

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/19/2160

**7 Abbotsview, Polmont, FK2 0QL
("the Property")**

The Parties:-

**Ms Caroline Grant, 7 Abbotsview, Polmont FK2 0QL
("the Homeowner")**

**Link Housing Group, Watling House, Callendar Business Park, Callendar Road,
Falkirk FK1 1XR
("the Factor")**

**Tribunal Members:
Graham Harding (Legal Member)
Robert Buchan (Ordinary Member)**

DECISION

The Factor has failed to carry out its property factor's duties.

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with sections 1, 2.1 and 2.4, of the Code

The decision is unanimous

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors 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"

The Factor became a Registered Property Factor on 7 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

1. By application dated 9 July 2019 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 1, 2.1, 2.2, 2.4, 2.5, 6.6 and 7.1 of

the Code and had also failed to carry out its Property Factor's duties. Specifically the Homeowner complained that:

- i. she had been unable to access the Factor's written Statement of Services on its website;
 - ii. she was expected to contribute to extensive works to the roof, rendering and installation of cavity wall insulation to be paid for over 18 months;
 - iii. the Factor had allowed the roof to be vandalised over the period from 2015 to March 2018 with lead flashings being removed allowing water ingress;
 - iv. the Factor had failed to disclose that repairs to the roof had been in the pipeline for many years;
 - v. the Factor had obtained personal information without first obtaining the necessary consent; and
the Factor had tried to make her sign a mandate to repay the cost of her share of the remedial works within 18 months as otherwise HEEPS funding for the cavity wall insulation would not be made available by the Local Authority;
 - vi. the Homeowner had not agreed to her property being re-rendered or her windows repainted and that this work was instigated by the Factor without her consent;
 - vii. that the standard of workmanship of the render around the Homeowners windows was inadequate to the extent that the windows no longer rotate and the window panes have been chipped and that the Factor has failed to adequately deal with the Homeowners complaints in this regard;
 - viii. that the Factor had in minutes of a meeting confirmed that the render would come with a 25 year guarantee but the guarantee issued only has a 10 year guarantee;
 - ix. that the Factor had prepared tenders for the roofing work long before the Homeowner purchased the property in 2017 but had failed to disclose this to the Homeowner; and
 - x. that the Factor had failed to deal with the Homeowners complaints properly.
2. By Notice of Acceptance dated 24 September 2019 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned.
 3. Intimation of the hearing was sent to the parties by post on 4 October 2019.
 4. By emails dated 25 October 2019 the Factor submitted written representations to the Tribunal.
 5. By email dated 20 November 2019 the Homeowner submitted further written submissions to the Tribunal.

Hearing

6. A Hearing was held at Westfield Community Centre, Westfield Street, Falkirk on 21 November 2019. The Homeowner attended personally supported by Mr James Wallace. The Factor was represented by Ms Lorna Dunsmore and Ms Ronni McMenemy.

Summary of submission

Section 1 of the Code

7. Ms McMenemy confirmed that it had been the Factor's policy over the previous two years not to send out Written Statements of Service ("WSS") to new proprietors but to refer them to a link on the group's website where the WSS could be accessed. She said there had not been many complaints about this procedure and a paper version was available if a Homeowner requested one. In response to a query from the Tribunal as to whether providing a link to the website satisfied the terms of Section 1 of the Code, Ms McMenemy said that she was aware of a Tribunal decision where this had been deemed to be sufficient and she was also aware that it was something which was currently under consideration as part of the Scottish Government's review of the Code. For her part the homeowner advised the Tribunal that she had only received a copy of the WSS when making her application to the Tribunal but on being unable to access the WSS online had not asked the Factor for a written copy.

Section 2.1 of the Code

8. The Homeowner explained to the Tribunal that she had found the letter with a mandate that she had been asked to sign by Mr Jamie Gibb in October 2018 had been both false and misleading. She had been concerned that by signing the mandate she would be obliging herself to pay the Factor a significant amount over an 18 month period when she could not afford to do so. She had therefore sought legal advice and her fears had been confirmed. She had also contacted Falkirk Council who had advised her that the HEEPS funding was not dependent on her agreeing to the other works being proposed by the Factor.
9. For the Factor Ms Dunsmore explained that at the time the letter and mandate had been prepared the Factor's officer involved had believed it had been necessary to obtain consent to all of the proposed works in order to obtain the funding but this had in fact been incorrect. The Factor accepted that there had been fault on its part in this regard.
10. For her part the Homeowner said that this had caused her major stress. She pointed out that the Factor was a massive organisation and therefore could be expected to know the correct position with regards to the availability of funding.
11. Ms Dunsmore pointed out that whilst there had been a mistake there was a significant advantage in having all the work done through a single contract.

