

Housing and Property Chamber
First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) in an application under section 17 of the Property Factors (Scotland) Act 2011 (“the Act”)

Chamber Ref: FTS/HPC/PF/20/2019, 2020, 2021, 2022, 2023, 2024

Re: Properties at Carrick Quay, Clyde Street, Glasgow, G1 4LH (“the Property”)

Parties:

Bill Richardson (Homeowner), Carrick Quay, Flat 4/1, 120 Clyde Street, Glasgow, G1 4LH (“the Applicant”) (FTS/HPC/PF/20/2019)

Debbie Kenny (Homeowner), Carrick Quay, Flat 3/1, 120 Clyde Street, Glasgow, G1 4LH (“the Applicant”) (FTS/HPC/PF/20/2020)

Caroline Thomson (Homeowner), Carrick Quay, Flat 3/1, 100 Clyde Street, Glasgow, G1 4LH (“the Applicant”) (FTS/HPC/PF/20/2021)

Jill Carruthers (Homeowner), Carrick Quay, Flat 1/02, 100 Clyde Street, Glasgow, G1 4LH (“the Applicant”) (FTS/HPC/PF/20/2022)

Madeleine Rooney (Homeowner), Carrick Quay, Flat 5/1, 130 Clyde Street, Glasgow, G1 4LH (“the Applicant”) (FTS/HPC/PF/20/2023)

Dawn MacTaggart (Homeowner), Carrick Quay, Flat 4/1, 100 Clyde Street, Glasgow, G1 4LH (“the Applicant”) (FTS/HPC/PF/20/2024)

Residential Management Group (Property Factor), Unit 6, 95 Morrison Street, Glasgow G5 8BE (“the Respondent”)

Tribunal Members:

Jim Bauld (Legal Member); Elizabeth Dickson (Ordinary Member)

Background

1. This case involves six separate applications lodged by six individual homeowners who all reside within the same development at Carrick Quay Glasgow.
2. The applications were dated 15 and 21 September 2020 and are applications by the homeowners to the Tribunal for a determination on whether the property factor had failed to comply with various sections of the Code of Conduct for Property Factors (hereafter referred to as “the Code of Conduct ”) imposed by section 14 of the Property Factors (Scotland) Act 2011 (hereafter referred to as “the 2011 Act”) and to carry out the property factor duties in terms of section 17 (1) (a) of the 2011 Act.
3. One of the applicants, Mr Bill Richardson, acts on his own behalf and has also been nominated by the other five applicants to act as their representative.
4. As the applications are in near identical terms the tribunal decided that they should all proceed simultaneously.
5. An initial case management discussion took place on 12 February 2021. The tribunal issued a note after the CMD requesting additional information from the parties.
6. Subsequent CMDs set for 7 May 2021 and 6 August 2021 were postponed
7. A hearing was set to take place on 15 October 2021. Prior to that date the tribunal decided to use that hearing as a case management discussion.
8. The homeowners did not attend either of the case management discussions which took place on 12 February 2021 or 15 October 2021.
9. After the case management discussion of 15 October the tribunal issued a follow-up note containing directions and narrating the issues still outstanding.
10. The tribunal then fixed a hearing to take place on 14 January 2022 using the Webex video conferencing platform

The alleged Code of Conduct breaches

11. Each of the homeowners complains about a breach of section 2.1 of the Code of Conduct. That section indicates that property factors must not provide information to homeowners which is misleading or false

