

Housing and Property Chamber

First-tier Tribunal for Scotland



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

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

Chamber Ref: FTS/HPC/PF/21/0033

**88 South Victoria Dock Road, City Quay, Dundee DD1 3BQ
("the Property")**

The Parties:-

**Mr Andrew Brews, 10 Fern Place, Leuchars, Fife KY16 0ET
("the Homeowner")**

**Ross & Liddell Limited, 60 St Enoch Square, Glasgow G1 4AW
(represented by their agent Anderson Strathern LLP, Solicitors, 50 George
Square, Glasgow G2 1EH
("the Factor"))**

Tribunal Members:

**Graham Harding (Legal Member)
Elizabeth Dickson (Ordinary Member)**

DECISION

The Tribunal unanimously determined that the Factor has complied with the Code of Conduct for Property Factors ("the Code"). No Property Factor Enforcement Order (PFEO) is necessary

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

Background

1. By application dated 6 January 2021 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 2.1 and 2.2 of the Code. The Homeowner submitted written representations in support of his application detailing the nature of his complaint.

2. By Notice of Acceptance dated 20 January 2021 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned.
3. By email dated 5 March 2021 the Factor's representatives submitted written representations in response to the Homeowner's complaint.
4. The Homeowner submitted further written representations by email on 5 February, 6 and 8 March 2021.

Hearing

5. A Hearing was held by teleconference on 19 March 2021. The Homeowner attended in person. Mr Gavin Baird and Mr Scott Quinn attended on behalf of the Factor and were represented by Ms Nicola McAtier of Anderson Strathern LLP, Solicitors, Glasgow.
6. By way of a preliminary matter the Tribunal noted that the written representations submitted by Ms McAtier made reference to the new Sections 2.1 and 2.2 of the Code which were not yet in force, a point which had been made in the Homeowner's submissions of 8 March. Ms McAtier acknowledged that there had been an error and that she had submitted amended written representations to the Tribunal on 18 March although the substantive defence of the complaint had not altered.

Summary of submissions

7. The Homeowner opened his submissions with a statement in which he said that the letter of 6 October 2020 from Mr Baird to him was written with the clear intention to discredit the Owners Association and in particular all the members of its Committee. He said that the letter was written with the purpose of communicating damaging and misleading information and that the Factor had been dishonest. He thought that in so doing the Factor had been acting out of self-preservation of its role as Factor at City Quay. The Homeowner went on to say that in his opinion Mr Baird had abused his position and the letter had been made up on assumption and used private emails not received by him. The Homeowner said the letter had been damaging to him personally and to all who had received it.
8. The Homeowner went on to say that the 108 pages sent on behalf of the Factor were all irrelevant and referred to matters which he had not complained about. The Homeowner questioned why the Factor needed to employ a lawyer if it had done nothing wrong.
9. The Homeowner said that he felt his integrity and standing had been damaged by a vindictive letter that had been sent intentionally and had caused stress and upset. The Homeowner explained that he had joined the Owners' Association to help other owners. He explained he was a small portfolio landlord and felt that the Factor's letter could cause him problems

going forward in that it was plausible that a tenant might think that his landlord was dishonest. He suggested that the Factor had no proof to support the slurs made and that as an owner he was entitled to a view about the Factor. The Homeowner went on to say that had he approached another factor the Factor would have had no right to mention it in a letter to owners.

