

Housing and Property Chamber
First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 19 Housing (Scotland) Act 2006

Chamber Ref: FTS/HPC/LM/21/0906

Property: Property at 15 McVicars Lane, Dundee DD1 4LH (the Property”)

Parties: Mr Sam Donaghey, 15 McVicars Lane, Dundee DD1 4LH (“the Applicant”)

and

J Reavley Factoring Ltd, 125 Nethergate, Dundee DD1 4DW (“the Respondent”)

Tribunal Members:

Mark Thorley (Legal Member)

Mrs Mary Lyden (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) decided the property factors have failed to comply with their duties in terms of section 2.5 and 3.3 of the Property Factors Code of Conduct (“the Code of Conduct”) made under section 14 of the Property Factors (Scotland) Act 2011 (“the Act”). The Tribunal proposes to make a Property Factoring Enforcement Order as set out in the accompanying notice under section 19(2)(a) of the Act.

Background

1. By application dated 12 April 2021 the homeowner sought a Property Factoring Enforcement Order (“PFEO”) against the property factors. His complaint was that they failed to comply with their duties under section 2.5 and 3.3 of the Code of Conduct.
2. The applicant’s complaint was that the respondent had failed to provide documentation that established the common areas and that not all areas were accessible to the applicant’s property yet the respondent sought to charge for maintenance of that, that the respondent had agreed to sort out parking on the street but had failed to do so and that the respondent had sought to charge the applicant for building insurance which was unnecessary.
3. The applicant maintained that he had set out a detailed email of complaint on 1 March 2021 and had set out that in accordance with their own conditions the respondents were to deal with complaints within 48 hours of the complaint being emailed to them. This

was contained within the written statement of services provided for McVicars Lane in Dundee. Although his email had been acknowledged there had been no substantive response to it.

4. The application was made on 12 April and was accompanied by copies of various emails to which the applicant referred in his application..
5. The applicant referred to the Code of Conduct and in particular to section 2.5 and 2.3, as well as the Property Factor's duties.

2.5 You must respond to enquiries and complaints received by letter or email within prompt timescale. The overall aim should be to deal with enquiries and complaints as quickly and as full as possible, and to keep homeowners informed if you require additional time to respond. The response times should be confirmed in the written statement.

3.3 You must provide 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 requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.

6. On 29 April 2021 the application was accepted for determination by the First-tier Tribunal.
7. On 11 May 2021 intimation was given of a conference call assigned for 29 June 2021.
8. On 29 June 2021 a hearing was conducted by teleconference. The hearing required to be continued as the applicant had emailed a large Inventory of Productions on 17 June and the productions had not been received. It was also confirmed by the respondent that they would obtain legal advice regarding the issue of the extent of the applicant's title rights in respect of the common areas at the development in which the property was situated as well as the extent of the response obligations in respect of the development. It was agreed by the respondent that they would enter into dialogue with the applicant regarding the issues of the extent of the applicant's rights and liabilities concerning common areas and the extent of the respondent's obligations regarding maintenance of those areas once the legal advice had been obtained.
9. On 9 September 2021 a further hearing took place again by remote teleconference call. The Inventory of Productions previously referred to at the hearing on 29 June had been intimated to the respondent. The respondent obtained legal advice regarding the extent of the common areas and this had been shared with the applicant. The legal advice, at this time, had not been sent to the Tribunal. It was agreed that it would be helpful for the respondent to obtain further legal advice regarding the extent of the applicant's entitlement in respect of the common areas at the development. The parties were encouraged to enter into dialogue.

10. A further evidential hearing took place on 24 November 2021. It was acknowledged by the respondent that he would liaise with all 29 home owners in the development and will make the necessary arrangements to correct any mischarging retrospectively. In addition he would also make arrangements to ensure that invoices for charging for development common parts would be in a clear format in line with the provisions of the title deed going forward.
11. There remained an issue surrounding the boundary wall and the repair and maintenance of this and communal parking maintenance and repair, the respondent sought to obtain further specific legal advice regarding this. It was acknowledged that the applicant and respondent were making good progress in resolving matters and that they had reached a consensus regarding the provisions in the title deeds and in turn the method of charging for maintenance. The Tribunal observed it was open to the applicant and response to reach an agreement to settle the application if they wished. The hearing was accordingly adjourned.
12. A further hearing was due to take place on 25 January 2022. On that date the respondent did not attend following upon a diary error. Accordingly the hearing was adjourned until 17 March 2022.