12. Each of the homeowners complains about a breach of section 2.5 of the Code of Conduct. That section requires factors to respond to enquiries and complaints within prompt timescales .
13. It appears to the tribunal that this element of the applications is also linked to the claim that sections 7.1 and 7.2 of the Code is breached.
14. Section 7.1 of the Code of Conduct requires the factor to have a written complaints policy Section 7.2 requires that a final decision on a complaint should be confirmed with senior management and the homeowner should then be advised of the manner in which they can apply to the tribunal if they are not satisfied with the final decision.
15. In the applications, the homeowners complain of a breach of section 4.1 of the Code, namely that the factor did not have a clear written procedure for debt recovery.
16. Each of the homeowners complains that a debt recovery court action was raised against them without any prior information and in breach of section 4.8 of the Code of Conduct.
17. Each of the homeowner complains that the Property Factor failed to carry out the “property factor’s duties”. Their complaints were:
 - Failure between 2017 and 2019 to provide information on year end deficit charges,
 - Failure to acknowledge complaints and respond to owners’ concerns,
 - Failure to provide accurate and consistent accounting statements,
 - Initiating court action without owners consultation, and
 - Failure to follow prescribed First Tier Tribunal process.

The tribunal has treated these complaints of failing to comply with the property factor’s duties as simply being further expressions of failures to comply with relevant sections of the Code rather than a breach of the duties set out in the 2011 Act at section 17(5)

Background/ agreed facts

18. These applications relate to complaints raised by six homeowners in the Carrick Quay development in Glasgow. The background facts do not appear to be a matter of significant contention nor dispute between the parties
19. The property factor was appointed by the Owners’ Association of the development and became the factor for the development with effect from 1 September 2016. They were eventually removed from that position on 30 June 2019 by the owners.

20. In respect of the management of the development, the property factors provided an estimate of the costs they expected to incur during each accounting year which ran from 1 September in each year to 31 August in the following year. The estimate was provided in advance and the owners were allowed to pay their estimated share of those costs by means of monthly direct debit payments. Invoices were sent twice a year.
21. Such an estimate was provided for the first year in which the factors acted as managers for this development. That year ran from 1 September 2016 to 31 August 2017
22. In respect of the second year running from 1 September 2017 to 31 August 2018 the property factors provided a further estimate of the likely cost.
23. During the course of that second year the property factors produced final accounts in respect of the first year which showed that the estimated costs were underestimated and that the owners were liable to pay additional costs. Those additional costs were intimated to the owners during the second year and were recovered by the monthly direct debit payment being increased for a period of four months during the year running from September 2017 to August 2018.
24. In respect of the year intended to run from September 2018 to August 2019 the property factors again provided an estimate of the likely costs and allowed owners to pay by monthly direct debit. They did not during that period finalise the accounts for the second year. The property factors were removed from office before the conclusion of the third year with their appointment ending on 30 June 2019.
25. Subsequent to their removal, the property factors produced concluded accounts in respect of both the second full year of their appointment (1 September 2017 to 31 August 2018) and the period from 1 September 2018 to 30 June 2019.
26. They remitted invoices to the owners in respect of what they claimed to be the outstanding amount due by the owners in respect of those periods.
27. The owners who have made the applications to the tribunal are dissatisfied with the accounting which has been provided and dispute the final accounts which have been provided.
28. Prior to the applications being made to the tribunal, the property factors raised simple procedure (debt recovery) actions at Glasgow Sheriff Court against a number of the applicants. Those actions were paused by the court when the applicants indicated to the court they were unhappy with the conduct of the property factor and believed that they had breached the Code of Conduct. The sheriff who was presiding in those actions indicated that she could not deal with the Code complaints and those issues required to be remitted to the tribunal.

29. The homeowners subsequently lodged the applications which are now before the tribunal.

Jurisdiction

30. The tribunal's jurisdiction is set out in the Property Factors (Scotland) Act 2011. The tribunal is entitled to determine whether a property factor has complied with the Code of Conduct and carried out the property factor's duties. If the tribunal determines that the property factor has not complied with the Code of Conduct or carried out its duties it can make a property factor enforcement order.
31. The tribunal has no jurisdiction at all to determine what sums are owed by homeowners to property factors in respect of work undertaken by the property factor. If a property factor claims that payment is due and cannot reach agreement on the amount owed by a homeowner then that it is a matter for the property factor to pursue through the sheriff court. The sheriff court has sole jurisdiction to determine whether the debt claimed is accurate and whether an order for payment should be made. The tribunal in this determination will make no decision on whether any debt is due by the homeowners to the property.