10. The Homeowner said he wished to draw to the Tribunal's attention what the Factor's Managing Director had said in his email of 24 December 2020. The Homeowner queried whether Mr Cunningham although stating that the Factor accepted the validity of the Owners' Association whether or not it has the support of a majority of owners had subsequently contradicted himself.
11. The Homeowner asserted that the Factor was wrong to refer to the Committee as self-elected and that the Factor had no right to demand copies of the mandates provided by owners to prove the validity or authority of the Association.
12. The Homeowner said that the Factor had been wrong to say that a Committee member had close relationship with a company with ties to another Factor.
13. The Homeowner queried whether it was fair or morally acceptable to destroy the credibility of the Owners' Association because of what others thought of the Factor's performance.
14. The Homeowner said that the email of 24 December from Mr Cunningham endorsed what Mr Baird had said in his letter and that damage had been intended to be done by the letter of 6 October 2020.
15. For the Factor Ms McAtier queried with the Homeowner if it was correct that he had three issues with the Factor namely the reference to the Committee being self-elected; that it was working against the Factor and that members were promoting their own personal agendas. The Homeowner confirmed this to be the case.
16. Ms McAtier referred the Tribunal to the Committee update to owners dated 25 September 2020 (Factor's Production number 11) and then asked Mr Baird to provide a brief overview as to why the letter of 6 October was sent to owners.
17. Mr Baird said that it was important to consider the background in context. He explained that his colleague Scott Quinn dealt with the owners at the development on a day-to-day basis but that he himself was the senior member of staff in the Dundee office. He said that the letter had been sent in reply to the Committee's update of 25 September and had been intended to be in respect of the cladding and fire safety issues. It had not been intended to be a long communication but rather to provide clarification over fire safety. Mr Baird went on to say that he believed the paragraph that had caused issue to be factually correct and it had not been intended to cause offence.
18. Mr Baird went on to say that the crux of the issue was that the Factor always wanted to engage with the owners but that it was incumbent on the Factor to

remind owners that the appointment of the Factor was in accordance with the Deed of Conditions.

19. Mr Baird said that the Committee had never provided the requested information regarding the Owners' support for the Committee and that the Factor was unable to take instructions from the Committee. It needed the agreement of owners as determined by the Deed of Conditions. Therefore, in the context of the information the Factor had, he believed the statement in the letter to be factually correct.
20. In response to a question from Ms McAtier regarding members of the owners Association working against the Factor Mr Baird said he believed that to be factually correct. Mr Baird went on to say that with regards to communications about fire safety there had been a number of communications between the Factor and the Committee both by email and meetings held over Zoom as well as face-to-face meetings. He said that latterly the meetings had been more frequent. Mr Baird went on to say that he had hoped that information from these would have been relayed fairly to owners. He did not think the information provided in the letter of 6 October was misleading.
21. Mr Baird went on to say that they now found themselves in the situation that nothing they did was perceived to be good enough by some members of the Committee but this was not reflected by the majority of owners nor had the Committee provided evidence to show it had the support of the majority of owners.
22. Mr Baird referred to examples of members of the Committee working against the Factor in the communications submitted. He spoke of a communication from the Committee in December 2020 in which it asked the Factor to totally disregard the 2011 Act and put it in breach of the Act. Mr Baird said that the Factor had to be careful of the provisions of the Act and therefore had to decide whether to do what the Committee had told them to do or to stick with doing what they believed to be correct. Mr Baird went on to say he had pages of notes where he believed the Committee had been acting against the Factor and he believed one owner on the Committee in particular was acting against the Factor and offered to elaborate.
23. Ms McAtier queried if it was fair to assume that the Factor was not co-operating with the Owners' Association and trying to make life difficult for it. Mr Baird replied that the Factor had obtained indicative quotes for carrying out a Fire Risk Assessment and these had been intended to be helpful. These had been provided to the Committee. However, with the benefit of hindsight the Factor should have forwarded them to owners at an earlier date. Mr Baird explained that the Factor had offered to take forward EWS1 certification if owners wanted it and had also offered financial assistance but that had been ignored by the Committee and had not been conveyed to owners.
24. Ms McAtier queried what had been the purpose of the statement that members of the Committee were promoting their own personal agendas. Mr Baird said that the Factor had been communicating with the Committee. He

explained he had experience of dealing with some owners at other developments and that there was a bad debt issue at the development and formal debt recovery proceedings had been raised against one member of the Committee who was involved with other property managers. Mr Baird said that it had been a general comment but that everything written was believed to be accurate.

