when fluorescent tubes had in fact been installed. This had resulted in an overcharge and the letter confirmed that a reduction of £7.17 was to be applied to the homeowner’s factoring account and offered an apology for the oversight and that it had not been brought to light sooner.

3. The homeowner then lodged a complaint with the property factor on 22 October 2015 and, on 11 November, the property factor's Head of Property Services wrote to the homeowner, explaining the reason for the lights and starters on the ground floor also being replaced and answering, point by point, the specific questions raised by the homeowner in his letter of complaint. The letter stated that this was a reply in accordance with Stage 2 of the property factor's complaints procedure and that, if the homeowner was not satisfied with the way in which his complaint had been dealt with, he might wish to write to HOHP.
4. In the letter of 11 November 2015, the property factor told the homeowner that the error had been caused by an IT issue and elaborated that the correct SOR code was not being accepted on the tradesman's PDA device and that he had entered a similar code. This code was, therefore, incorrect and it showed up in the property factor's system as repair to a bulkhead light fitting with 60w lamp. The Committee accepted this explanation and noted that it explained also the incorrect information given to the homeowner when he first queried the bill.
5. The Committee holds that the information originally given to the homeowner on 7 May 2015 was false, but is satisfied that it was given in good faith by an employee of the property factor who relied on the (incorrect) information that the inputting on the tradesman's PDA of the wrong SOR code produced. The Committee agrees with the view stated by the homeowner that, rather than use a code that was approximate, the tradesman ought to have clarified the matter, but accepts that, once the issue had been identified, the steps taken by the property factor to correct the factoring bills and explain and apologise for the error were reasonable and there was no intention at any point to mislead the homeowner.
6. For the reasons stated in the 5 preceding paragraphs, the Committee does not uphold the homeowner's complaint under Section 2.1 of the Code.
7. The Committee has considered carefully the terms of the letter from the Director of Housing and Technical Resources to the homeowner dated 6 October 2015, which the homeowner states was harassment and was intimidating or threatening. The Committee's view is, however, that this letter does not constitute a failure to comply with Sections 2.2 and 4.9 of the Code, as it merely sets out the next steps in the property factor's procedures for collecting arrears of factoring charges, so amounts to giving reasonable indication that the property factor may take legal action. Accordingly, the Committee does not uphold the homeowner's complaint in respect of sections 2.2 or 4.9 of the Code. By the time the letter of 6 October was sent, the factoring account had been adjusted to reflect the reduced cost of the light fittings and, in the absence of a response from the homeowner to the property factor's letter of 14 September, the property factor was entitled to assume the homeowner had accepted the explanation and apology given in that letter. The homeowner did not lodge his complaint until after the letter of 6 October had been sent out.

8. The Committee has noted that there was a considerable delay in responding in writing to the homeowner's query about repair number 204107353. The initial query appears to have been made on 7 May 2015, when an employee of the property factor gave the homeowner the detail that was appearing on the computer system about the repair work. As already noted, and conceded by the property factor, this information was incorrect, due to an inputting error by the tradesman resulting in an incorrect costing code and description of work appearing in the system. On the same day, the homeowner emailed the property factor with photographs of the light fittings, requesting an explanation in detail and confirmation of the work carried out. The property factor did not respond in detail until 14 September 2015. The Committee, therefore, upholds the homeowner's complaint in respect of Section 2.5, but, noting that further detailed responses were sent to the homeowner on 20 October and 11 November, is of the view that the delay was of a one-off nature and the Committee does not propose making a Property Factor Enforcement Order in respect of the delay.
9. The Committee does not uphold the homeowner's complaint in respect of Section 3.3 of the Code. The homeowner's complaint relates to a single invoice and the Committee has determined that the property factor acknowledged and explained the mistake and took reasonable steps to rectify it. There has been no other evidence provided to the Committee that the property factor has failed to comply with the duty to provide the information required by section 3.3 of the Code.
10. The Committee has given careful consideration to the use of the phrase "preventative maintenance" in the property factor's letter to the homeowner dated 11 November 2015 and to the question of whether the work involved could be regarded as "cyclical maintenance" in terms of Section 6.4 of the Code. The Committee had concluded that the works covered by the "preventative maintenance" do not constitute cyclical maintenance, but rather are a pragmatic solution to a reported fault, designed to reduce the expense of repeated call-outs which the electrician thought were probable, given that the ground floor lights were dim and, in his view, likely to fail in the short term. Accordingly, the Committee does not uphold the homeowner's complaint under Section 6.4 of the Code. The Committee does, however, recommend that, to avoid disputes and uncertainty, such preventative maintenance policies should be agreed with the homeowners and set out in the Written Statement of Services.
11. The Committee does not uphold the homeowner's complaint that the property factor has failed to carry out the Property Factor's duties. The homeowner's evidence in this regard related only to the matters complained of in relation to Section 2.1 of the Code and the complaint under Section 2.1 has not been upheld by the Committee.
12. The Committee appreciate that the homeowner has been put to considerable inconvenience in pursuing his complaint against the property factor, and, although

no Property Factor Enforcement Order is to be made, the Committee recommends that the property factor reviews its procedures and uses every endeavour to prevent any recurrence of the confusion over billing for works carried out that this case has demonstrated. Such occurrences erode the trust that is essential for a good working relationship between homeowners and property factors and results in homeowners feeling they have to micro-manage the work which they are paying property factors to carry out on their behalf and the accounts that the property factors issue for that work.

13. The Committee did not accept for consideration at the Hearing the email sent by the property factor to the homeowner on 21 June 2015, as the homeowner had not had adequate notice and could not give a considered response at a Hearing only one day later, but the Committee hopes that this email may form the basis for further discussion between the parties with a view to resolution.

PROPOSED PROPERTY FACTOR ENFORCEMENT ORDER

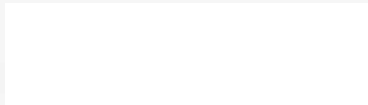
The Committee does not propose to make a Property Factor Enforcement Order.

Appeals

The parties' attention is drawn to the terms of section 22 of the 2011 Act regarding their right to appeal and the time limit for doing so. It provides

"(1) An appeal on a point of law only may be made by summary application to the Sheriff against a decision of the president of the Homeowner Housing Panel or a Homeowner Housing Committee. (2) An appeal under subsection (1) must be made within the period of 21 days beginning with the date on which the decision appealed against is made ... "

Chairperson Signature



Date 22 June 2016