The hearing

32. The hearing proceeded on the 14 January 2022. Of the six applicants, all were present with the exception of Miss Carruthers. Mr Richardson was representing all applicants.
33. The respondents were represented by their solicitor Miss Lindsey Wilson and she was accompanied by Mr. Andrew Rose.
34. The tribunal noted that the respondents had lodged significant productions by emails which had been submitted to the tribunal office on the 13 January 2022 at 4:57 pm and 8:14 pm.
35. Ms Wilson asked the tribunal to allow these productions to be received although they had clearly been lodged late
36. It was her position that they contained documents which had previously been provided to Mr Richardson by Mr Rose. Mr Richardson conceded that there was nothing new in the documents which had been lodged and accordingly the tribunal indicated it would proceed as planned and allow Ms Wilson to refer to the documents as required

37. The hearing took place over the course of the day commencing shortly after 10.00 a.m. and concluding shortly after 5.00 p.m.
38. During the course of the hearing the tribunal heard from Mr Richardson on his own behalf and on behalf of the other applicants. The tribunal also heard a response from Ms Wilson on behalf of the applicants. The tribunal also heard directly from the other applicants who were present namely Miss Thomson, Ms McTaggart, Ms Kenny and Ms Rooney.
39. At certain points during the hearing the tribunal adjourned to allow parties to have informal discussions
40. At one point during the hearing there was a proposal made by the applicants that they would each pay £167 to the respondents in full and final settlement of all sums which may be due to be paid by them to the respondents. That proposal was rejected by the respondents.
41. Throughout the course of the hearing the tribunal attempted to ascertain the essence of the issue in dispute between the parties.
42. The respondents were properly appointed as factors. There is no doubt that while acting as factors they instructed various works of maintenance and repair and acted as property managers. There appears to be no dispute that they are entitled to be paid by the homeowners in respect of the works properly instructed and completed..
43. The manner in which the respondents invoiced the applicants was on the basis that they estimated the likely costs for the year ahead, divided that between the relevant homeowners and allowed the homeowners to pay that amount over the course of the year. The clear intention was that any under-estimate or over-estimate would be taken into account in a subsequent year.
44. At the end of each year the respondents would produce final accounts which would either demonstrate that there was a surplus or deficit based on the initial estimates.
45. In respect of the accounts for the period from 1 September 2016 to 31 August 2017 the respondents produced copies of the accounts which they prepared. They had initially prepared a set of accounts showing a total deficit of £27,560. They then produced a revised set of accounts showing a deficit of £29,348. That required to be recovered from the various owners at the Development.
46. Recovery of that amount was made during the second year of their appointment running from 1 September to 31 August 2018. At a point during that year the monthly direct debit payments being paid by the respective homeowners was increased from £120 per month to £241 per month for a period of four months.
47. The completed accounts in respect of the period from 1 September 2017 to 31 August 2018 showed a deficit of £10,419. No attempt was made to recover

that during the subsequent year which was truncated. The final accounts for the period from 1 September 2018 to 30 June 2019 showed a surplus of £1579.

48. Accordingly at the end of the property factor's period of appointment, assuming the final accounts prepared by the respondents were accurate, there remained a deficit which they were entitled to recover from the homeowners. The property factors prepared and issued to the homeowners final invoices based on the accounts.

