

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

**Decision on Homeowner's application: Property Factor (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: FTS/HPC/LM/21/1223

The Parties:-

Michael Toole, Laudervale Gardens, Balloch, G83 8LL ("the Homeowner")

Ross & Liddle, 60 St Enoch Square, Glasgow, G1 4AW ("the Factor")

The Tribunal:-

Melanie Barbour (Legal Member)

Kingsley Bruce (Ordinary Member)

DECISION

The Factor did not fail to comply with its property factor duties and did not fail to comply with section 6 of the Code of Conduct for Property Factor. The decision is unanimous.

Introduction

1. In this decision the Property Factor (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factor (Scotland) Act 2011 Code of Conduct for Property Factor is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"
2. The Factor is a Registered Property Factor and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that registration.

Background

3. By application dated 10 May 2021 the Homeowner complained to the Tribunal that the Factor was in breach of Section 6 of the Code “carrying out maintenance and repairs” and in breach of its property factor duties namely that:-

Common repairs:

- i. Owners were asked to pay for major repair work, 13 paid and 5 did not, rather than pursue legal avenues against non-payers Ross & Liddell decided to walk away. There are 18 flats in the building, 13 paid towards repairs and 5 did not. I asked Ross & Liddell to pursue legal action, they said that they would not do so and that [Homeowner] could do this.*
- ii. Ross & Liddell could have asked the council to make up shortfall. They did not do so.*

Credit Refund:

- iii. When Ross & Liddell decided to give up managing the property in September last year, several owners were in credit.*
 - a. Ross & Liddell did not refund money immediately but made the refund in March [2021].*
 - b. They also used credit owed to cover £3,000 shortfall owed by two owners rather than pursue them through the courts. I have since discovered that they did pursue them through courts.*
4. By Notice of Acceptance dated 27 May 2021 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned to take place on 28 July 2021.

5. The Property Factor's legal representative submitted written representations in response to the complaint dated 17 June and 13 July 2021. The Homeowner submitted written representations on 26 June 2021.

6. Two directions were issued seeking clarification of certain matters, including:-
 - The Property Factor shall submit copies of any documentation produced by West Dunbartonshire Council in relation to any procedure they have in place to make up any shortfall in funding for common repairs.

 - The Homeowner shall consider the terms of the correspondence from the property factors agents dated 17 June 2021 and shall advise the Tribunal by **2 July 2021** if they accept that they have now received copy correspondence from the Property Factor resolving their concern.
 - If the Homeowner considers that the correspondence from the property factor resolves his concern they shall confirm this and will withdraw his application.

 - If the Homeowner does not consider that the correspondence from the property factor resolves his concern he shall confirm this to the tribunal and provide his reasons why.

7. By written representations and email correspondence dated 12 July 2021 the Homeowner confirmed that heads (i) and (iii) of his complaint had not been resolved. He now accepted that head (ii) had been resolved, in that, he appreciated that West Dunbartonshire Council would not make up the shortfall towards repairs. He advised that he had never disputed the Property Factor's right to ask owners to cover outstanding debts.

Hearing

8. A Hearing was held by teleconference on 28 July 2021. The Homeowner had advised that he did not wish to attend and would rely on his written submissions. The Property Factor was represented by Nicola McAtier from Messrs Anderson Strathern. Also in attendance from the Property Factor were employees, John McCabe and Jennifer Johnston.
9. The Property Factor's agent confirmed that they adopted everything set out in their written submissions but were available to clarify any other points as necessary. The Tribunal noted that it was no longer considering the question of West Dunbartonshire Council contributing to the cost of the repairs (complaint head (ii)).
10. As a preliminary point the Property Factor advised that they considered that the application was premature, not in accordance with section 17 (3) of the Act and therefore incompetent. In support of this position, they advised that the Homeowner had not completed the complaints procedure. The Homeowner had received a response to his complaint from the Property Factor. The Property Factor had not delayed or unreasonably delayed in attempting to resolve the Homeowner's concerns. They submitted that they had responded to the Homeowner's complaint and had issued this on the 10 May 2021. He had also been sent a holding letter acknowledging the issues raised and confirming that a response would be sent to him. Having had the response issued to him, he had not advised if he was satisfied with it. He had submitted this application to the Tribunal. He had not referred to the response in his application to the Tribunal. They appreciated however that the application was now before the Tribunal and if the tribunal did not agree with the Property Factor's submission on this point, they were in a position to proceed with the Hearing.
11. The Tribunal noted that the application had been made on the same date that the response had been posted out to the Homeowner. The Tribunal considered therefore that the Homeowner had not received a response from

the Property Factor at the time that he had submitted his complaint to the Tribunal.