There had not been an intention on the part of the Factor to insist on payment within 12 months. As an owner of the majority of the properties in the block Link were in a position to proceed with the works without the Homeowners vote in favour and the language of Falkirk Council in the HEEPs application had not helped.

12. Ms Dunsmore went on to say that there had been economies of scale in carrying out all the proposed works at once and Ms McMenemy said that this had been explained to homeowners at a meeting. She also pointed out that although the title deeds to the property provided that the Factor could seek to recover any expenditure within one month the Homeowner had first been told about the expenditure in June 2018 and not been invoiced until March 2019 with the Factor still prepared to accept payment over a period of time as there had been an offer made to the Homeowner to spread the cost over 24 months.
13. Ms Dunsmore went on to say that the Factor had not received any proposals for payment from the Homeowner and consideration had to be given to the terms of the Consumer Credit Act and also there was an obligation on the Factor to look at what was reasonable in the circumstances.

Section 2.2 of the Code

14. The Homeowner accepted that the communications from the Factor had not been abusive or threatening but by referring to the debt due in the statements sent to her she found them to be intimidating.
15. For the Factor Ms Dunsmore confirmed that as the Homeowner had made an application to the Tribunal no debt recovery steps had been taken at this time.
16. The Tribunal queried with the Homeowner whether she felt she should pay for the works that had been carried out. The homeowner explained that it was her belief that the roof had been in disrepair for some time before she purchased the property. There had been a previous mandate prepared in 2016 but the works had then not gone ahead and then there had been further damage in 2018 as a result of which there had been a major design change due to further water ingress. The Homeowner was aware that lead flashings had been removed from the roof and that it was the Factor who held the key to the access to the roof and who provided it to tradesmen. According to the Homeowner the Factor ought to have carried out the overhaul of the roof a long time before they did.
17. For the Factor Ms Dunsmore accepted that the property and the block in which it was situated was required to meet the Social housing Standard but there was no evidence to suggest that the condition of the roof had worsened as it was shown that there had been a number of repairs carried out to it.
18. The Homeowner challenged this assertion by pointing out that the lead flashings had been removed and this had led to increased water ingress. The roof was in disrepair by 2015/16 and would have got worse by 2018.

19. Ms Dunsmore explained that the person who had dealt with the block back in 2015 had retired and there was nothing on file regarding the proposed overhaul of the roof. She did not think it had been a planned replacement. The roof was inspected by a surveyor every quarter and up until 2018 it had not been deemed to be needing immediate attention.
20. Returning to the issue of the correspondence that the Homeowner found intimidating Ms Dunsmore requested the Homeowner provide details of which letter she was referring to as the Factor genuinely did not wish clients to feel intimidated. The Homeowner said the letter was asking her to arrange payment.

Section 2.4 of the Code

21. With regards to this section of the Code it was the Homeowners position that it would have been possible for her to have agreed to only having the insulation work done and not the rendering and the painting of the windows as well. The homeowner pointed out that another homeowner Mr Wallace had advised the Factor that he did not want his windows painted but they had been painted anyway. The Homeowner said he had been successful in obtaining a refund of £480.00. The homeowner said she had never agreed to her windows being painted.
22. It was accepted by Ms Dunsmore that the Factor had prior to the windows being painted agreed with Mr Wallace that he was going to paint his own windows but that the contractors had gone ahead and painted his windows without his consent. It was accepted that an arrangement had been made with Mr Wallace to reimburse the cost of painting the windows but Ms Dunsmore did not know the exact amount. As Mr Wallace was present to support the Homeowner, she was able to confirm the amount reimbursed had been £480.00. Ms Dunsmore pointed out to the Tribunal that there was provision within the title deeds at Clause SIXTH of the Deed of Conditions for Link to arrange for all necessary work to be carried out should a proprietor fail in Link's opinion to maintain their property in a good state of repair. She accepted however that the Homeowner had not been requested to paint the windows nor had she refused to do so.