The hearing

13. The hearing was conducted by means of a teleconference call on the morning of 17 March. Both the applicant and the respondent were present.
14. The parties were invited to confirm whether any agreement had been reached. They confirmed that no agreement had been reached.
15. Parties were also reminded of the direction provided by the Tribunal following upon the hearing on 25 January namely that the respondent was to (a) liaise with the homeowners regarding retrospective charging and charging going forward, (b) parties to have direct discussions with a view to resolving outstanding matters relating to walls and communal parking maintenance and repair etc and (c) both parties to provide the Tribunal with a note of matters referred to in (a) and (b) above in writing and within 7 days prior to the next evidential hearing.
16. The respondent advised that he had not responded to the advice that he had simply missed the direction and had not responded to it.
17. The applicant had lodged for the hearing in advance a total of three Inventories. These Inventories will be referred to as nos. 1, 2 and 3 and the documents numbered individually in terms.
18. Both parties thereafter gave oral evidence.

Findings in Fact

19. The homeowner is the proprietor of the property at 15 McVicars Lane, Dundee DD1 4LH.
20. The property factors, in the course of their business, manage the developments at McVicars Lane, Dundee and have done so since July 2019. 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 are under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.
21. The applicant has notified the property factors in writing as to why he considers the property factors have failed to carry out their duties arising under section 14 of the Act.
22. The homeowner made an application to the First-tier Tribunal for Scotland (Housing and Property Chamber) on 12 April 2021.
23. The concerns set out in the application have not been addressed to the applicant’s satisfaction. The Tribunal, having heard evidence and having considered all the written evidence is satisfied that the Code of Conduct under section 2.5 and 3.3 has been breached and make a Property Factor Enforcement Order (“PFEO”).

Reasons for Decision

24. The respondent wrote to the owners regarding factoring services at McVicars Lane, Dundee on 31 May 2019 (1/6 of process) setting out that they had commenced management of the site from 1 July 2019. By email dated 20 September 2019 the applicant had written to the respondent setting out various queries regarding invoicing and the management fee (1/12). These queries continued (1/19). This led to the applicant writing an email of complaint (1/29). This email was re-issued on 3 March 2021 following upon a period of 48 hours’ notice. The notice period was set down by the respondent in their written statement as to how long it would take to respond to a complaint.
25. The applicant set out in his complaint of 3 March that requests had been made as far back as 18 September 2019 with the most recent on 12 October 2020 requiring a breakdown of charges. In particular the applicant indicated that he was being charged for areas that were not relevant to his property and to which he did not have access. The common areas were not set out. There was a clear failure to respond. Following upon a meeting on 29 September 2020 it was agreed that the response would supply a plan with regard to parking but that this had not been undertaken. Further that the respondent had applied buildings insurance to the applicant’s annual bill which was unnecessary.

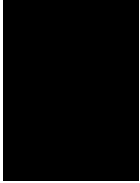
26. The respondent's position at the hearing was that standing the applicant had taken the matter to the First-tier Tribunal there was no need to respond to the written document. Even subsequent to the commencement of the Tribunal the applicant had continued to engage with the respondent. He emailed on 13 September 2021 (2/2).
27. Further email correspondence was sent by the applicant to the respondent on 1 February 2022 relating to the parking (3/2).
28. The applicant in his evidence confirmed that in November 2021 it had been agreed that charges were incorrect but there seemed to be no resolution to this. As far as the applicant was concerned there had been failure to respond to him and a failure to deal with issues surrounding calculation of costs.
29. The respondent gave evidence and explained that the issue of charging was not a straightforward one. There was still work to do.
30. The Tribunal accepted the evidence provided by the applicant. There was a significant amount of paperwork lodged by the applicant. The applicant had made strenuous efforts to engage with the respondent. There was a lack of written response and in particular to his complaint of 3 March 2021. This was not responded to by the respondent in terms of their written statement. There was a failure to engage. There was clear evidence of this from the paperwork.
31. Likewise in terms of the accounting that had been undertaken. Many questions had been asked in relation to the accounting. It appeared that there had been some acknowledgement that there had been some overcharging taking place but there were many questions that still remained to be answered.
32. The Tribunal accepted the evidence of the applicant which was supported by the written paperwork.

Proposed Property Factor Enforcement Order (PFEO)

33. Having determined that the property factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO. The Tribunal decided to make a PFEO.
34. In considering the terms of the PFEO the Tribunal took into account the frustration and convenience caused to the home owner by the property factor's failure to carry out their property factor duties.
35. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the property factor and allow parties an opportunity to make representations.
36. A proposed PFEO accompanies this decision. Comments may be made in respect of the proposed PFEO within fourteen days of receipt by the parties in terms of Section 19(2) of the 2011 Act.

Right of Appeal

In terms of Section 46 of the Tribunal (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.

**11 April 2022**_____
Legal Member_____
Date