12. Further, the Tribunal had issued a direction asking the Homeowner to advise if he considered that the response from the Property Factor dated 10 May 2021 addressed his complaint, he had responded to that direction and advised that it did not address two of the three heads of complaint and he asked the Tribunal to determine these two matters.
13. The Tribunal did not uphold the Property Factor's preliminary point and advised that the complaint under heads (i) and (iii) would proceed to a substantive hearing.

Common Repairs: Section 6 of the Code- Carrying out Repairs and Maintenance and The Property Factor Duty regarding Common Repairs

14. The Homeowner advised that the Property Factor had failed to take legal action against non-payers to the communal repairs. He advised that he had asked the Property Factor to get their legal department to pursue non-payers. The Property Factor response had been that it was down to the Homeowner to pursue this course of action not the Property Factor.
15. The Property Factor's agent submitted that they did not consider that there had been any breach of Section 6 or of the duty to carry out common repairs. The Property Factor advised that substantial repairs were required to be undertaken to the property. The Property Factor required to obtain authority from the owners to allow the repairs to proceed. They set out in their written representations the timeline of their involvement. They were aware repairs were necessary in November 2013. They wrote to Homeowners on 28 April 2014 regarding their proposals about the repairs. They sent a reminder in May 2014. There was a lack of response. They made further attempts to engage the Homeowners between 2014 until August 2019. They received only 58.5% of the funding for the repairs from the Homeowners as of August 2020. At that time the Property Factor decided that the repairs would need to be cancelled.

The Homeowners who had paid their share had their contribution returned to them.

16. The Property Factor advised that they could only seek to pursue Homeowners for non-payment of works which have already been carried out. The substantial repairs works had not been completed. There was a significant shortfall in the cost of the repairs. Therefore, the Property Factor were unable to instruct the works and had no route to enforce the deficit from the Homeowners who had not contributed.
17. In oral submission they confirmed that the Homeowners had to pay for the repairs before they could be instructed. A number of the owners had failed to engage and had not paid their share of the costs of repairs. The cost of the repairs were expensive. Given the high value of the repairs it was reasonable to ensure that money for the costs of the repairs was obtained prior to the repairs being carried out. It would not have been reasonable for the Property Factor to have to meet these costs, and further it would not have been reasonable to the other Homeowners to have to meet the costs of the non-paying Homeowners.
18. With a number of the Homeowners failing to engage at all, as set out in the correspondence submitted by the Property Factor and in view of the period of time over the which the payments had been requested, the Property Factor had no other option but to cancel the repairs instructed. They submitted that it was the duty of the Property Factor to ensure that the cost of the repairs was spread reasonably across the Homeowners and if the Property Factor were to proceed with the repairs it would have been prejudicial to the remaining Homeowners who were prepared to contribute. There would be a deficit which would have had to be spread across the other Homeowners. They submitted that looking at section 6 of the code they were satisfied that there had been no breach and further that there had been no breach of their duties as property factor.
19. They submitted that the Property Factor had procedures in place to deal with the matters requiring repairs, maintenance, and attention. The Homeowners

were given information and could have engaged with the repairs process. They did not consider that there was anything in section 6 which had been breached. In terms of their duties, they referred to section 2 “iii Major Repairs” of the Service Level Agreement (page 4) noting that advance funding would be sought and the reasons for this.

20. This had not been the first attempt to get repairs organised.

21. When the Property Factor decided that they were unable to proceed with the repair works a letter had been sent to the Homeowners on 17 August 2020 advising them of this. Money collected had been returned to the paying Homeowners on 21 August 2020. Those funds had been held separately in a client account.

Credit Refund

22. (a) Turning to the refund, the Property Factor denied that there had been a delay in repaying it. The Property Factor ceased management on 20 September 2020. All Homeowners were written to on 17 August 2020 advising that the Property Factor would look to issue a final account at the earliest opportunity once all suppliers invoices had been received.