The dispute between the parties

49. The homeowners are disputing these final invoices. They disputed them for different reasons.
50. In Ms Thomson's case she disputes the account because she only became a homeowner on 1 March 2019. Her liability in respect of common charges owed to the respondents would only apply for a period of four months namely 1 March 2019 to 30 June 2019. The estimated common charge of the each month being paid by the respective homeowners during this period was £143. Miss Thomson indicated to the tribunal that she has been given a variety of different "final" invoices showing different amounts owed by her. She has never been given a proper final account which deals with her period of ownership while the respondents were property factors. She accepts that she has paid nothing to the property factors and agrees that she must owe some amount to cover the charges incurred during that period of ownership. She indicates that she had initially been asked to pay a bill of £1851.41. She has now received what is meant to be a final account in the sum of £1003. That would equate to an annual bill of over £3000. It is her position that such a bill is grossly overstated given that the average bill incurred on an annual basis over the previous two years was somewhere between £1400 and £1800 per flat. She indicated that no court action had yet been taken against her by the factors.
51. Miss Rooney's position was that she paid the final bill which she was sent because she did not want to have a court action raised against her. Her final account was £719.24. She has no idea whether that account is correct or not has never been provided with appropriate accounting to justify it.
52. Miss McTaggart indicated to the tribunal that she had received two final accounts one for £876, one for £910. She does not know which is correct. She is willing to pay but wants to have an accurate accounting provided.
53. Miss Kenny indicated to the tribunal that she had stopped paying her monthly direct debit many months before the respondents were removed from office. She indicated that she was the treasurer of the owners' association and that she was aware that the owners' association had paid certain bills from their own bank accounts. She has asked for evidence that the respondents had made payments of certain accounts and says she has not received it.
54. Mr Richardson indicated to the tribunal that he had been in contact with Mr Rose from the respondents. It was his position that he had still not been

provided with the information he had requested. He was unable to reconcile the amount being sought from the information provided.

55. On behalf of the respondent Miss Wilson led evidence from Mr Rose. The tribunal's attention was drawn to the invoices which were sent to the owners, to the agreed schedule of payments and to the accounts prepared in respect of each of the three periods during which the respondents were the factors.
56. Mr Rose explained that the revised accounts for the first year required to be done because certain expenditure had not been included in the original accounts. It was his position that the annual accounts which were produced were accurate and showed the correct expenditure levels incurred by the respondents during their time as factor. The annual accounts had been audited and approved by a firm of chartered accountants. It was his position that each of the homeowners still owed money to the respondent and that they had been appropriately billed for the outstanding amounts.
57. With regard to the court actions which had been raised it was his position that appropriate notice of that had been given to the owners involved and the court actions had been properly and correctly raised
58. It was conceded that the finalised annual accounts for the development were not sent to individual homeowners. These accounts were provided only to the owners' association. They were available for the homeowners if they wished to request them

Are the alleged breaches of the Code established?

59. The tribunal notes that the applicants are alleging breaches of a number of different sections of the code
60. The sections of the Code where the tribunal can currently determine whether there are breaches are sections 2.1 and 2.5.
61. Section 2.1 requires a property factor not to provide information which is misleading or false. The difficulty with that particular allegation is that the homeowners are arguing that the sums being claimed from them are wrong and that the information in the letters threatening court action and the court papers themselves are therefore "false and misleading". However, as indicated above, this tribunal has no jurisdiction to determine what outstanding sums may or may not be owed by the homeowners to the property factors at the termination of their appointment. Only the sheriff court can make that determination. Unless and until the sheriff court makes that determination then this tribunal is practically unable to make any finding that section 2.1 of the code has been breached in this particular regard. The tribunal is able to make determinations with regard to other allegations of the provision of false and misleading information in relation to the accounts issued to homeowners at various times during the factor's appointment