25. Ms McAtier referred Mr Baird to the letter of 28 January 2021 and Mr Cunningham's letter of 24 December 2020. Mr Baird explained that the letter of 28 January was in compliance with what they had undertaken to do in Mr Cunningham's email of 24 December which was to issue a further letter of explanation and confirm that there had never been any intention to cause offence.
26. Ms McAtier referred the Tribunal to the Factor's written submissions and suggested that there had been clear miscommunication on the part of the Owners' Association which could have created great difficulties with other owners. The Factor owed a duty to all owners and not to the Owners' Association individual Committee members. Ms McAtier submitted that the letter of 6 October was factually correct and was not misleading and therefore not a breach of Section 2.1 of the Code. She also submitted it was not abusive or intimidating and therefore not in breach of Section 2.2 of the Code. Furthermore, following the complaints received the Factor had addressed the issues in a further letter to owners on 28 January 2021. Ms McAtier submitted that the Factor had properly addressed the Homeowner's complaint prior to the raising of the application and the Factor remained committed to engage with the Owners' Association and all the owners in the development.
27. The Homeowner explained that there had been a meeting of the Committee with the Factor on 26 August 2020 regarding cladding at the development. At that time there had been a debate and they had put forward their massive concerns about insurance premiums. The following day an email was sent to Mr Quinn and on 28 August he had responded to say he had escalated their concerns. The Homeowner went on to say that despite this they heard nothing further from the Factor until the letter of 6 October. The Homeowner said that the Committee has also asked the Factor to join with another property management company operating at City Quay, EPM to deal with the cladding issues. He said that the Factor had no idea how other owners felt. The Homeowner went on to say that the Owners' Association had on one occasion asked if the Factor could go ahead and arrange a fire risk assessment to be done because they were concerned about fire safety. He said the Association acted on behalf of owners and that he was talking about the stress that owners felt.
28. In response to a question from the Homeowner Mr Baird responded by saying that members of the Committee appeared to be forgetting that the Factor continued to take Fire Safety very seriously. He said that at a point when a small number of owners were claiming to act for the majority it was reasonable for the Factor to question and ask the Committee to provide evidence of majority support.

29. For his part the Homeowner queried why Mr Baird had the right to ask the Committee to prove they were legitimate. In response Mr Baird suggested they were talking at cross purposes. He explained that the Factor agreed that the Owners' Association was legitimate but that the Factor cannot take instructions from a small group of owners but from all the owners. Mr Baird went on to say the Factor had included the Owners' Association in its discussions but certainly could not take instructions from them especially when it was not provided with evidence of majority support.
30. The Tribunal queried with the Homeowner why he had taken exception to the letter of 6 October when he was not mentioned by name and when the letter did not say that all members of the Committee were working against the Factor. In response the Homeowner said that he felt that he was included as anything said about the Committee included all its members.
31. For his part Mr Baird said that the driver had always been Mr Newcombe although he could not pretend that the Factor had not had issues with individual owners. Mr Baird went on to say that at subsequent meetings after the letter had been issued Mr Newcombe had not mentioned the letter. Mr Baird confirmed that there had been issues with some but not all the members of the Committee and the letter had not been written with the Homeowner in mind.
32. In response to a further query from the Tribunal the Homeowner said that the Committee had been formed at the Owners' Association meeting held on 27 November 2019. He said the meeting had been attended by 8 or 9 owners and they had filled the Committee places. The nominations had been received prior to the meeting. 2 or 3 had not become members, anyone could have put themselves forward for the committee at the meeting. The Homeowner went on to say that the Association was unable to communicate with all the owners on the development as the Factor would not provide their details. He said that the Factor was questioning the validity of the Association. The Homeowner went on to say that he had no agenda. He accepted that one member of the Committee had issues with the Factor and that he was not interested in the other seven but that together they did have questions over the Factor's performance but just because they questioned something did not mean they were working against them.
33. In response to a further question from the Tribunal the Homeowner said that prior to the formation of the Owners' Association they had canvassed by putting leaflets through doors and the Factor had assisted at one time by sending out paperwork. Mr Baird confirmed that this was the case. Mr Baird also confirmed that a further communication from the Association had been sent by the Factor to all owners the previous week.
34. In conclusion Ms McAtier referred the Tribunal to the written representations and the emails from members of the Committee and suggested that some members did have a personal agenda to disengage the Factor. She said for

someone to be defamed they have to be named and there had been no loss on the part of the Homeowner.

35. For his part the Homeowner said that is what you get when you have a diverse body of people and they are fully entitled to an opinion. He went on to say that the letter naming him impacted on him as a small portfolio landlord and the outcome of the hearing was important to his standing. He said he was looking for compensation from the Factor.