23. The Property Factor wrote again to Homeowners on 23 September 2020, that letter referred to any remaining debt and advised that the Property Factor would only share the debt among the Homeowners as a last resort.

24. There required to be some debt apportionment, and this was confirmed to Homeowners on 17 December 2020. They advised that that letter also indicated that they had been ready to issue final invoices however this was an oversight and it had not in fact been the case, an invoice from Scottish Hydro was still be received. The Scottish Hydro invoice was not received until February 2021.

25. They accepted that they should have written to the Homeowners clarifying that they were waiting on the Scottish Hydro invoice, as soon as they realised this, and they apologised for any inconvenience to the Homeowner that this had caused. They advised that final accounts were raised on 11 February and a balance refund was issued on 4 March 2021.
26. They accepted that there had been a miscommunication about what was to happen with the Scottish Hydro invoice. By way of explanation they advised that the Property Factor's finance department was aware that there was a Scottish Hydro invoice to come in, however they did not inform John McCabe, the Property Manager. The finance department issue the final accounts; whereas John McCabe's role was to keep the Homeowners informed as to what was happening with payment of the final accounts. The Scottish Hydro invoice was paid quarterly but sometimes they were late invoicing, and they did not issue their account until February 2021.
27. The Property Factor were asked where the reference to "payment in three months" was, in terms of the Service Level Agreement, as mentioned in the letter to the Homeowner of 26 March. The Property Factor advised that the three months reference comes from the code of conduct that you have three months to complete the termination and the code also provides for reasonable delay.
28. They advised that there was not a failure to refund the credit balance, but a failure to pay the balance within the proposed timescales, because they had been waiting to receive the final invoice from Scottish Hydro. The Property Factor advised therefore, that they did not accept that there had been a failure to return the funds but did accept that they should have kept Homeowners better informed.
29. (b) Considering the three individual debtors, the Property Factor advised that there were letters sent to the three debtors telling them that their failure to pay

would lead to the debt being spread among individual owners. They submitted that they were entitled to spread the debt and noted that there is reference in the title deeds that a debt may be spread amongst Homeowners (see burden 2). In addition, the service level agreement allowed them to do so, see Section 9 (v) spreading of debt.

30. Ms Johnson submitted that the Property Factor were justified in spreading the debt with the other Homeowners. She explained why legal action was not pursued against the three individual Homeowners at final apportionment.
31. She advised that steps had been taken to pursue the three debtors. The Property Factor's detailed position was set out in their email to the Homeowner dated 26 March 2021. There were three accounts. One of the accounts involved an executry estate and the Property Factor had contacted the estate and a family member but there had been no response. They had placed a notice of potential liability on the property, and this remained active. Funds could therefore be recovered if the property were sold. The other two accounts related to the same property and there was a family connection with the owners. The credit control section had investigated recovery of these accounts however both owners resided abroad, the accounts had been passed to the sheriff officers to assess and it was considered that it would be too costly to pursue the debt where the debtors were abroad. A notice of potential liability was put on the property as well.
32. The Property Factor were asked if there had been any action taken to the recover the monies going through internal processes. They advised that the once the debt passes the final reminder stage, it is removed from the property manager and passed to the credit control team. It is credit control team who contact the Homeowner by telephone and email; and if the Homeowners engage then they can agree a repayment arrangement. If no agreement is entered into then the account will be passed to Sheriff Officers to try and recover debts.