62. With regard to section 2.5 of the code, the requirement there is that the factor should respond to enquiries and complaints received by letter or email within prompt timescales. In regard to this section of the code the tribunal finds that in respect of each applicant the property factor has at times failed to respond to enquiries within prompt timescales.
63. At the conclusion of the hearing the tribunal took time to review the documents which had been lodged by the parties. During the hearing the parties had drawn the tribunal's attention to specific items within the inventories of productions which had been lodged
64. The tribunal notes that a number of the documents tend to show that in a number of instances the respondents did fail to respond to the applicants promptly and within a reasonable period of time
65. Some examples of these can be found within the documents as follows
66. Taking each homeowners position in turn and by referring to the page numbers of the final inventory of productions lodged on behalf of both parties, the tribunal notes the following
67. Pages 39-41 of the homeowners' inventory show a series of text or WhatsApp messages between Mr Richardson and the property factor. The messages started on 5 March 2019 and continued to 5 April 2019 without the particular issue being raised by Mr Richardson ever actually being answered.
68. At page 69 there is an exchange of emails between Mrs Kenny and the factors in which the factors apologise for a delay in coming back to her. That delay seems to be one of approximately 10 weeks
69. At page 125 Mrs Rooney indicates that she lodged a complaint on 1 August 2019 and did not receive a reply for over a month
70. At pages 136- 237, Mrs McTaggart indicates an attempt over a period of almost 4 months to resolve a query regarding her outstanding bill. At no point did she receive any satisfactory response from the property factor
71. Another example is on pages 141-142. An email from Mrs McTaggart of 31 July 2019 is not answered until 13 August 2019 and even that reply does not deal with the query raised
72. At page 151 is an email from the property factor indicating that they sent an email to Mrs McTaggart to a wrong email address

73. At pages 182 to 185 a series of emails sent by the solicitor for Mrs Thompson to the property factors. These emails again demonstrate failure to reply within a reasonable time to fairly straightforward queries
74. At page 191 Mrs Thompson produces an email from the property factors dated 11 August 2021 which is a response to her email of 26 May 2021. Again a delay of over two months in responding to an email
75. There are also examples within the property factors own productions of an acknowledgement of delays and failures to respond to correspondence. The emails offer apologies to the homeowners
76. On page 187 of the respondent's inventory there is a letter dated 7 February 2019 from the respondents to the owners. That letter indicates that the accounts which had been originally issued for the year ending 31 August 2017 were incorrect and required to be revised, The respondents apologise for this error
77. On page 196 of that inventory is another letter dated 8 February 2019 where the respondents again apologise for an administrative error indicating that the invoices in respect of the deficit for that year were incorrect and that the transaction has been reversed from the account again apologising for the oversight
78. The initial deficit shown in the accounts for that period was £27,560. Those accounts appear at pages 214-215 of the inventory. The revised deficit was £29,348 showing at page 223 of the inventory
79. On page 176 of this inventory is another letter sent to the owners dated 9 March 2018. That letter refers to the accounts for the period ending 31 August 2017 and indicates that there is a balancing charge required to recover the overspend. The letter provides new information with regard to the amount of the balancing charge and the overspend. The information regarding the balancing charge did not appear to be sent to the owners until 5 April 2018. An example of that letter can be found at page 152 of the inventory and at page 138
80. At present the tribunal would be in a position to make findings that the respondents have breached the relevant parts of section 2 of the Code. It could be determined that the accounts which were remitted were inaccurate and this could be deemed to be false and misleading. There are examples of emails being sent by the various applicants to the respondents who did not respond promptly to them.
81. With regard to the alleged breaches of section 7.1 and 7.2 the tribunal at present cannot determine that there has been a breach of these sections. These sections simply require a property factor to have a written complaints policy and to follow that written complaints policy and having done so to confirm

a final decision to tell homeowners and to advise them that they may apply to the tribunal

82. It seems clear that the property factor has such a policy. It could be argued that some of those emails failed to be treated as complaints and should have triggered the appropriate use of the complaints policy which the respondents follow. The factor accepts that they did so with one such email from one of the applicants. If they failed to recognise the emails as complaints then it is possible that the tribunal could determine that there have been breaches of sections 7.1 and 7.2. At present it is difficult to see the emails from the applicants as formal “complaints” which would require the use of the complaints policy

The real issue for determination?