Section 2.5 of the Code

23. It was accepted by Ms Dunsmore that there had been a delay in responding to the Homeowner's pre-complaint email of 21 March 2019 although a number of attempts had been made to speak to the Homeowner on the telephone. The homeowner had escalated her complaint on 21 April 2019 and had been due a response by 29 April but this had been a day late due to the Easter Bank holiday.

Section 6.6 of the Code

24. It was the Factor's position that the roofing and tender work was advertised on the Public Contracts Scotland ("PCS") website on 18 April 2019 as a "Quick Quote." This was not to be confused with a 2015 tender document on the PCS website for responsive repairs for building work across the whole of Link's Central Scotland properties. Ms Dunsmore said that it was the Factor's aim to be as open and transparent as possible in the tendering process and the Homeowner had simply been mistaken in this regard. She said the issue raised by the homeowner had been addressed in the Factors Stage 2 complaints response letter of 23 September 2019

Section 7.1 of the Code

25. Ms Dunsmore confirmed that the Factor did have a written complaints resolution procedure contained within section 7 of its written statement of services. The Factor had accepted it had been a day late in responding to the Homeowner's letter of complaint of 21 April and had apologised to the Homeowner for this delay.

Property Factors Duties

26. The Homeowner stated that the Factor had failed to properly maintain the roof. If there had been effective quarterly inspections, they would have picked up the issue with regards to the removal of the lead flashing and the additional water ingress thus caused.
27. In response to a query from the Tribunal Ms McMenemy explained that access to the roof was obtained via a ladder and a hatch secured by a padlock. She was aware of a verbal report at some time that a padlock had been sawn through but there had been no written record of this and she was unable to say when it had happened or who had reported it. There was some discussion as to whether the removal of the lead flashing could have been as a result of storm damage but this seemed unlikely. The Tribunal queried the terms of the letter from Mr Culross to the Homeowner dated 3 June 2019 in which reference was made to vandalism and Links role in which it was suggested that the Factor would not deal with issues with regard to criminal, anti-social behaviour or vandalism at the building. The tribunal queried whether in fact the Factor could disregard issues such as this and particularly if there had been lead flashing removed from the roof.
28. It was accepted by Ms Dunsmore that there were issues with the render around the Homeowners windows and that this required to be remedied. Ms Dunsmore's position was that attempts had been made for the contractors to arrange access to carry out remedial work but the Homeowner was not agreeing to access at this time. The Homeowner's position was that she wished the matter to be dealt with through the Tribunal. She was concerned that the contractors intended to carry out the remedial work from inside her property when it needed to be done from the outside. Ms Dunsmore indicated that the contractors would need to carry out work both inside and outside. In response to a query from the Tribunal it was accepted by both parties that

there would need to be a clear understanding in advance of any remedial work being undertaken as to exactly what the contractors intended to do to remedy the defects in the render and the windows.

29. Prior to concluding the Hearing, the Tribunal adjourned the hearing for a short time to allow the parties an opportunity to consider their positions and if appropriate to meet and discuss any extra-judicial settlement proposals they may have. After a short adjournment the parties returned to report they had been unable to reach any agreement
30. The Homeowner referred the Tribunal to the amended minutes of the owners meeting of 3 July 2018. She pointed out that the original minute had said that the render would have a 25 year guarantee. Although she had not attended the meeting she had been told by another owner, Mr Wallace who had been present that was what had been said. When the guarantees were issued the render only had a ten year guarantee. The Factor had recently issued revised minutes to reflect that this was the case. In the Homeowner's submission the minute did not reflect what had been said at the meeting.
31. The Homeowner said that she had spent a massive amount of time making her application to the Tribunal. She felt she was entitled to some form of compensation for the various failings on the part of the Factor and there required to be a financial resolution to her complaint. She was looking for the Tribunal to order the Factor to cover the debt of £3981.82 that had been added to her account.
32. For the Factor Ms Dunsmore submitted that the Factor had offered to meet with the homeowner to try to resolve the complaint. The Factor was willing to engage with the Homeowner to agree a reasonable repayment programme and to arrange for the remedial works to the windows and surround to be carried out.

The Tribunal make the following findings in fact:

33. The Homeowner is the owner of 7 Abbotsview, Polmont ("the Property")
34. The Property is a flat within the block forming 1 to 23 Abbotsview Polmont (hereinafter "the Development").
35. The Factor performed the role of the property factor of the Development.
36. The Factor's parent organisation Link Housing Association Limited own a majority of the flats within the development.
37. The Factor did not within four weeks of the Homeowner purchasing the property provide the Homeowner with a Written Statement of Services ("WSS") but did provide the homeowner with a link to the Factor's website where the WSS was said to be available.