33. The Property Factor advised for example, the period of the debt for the P Hamilton account (one of owners who resided abroad) had existed over a number of years. They had very limited response from the Homeowner. There had been some payments, but matters had progressed that in 2020 the case had been sent to the sheriff officers. The Property Factor had lodged email correspondence showing the breakdown of the debt. There had been various points when the client has gone off grid. Balances due in 2017 were likely considered too low to pursue. It was not until 2018 that the balance was larger, and they may consider pursuing, however the Homeowner then began paying some invoices in July 2018. The tribunal asked whether P Hamilton paid the accounts in 2017 and 2018. Property Factor advised that there were some payments made in 2017 and 2018. The sums had been increasing and decreasing as there had been some engagement over the period. Other than trying to make contact with the owner no legal action was taken until 2019.
34. Accounts relating to this Homeowner and the next owner at that address were passed to Sheriff Officers in 2019. The Sheriff Officers assess the prospects of success. Where Homeowners live abroad it is difficult to serve the papers on them, and usually not cost effective. Generally, any debt under £3000 may not be cost effective to raise in court proceedings and there is a risk of further costs which would then have to be spread among the remaining Homeowners if court action was not successful.
35. They did not consider that there had been any breach of the Property Factor's duties. They referred to the Service Level Agreement Section 9 regarding account dispute and in particular, (iv) court proceedings and (v) spreading of debt.
36. Other than the letter of December 2020 there was no correspondence with the other Homeowners about any outstanding debts. It would not show up in annual accounts. The debt was relatively small and may have been paid from the float during the course of the Property Factor service.
37. They advised that the termination of the Property Factor's service was largely driven from the largescale repairs which could not be organised, not the

smaller outstanding debts. Had the Property Factor not terminated their services they would have proceeded to advise the other Homeowners of these debts.

The Tribunal made the following findings in fact:

38. The Homeowner is the owner of 4 Laudervale Gardens, Balloch ("the Property").
39. The Factor performed the role of the Property Factor for the Property from at least 2013.
40. The Factor resigned from performing the role of Property Factor on 17 August 2020.
41. The Factor ceased carrying out their role as factor at the Property on 20 September 2020.
42. The Factor advised Homeowners in writing on 17 December 2020 that they would receive their final bill shortly.
43. That the Factor received a final account from Scottish Hydro in February 2021.
44. The Factor repaid the final balances on 4 March 2021.
45. The Factor deducted from balances to be repaid to Homeowners a share of any outstanding debt which included unpaid charges from other Homeowners.
46. The Factor operated a debt recovery procedure.
47. That the debt recovery procedure included assessing the prospects of recovery debt of through formal court action.
48. That the Factor advised that debt recovery through formal court action was on occasion cost prohibitive.
49. That there were three outstanding accounts due as of March 2021. That formal legal action was considered to be cost prohibitive as two debtors lived abroad and the third was deceased.
50. Notices of Potential Liability were placed on the properties of the debtors/Homeowners.
51. In around November 2013 the Factor sought to undertake major repair works to the property.

52. From 2013 until August 2020 the Factor sent a number of letters to Homeowners asking Homeowners to contribute to the cost of the repairs.
53. As of August 2020, only 13 of out 18 of the Homeowners had paid towards the cost of the major repairs.
54. That there was a shortfall in the cost of the repair work at as at August 2020.
55. That the Factor advised Homeowners in August 2020 that they were no longer undertaking the major repairs programme.
56. In August 2020 the Factor repaid the major repair money to the Homeowners who had contributed to the major repair works.
57. The Factor could not raise legal proceedings against Homeowners for payment of repair works in advance of any repair being carried out.
58. That the Factor's duties were determined by the terms of the title deeds and the service level agreement dated July 2020.
59. The Homeowner sent a letter of complaint to the Factor on 1 April 2021.
60. The Factor responded to the complaint letter on 10 May 2021.

Reasons for Decision

Common repairs : Section 6 of the Code - Carrying out Repairs and Maintenance and The Duty regarding Common Repairs

61. We considered that the Property Factor's duties arose from the terms of the Service Level Agreement and the title deeds. The costs of the major repair works were substantial. The service level agreement at Section 2(iii) confirms that the Property Factor will normally seek advance funding of the whole cost of repairs prior to instructing repair works. It also explains why they seek advance funding, in order to pay contractors' invoices and not to leave other Homeowners liable to make up the shortfall of defaulting Homeowners. In the Property Factor's letter of 10 May 2021, it was clear that there was a significant amount of money needed to be contributed to the major repairs. This sum was also referred to in their email of March 2021.