83. The applicant alleges breaches of sections 4.1 and 4.8 of the Code. Section 4.1 requires that property factors have a clear written procedure for debt recovery and section 4.8 requires that a property factor must not take legal action against a homeowner without giving without taking reasonable steps to resolve the matter and without giving notice of their intention to do so. Again in this case the property factor has a debt recovery policy. In this case it is clear that the property factors and their solicitors wrote to the homeowners warning them that such action might be taken. While the applicants may be unhappy that such actions were raised despite their querying the amounts being sought, the raising of such actions does not of itself establish a breach of the code. The pausing of these actions by the court does not establish any breach of the Code.
84. If the sheriff court determines that the respondent's debt recovery actions are properly founded and the applicants owe the sums (or at least a substantial part of same) claimed the respondents then it is clear that there could be no breach of section 4 of the Code. In the circumstances the tribunal would be likely to regard any other breaches as far more minor.
85. The difficulty for the tribunal in making a property factor enforcement order is that such order is highly dependent on the resolution of the issue of the sums owed. If the applicants are correct and that they are being inappropriately pursued for excessive sums, then the tribunal might be persuaded to conclude that there is also a breach of the relevant parts of section 4 of the Code.
86. It appears to the tribunal that the whole dispute between the applicants and the respondents hinges on the sums claimed to be owed by the applicant to the respondents at the termination of their appointment. This tribunal does not have jurisdiction to determine the amount owed (if any) by the applicant to the respondent. That determination falls solely within the jurisdiction of the sheriff court unless the parties agree to some other form of resolution. Until that element of the dispute is resolved then the tribunal is effectively unable to reach a final conclusion on all aspects of the alleged Code breaches .

Further procedure

87. Accordingly the tribunal is a situation where it requires the parties to confirm which course of action should now be pursued.
88. Do the parties wish the tribunal to make no order at the present time and await the outcome of a number of sheriff court actions?
89. Do the parties wish further time to discuss, negotiate and attempt to resolve the issues between them without either the tribunal or the court making any formal determination? The tribunal notes that during the hearing the applicants made an offer to settle the proceedings. Although that offer was not acceptable to the respondent, is there some other resolution which might be mutually agreed by the parties and which would avoid further tribunal procedure, further court procedure and save further time and energy of all the parties and avoid additional and increasing expense
90. Do the parties wish to attempt alternative dispute resolution with regard to the debt perhaps by using mediation?
91. Would the parties prefer that the tribunal simply makes an order now based only on the breaches of section 2 of the Code and rejecting the allegations of breaches of sections 4 and 7 at this stage?
92. At this stage, the tribunal, if making a PFEO, would issue an order for payment of a modest sum to each applicant

The proposed PFEO

93. If the tribunal finds that there is a breach of the code, the tribunal's responsibility is to decide whether to make a property factor enforcement order (PFEO) in terms of section 19 of the 2011 act. When a tribunal proposes to make such an order it must give notice of the proposal to the property factor and also allow parties for the opportunity to make representations on the proposed PFEO
94. At present the proposed PFEO would be in these terms

The tribunal proposes to make a PFEO in respect of each application and proposes an order for payment would be made against the property factor in favour of each individual applicant in the sum of £100 . It will make no order meantime in respect of the other alleged breaches

Further representations required

95. Parties are ask to make representations as allowed by section 19 of the 2011 Act and upon receipt of same the tribunal will decide on further procedure, whether that is to adjourn proceedings or to make a PFEO

96. The tribunal would be willing to arrange a further hearing to discuss further procedure if parties thought that would be useful. Such a hearing could now take place on a face to face basis at the tribunal's offices in Glasgow . This suggestion is made by the tribunal taking into account the overriding objective of the tribunal which is to deal with proceedings justly

Final comment

The legal member of the tribunal acknowledges and apologises for the delay in the preparation and issue of this decision

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.

..... **Legal Member**

28 August 2022

.....**Date**