38. The Homeowner was unable to access the WSS on the Factor's website.
39. A letter with a mandate prepared by the Factor and sent to the Homeowner in October 2018 contained inaccurate information regarding the provision of HEEPS funding for cavity wall insulation by Falkirk Council which was false and misleading.
40. As owners of the majority of the flats in the development Link Housing Association were able to proceed to instruct the repairs to the roof and the re-rendering of the development without the consent of the Homeowner.
41. The Homeowner consented to the installation of cavity wall insulation.
42. The communications sent by the Factor to the Homeowner were not abusive, threatening or intimidating.
43. The Factor did not obtain the Homeowners consent to have her windows painted by the contractors nor did the Factor have any entitlement to instruct such work in terms of Clause SIXTH of the Deed of Conditions burdening the property.
44. The Factor had delayed responding to a pre-complaint email from the Homeowner dated 21 March 2019 but had attempted unsuccessfully to contact the Homeowner by telephone.
45. The Factor was a day late in responding to the Homeowner's letter of complaint dated 21 April 2019 in terms of the timescales contained in its complaints procedures contained in the WSS.
46. The tender for the repairs to the roof, render and insulation work at the development was advertised on the Public Contracts Scotland website on 18 April 2019.
47. The Factor has a written complaints procedure incorporated into its WSS.
48. Lead flashing from the roof of the development has been removed without the consent or knowledge of the Factor.
49. The render around the Homeowner's windows is not to a reasonable standard. The windows no longer rotate. The window panes have been chipped.
50. Remedial works to the render around the Homeowner's windows and the replacement of the chipped window panes are required.

Reasons for Decision

Section 1 of the Code

51. The Tribunal is aware that there are conflicting Tribunal decisions as to whether it is sufficient for a Factor to provide a Homeowner with a link to its website in order to obtain a copy of its WSS. The Tribunal is also aware that this is an issue being considered under the current review of the Code. It is a matter of concern if a Homeowner is unable to access a Factor's WSS online. On the other hand, it would have been open to the Homeowner to have contacted the Factor and to have asked for a printed copy of the WSS. Nevertheless, on a strict interpretation of the Code the Factor is obliged to provide any new homeowner with a WSS within four weeks of agreeing to provide services to them and in this regard the Factor was in breach of the Code. It is accepted however that the Factor would not have known that the Homeowner had been unable to access the WSS online as she did not contact it to advise it of the problem. It is therefore in the Tribunal's view something of a technical breach of the Code and as the Homeowner has now obtained a copy of the WSS no further action is required although the Factor may wish to consider its position with regards to issuing WSS to new Homeowners in the future.

Section 2.1 of the Code

52. It was clear to the Tribunal that the information contained in the letter from Mr Gibb to the Homeowner in his letter of October 2018 was incorrect and was therefore false and misleading and this was to all intent and purposes acknowledged by Ms Dunsmore on behalf of the Factor. The Tribunal was therefore satisfied that the Factor was in breach of this section of the Code.

Section 2.2 of the Code

53. Whilst the Homeowner has undoubtedly been stressed as a result of being faced with having to pay her share of a significant repair to the development and one that she had not voted in favour of being undertaken it cannot be said that the communications from the Factor to her could be classified as abusive or threatening or intimidating giving the words their normal meaning. The Tribunal was therefore satisfied that the Factor was not in breach of this section of the Code.

Section 2.4 of the Code

54. The Homeowner could not prevent Link from deciding to re-render the development. As the majority owners they could determine to proceed and the walls of the development are common property. The Homeowner is therefore bound to pay her share of the cost of this. The Factor failed to obtain the Homeowners consent to have her windows painted and as a result incurred a charge of £480.00 without the necessary authority. The Factor was therefore in breach of this section of the Code.

Section 2.5 of the Code

55. The delays in responding to the Homeowner's complaints were at the lowest end of the scale and were acknowledged by the Factor. Public holidays will in the Tribunals view almost inevitable lead to short delays in responding to a complaint and taking this into account the Tribunal did not find that the Factor was materially in breach of this section of the Code.