62. We consider that the Property Factor did all that they could to try and obtain the costs of the major works. They had attempted to do so over several years. We consider that the letter was clear and explained the Property Factor's position on the issue. We did not consider that the Property Factor could have done anymore to pursue the issue of organising the payment for the major repair works. The Property Factor could not have forced the non-paying Homeowners to contribute to the cost of the repairs not yet carried out. The Property Factor could not have raised legal proceedings against Homeowners for payment of works not completed. We did not find that there had been any breach of the Property Factor duties

63. The Tribunal also considered that there had been no breach of the code of conduct Section 6.

Credit Refund

64. The Tribunal believe that the issue of sundry debtors is often considered to be a rather thorny issue. At the end of every quarter it is often usual practice that Homeowners will get a statement of setting out their share of contributions; and at end of the year an account of what they have paid in and what they are owed/owe. What owners often do not get is an overall accounting showing total accounting and total expenditure for the whole development. Such a document could overwhelm a Homeowner and may still not provide the Homeowner with what the Homeowner needs to know. Each Homeowner should however get their own account and that account should be clear and understandable to that Homeowner. The Tribunal considered that this is often an issue about good communication between the parties. We considered that the Homeowner should know if there is outstanding money owing at least yearly.

65. Turning to the present case and the three debts, it was not clear from the submissions of the Property Factor when they would have notified the Homeowners about these sundry debts. The Tribunal considered that the Property Factor was rather unclear in submissions as to what happened with

debt recovery in the credit control team. The other Homeowners do not appear to have been aware that there were any outstanding debts until after the Property Factor had given notice that they were terminating their services. The Property Factor were also not clear what they had done about collecting the debt, and what amounts triggered formal recovery processes. That said it is acknowledged that debts can reduce when there is some contact from the non-paying Homeowner; and if they make an offer it is often sensible to try and agree some informal repayment arrangement before proceeding to court which is often costly with no guarantee of payment.

66. We considered that in the grand scheme of things £3000 was not an excessively large sum owing. Although, we also considered that where debts are allowed to accumulate it becomes more difficult to recover the sums due.

67. We considered that the Property Factor should have been more proactive in pursuing these debts and clearer in explaining what they did do. They appeared to the Tribunal to have allowed the debt to drift for some time. There was a lack of clarity as to the level of debt and when they passed debt to Sheriff Officers. One of the accounts appeared to have been sitting with the credit control team for over two years (and the sum was never less than £700) before the matter was sent to the sheriff officers.

68. We thought there appeared to be a lack of knowledge about the debt recovery procedures, although we would note that this is not the breach complained of.

69. What the Homeowner complained of was that he considered that there was a breach of Property Factor duties (contained in section 7B of the application) that the Property Factor used Homeowners' credit to cover the £3000 debt shortfall rather than pursuing the non-paying Homeowners through court. We did not find that there was a breach of their duty as we found that the debts had been pursued by the Property Factor. Advice was obtained from the Sheriff Officers in terms of likelihood of recovery of the debt. Considering additional costs that would likely have been incurred and also, the prospects of success, the Tribunal considered that the Property Factor took reasonable

and appropriate action. We also note that Notices of Potential Liability were put in place over both properties. We consider that they were entitled to take the action that they did in terms of section 9 of their Service Level Agreement.

70. We did not find that there had been a breach of the Property Factor duties in this regard.

The Final Payment

71. The Property Factor contract was terminated on 20 September 2020. In December 2020 the Property Factor had advised Homeowners that outstanding debt would be settled shortly. However, there was then a delay and Homeowners were not advised what was happening. We did consider that there had been a failure to communicate the delay to Homeowners. The Homeowners would have expected the final account in December 2020 or shortly after. The Property Factor could have informed the Homeowners that they were waiting on a final invoice. It would appear that there had been a breakdown of communication with the property manager and the finance department.

72. Having regard to the Property Factor waiting for a final invoice from Scottish Hydro we note that they settled the accounts shortly after the invoice was received. However, it does appear that they could have kept the Homeowners better informed in terms of waiting on this invoice. We note that major repair monies (once the decision was taken not to proceed) were refunded quickly, and in terms of the final invoice once they had received the Scottish Hydro invoice they settled the final invoice timeously.

73. We do not consider that there is a breach of the Property Factor's duties under this head. We would observe however that it may have been helpful had the Property Factor been better at communicating with the Homeowners to keep them informed about possible delay and when payment of final account would be issued. We note that they had apologised for the delay in final payment in their written submission before the tribunal.

Decision

74. The Tribunal finds that the Factor did not fail to comply with its Property Factor duties and did not fail to comply with section 6 of the Code of Conduct for Property Factor. The decision is unanimous.

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.

Melanie Barbour Legal Member and Chair

2021 Date