The Tribunal make the following findings in fact:

36. The Homeowner is the owner of 88 South Victoria Dock Road, City Quay, Dundee ("the Property")

37. The Property is a flat within the City Quay Phase 1 or AWG Phase (hereinafter "the Development").

38. The Factor performed the role of the property Factor of the Development.

39. The Factor issued a letter to owners dated 6 October 2020.

40. The letter did not name the Homeowner.

41. The letter did name one member of the AWG Owners' Association Committee and made reference to "members of his self-elected Committee"

42. The letter specifically attributed misleading and disingenuous information to the named member of the Committee.

43. Following a complaint by the Homeowner the Factor responded by emails dated 25 November 2020 and 24 December 2020.

44. The Factor issued a letter of clarification to owners dated 28 January 2021.

45. Some members of the Committee wish to appoint another Factor to manage the Development.

46. The Owners' Association does not have authority to instruct the Factor.

47. The Factor is obliged to take instructions from the Development owners in accordance with the Deed of Conditions burdening the Development.

Reasons for Decision

Section 2.1 of the Code

48. The Tribunal noted that the Homeowner was not named personally in the letter of 6 October. It also noted that the comments in the third last paragraph

of that letter were not directed at all members of the Committee. If it had been then the wording would have been more likely to have been “BN and his self-elected Committee”. The Tribunal was satisfied that this view was correct when it considered Mr Baird’s evidence that the letter had not been directed at the Homeowner and when it considered the various emails submitted on behalf of the Factor that had been exchanged between other members of the Committee.

49. The Tribunal considered that the use of the words “self-elected” in the letter could potentially be false or misleading given that from the Minute provided it appeared that the Committee had been properly elected. However, the copy of the constitution provided to the Tribunal did not say what proportion of members present would form a quorum. That is unusual in this type of organisation. Also, it is not at all clear who nominated the committee members. It is certainly possible that the committee was nominated by its own members. The Homeowner did not seek to challenge the assertion made by the Factor in Mr Cunningham’s email of 24 December 2020 that the meeting of owners on 27 November 2019 was attended by owners from 8 out of 169 properties with 6 of the owners attending being elected as committee members. The Homeowner did not provide the Tribunal with any evidence to confirm who selected the committee if it was not the members of the committee themselves.

50. In considering whether or not the Factor was in breach of Section 2.1 of the Code the Tribunal had to determine if the letter of 6 October 2020 contained false or misleading information. In his evidence the Homeowner confirmed it was the contents of the third last paragraph to which he took exception. Although the Tribunal had some reservations about the Factor’s use of the word “self-elected” it concluded that there was just sufficient evidence on the balance of probabilities to accept that the use of the word was justified. The Tribunal was also satisfied when it considered the various emails submitted on behalf of the Factor that had been exchanged between other members of the committee that some members of the committee were indeed working against the Factor to promote their own agenda with a view to trying to remove them from office.

51. Having regard to all the oral submissions made by or on behalf of both parties and after careful consideration of the written documentation the Tribunal was satisfied that the Letter of 6 October could not be said to contain false or misleading information either about him as an individual member of the Committee or in general. It therefore does not find that the Factor is in breach of this section of the Code.

Section 2.4 of the Code

52. The Tribunal was unable to determine anything in the Factor’s letter of 6 October 2020 that could be said to be intimidating. With regards to being abusive the dictionary definition is given as “extremely offensive and insulting”. As the Tribunal has indicated above the Homeowner was not named in the letter and therefore it is difficult to see how it could be said that

the letter was directed at him individually. Nor can it be said that the letter was directed at all members of the Committee rather it was referring to those members who apparently had their own personal agendas. Even then there was nothing in the letter that could be said to be abusive towards them. That being the case the Tribunal did not consider that the words used in the letter could be said to be either abusive or intimidating and therefore found that the Factor was not in breach of Section 2.4 of the Code.

53. The Tribunal therefore finds that the Factor has complied with the Code.

Appeals

A Homeowner or property Factor aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.



Graham Harding

Legal Member and Chair

3 April 2021

Date