Section 6.6 of the Code

56. Although the Homeowner had suspicions that the repairs to the roof had previously been put out to tender the tender documentation from 2015 submitted to the Tribunal clearly did not relate to the Development. There may well have been previous discussions and proposals prior to the Homeowner's purchase of the property that had not for whatever reason gone ahead. That from the Homeowner's perspective was very unfortunate as she has now been burdened quite unwillingly with a share of the cost of repairing the roof. It does appear however that a decision to repair the roof combined with installing cavity wall insulation and re-rendering the building was not taken until after the Homeowner had completed her purchase of the property. Prior to that The Factor had instructed a number of repairs to the roof. That would tend to indicate that at that time there was no firm intention to carry out a total renovation of the roof. It did appear to the Tribunal that all documentation relating to the tendering process had been made available to the Homeowner and therefore the Factor was not in breach of this section of the Code.

Section 7.1 of the Code

57. The Tribunal was satisfied that the Factor's WSS contained a clear written complaints procedure setting out a series of steps and timescales and therefore did not find the Factor to be in breach of this section of the Code.

Property Factors Duties

58. The Tribunal was concerned to note that there had been what appeared to be a number of failures on the part of the Factor. It seemed it was not just the render around the Homeowners property that had been poorly applied causing problems with the opening of windows and yet the contractors had been allowed to remove scaffolding before the snagging had been remedied. The Homeowner had not given her consent to her windows being painted and there was no suggestion that she had been asked to paint them and had failed to do so within a reasonable period of time. Therefore, there was no basis on which the Factor could determine to instruct contractors themselves to paint the Homeowners windows. Nonetheless the Homeowners windows were painted without authority apparently at a cost to the Homeowner of £480.00. Furthermore, it did appear to the Tribunal that despite apparent quarterly inspections of the roof by the Factor's surveyors it had been possible

for someone or some persons to gain access to the roof possibly by cutting through a padlock and remove the lead flashings from the roof. The photographs submitted to the Tribunal show that the flashings have been cut and therefore not as was suggested as a result of storm damage. The Tribunal had some difficulty in understanding how Mr Culross in his letter to the Homeowner of 3 June 2019 could suggest that it was not part of the Factor's role to take some interest in issues of this sort.

59. Whilst the Tribunal could sympathise with the Homeowner and the situation she has found herself in which was certainly not of her making it was perhaps an inevitable consequence of purchasing a property in a block in which a single owner owns a majority of the properties. In such situations that owner can and will dictate when works are going to be undertaken and the extent and therefore the cost of such works. The Tribunal has been unable to determine why it was decided that the roof did not need to be completely overhauled prior to the Homeowners purchase of the property. The Factor was unable to provide much meaningful information. It may have been that Link did not have the necessary funds set aside at that time. It may have been it was felt that there was still some life left in the roof and that further repairs were sufficient. The fact remains that no decision was taken by the majority of owners to carry out the extensive works to the roof and to the rest of the building until after the Homeowner had purchased the property. The problem with the roof may well have been exacerbated by the removal of the lead flashing but the Tribunal has been unable to determine when this occurred. It did however appear to the Tribunal that the Factor's inspections of the roof and subsequent reporting left something to be desired. It was woefully inadequate for the Factor's representative to say that she was aware that there had been some sort of report of a padlock being cut open at the access to the roof but there was no written report and no date recorded. The Tribunal was therefore satisfied that there had been failures on the part of the Factor to properly carry out its Property Factors Duties by failing to adequately supervise the contractor carrying out the rendering, by allowing the contractors to paint the Homeowners windows without her consent, by failing to properly record and investigate suspicious activity involving the cutting of a padlock at the access to the roof of the development and the possible theft of lead flashing.
60. As a result of the Factor's breaches of the Code and its failures to carry out its property factors duties the Tribunal intends to make a Property Factors Enforcement Order. There will be some issues that will not form part of the order regarding the repairs to the Homeowners windows as it has been accepted by both parties that these are necessary and may take some time to complete particularly due to the time of the year. It should be noted however that it is incumbent on the Factor to ensure that these works are carried out properly and to the satisfaction of the Homeowner as no doubt if they are not there would be a further application to the Tribunal. The Tribunal would also wish the Factor to enter into meaningful discussion with the Homeowner in order to reach agreement over a payment plan in respect of the Homeowners share of the cost of the repairs.

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

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

11 December 2019 Date