



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) issued under Section 19(1)(a) of the Property Factors (Scotland) Act 2011

Case reference: FTS/HPC/PF/21/0456

Re:- 64 Silvertrees Wynd, Bothwell G71 8FH

The Parties:-

**Mr William Gardner and Mrs Moira Gardner, 64 Silvertrees Wynd, Bothwell G71 8FH
("the Applicants")**

and

**Miller Property Management Limited, Suite 2.2 Waverley House, Caird Park, Hamilton ML3 0QA
("the Respondent")**

Tribunal Members:

Richard Mill (legal member) and David Godfrey (ordinary member)

Decision

The Tribunal unanimously determined that the respondent has complied with the Code of Conduct for Property Factors ("the Code") and their property factor duties.

Introduction

By application dated 22 February 2021, the applicants complain about the respondent breaching a number of sections of the Code. These were specified as sections 2.2, 2.5, 3, 5.5, 6.3 and 6.9.

The written application was accompanied by communications between the parties, including the applicants' notification letter for the purposes of Section 17 of the Act.

The respondent lodged written submissions which are dated 4 May 2021.

The written application to the Tribunal did not highlight that the respondent's duties were being complained about. This was the subject of subsequent clarification. The applicants did insist upon a relevant complaint under the respondent's duties. The Tribunal was satisfied that notification for the purposes of Section 17 of the Act had been given to the respondent and this is specifically contained within an email sent by the applicants on 13 March 2021 to the respondent.

At the commencement of the hearing, the applicants' representative advised that the complaints under sections 5.5 and 6.9 were no longer being insisted upon.

Hearing

The hearing took place by teleconference on 25 October 2021 at 10.00 am.

The applicants were represented by Mrs Caroline Adams, a neighbour friend of the applicants. Neither of the applicants joined the hearing personally. The Tribunal was informed that Mr Gardner is 86 years of age is ill. His wife, who is 86 years of age, is understandably primarily concerned with the state of her husband's health. The applicant's representative wished to proceed in their absence.

The respondent was represented by Mr Harry Miller, a Director of the respondent company.

The Tribunal utilised its inquisitorial function making inquiry into the applicants' complaints and the reaction of the respondent to them. Both parties representatives were afforded the fair opportunity of making submissions throughout. The Tribunal ascertained the relevant chronology and then looked at each Code complaint in turn. Both parties representatives were afforded a fair opportunity of making relevant submissions to the Tribunal in respect of each section of the Code. The Tribunal also considered the property factor duties complained of in the same manner. Both parties representatives were also afforded the opportunity of making concluding submissions.

The Tribunal reserved its decision.

Findings in Fact

1. The applicants are the heritable proprietors of 64 Silvertrees Wynd, Bothwell G71 8FH ("the property").
2. In terms of the Deed of Conditions provision is made for the appointment of a property factor. The respondent is the appointed property factor for the development. The respondent is a registered property factor – No PF000314.
3. The property is a flat. There are a total of 60 residential flats within the development which the respondent manages. This is a modern development completed around 2014. There is one block of 40 flats and one block of 20 flats. The property is contained within the block of 40 flats. The flat is one

of 14 entered from the same stairwell. Apportionments for various items charged by the respondent is accordingly on the basis of one-sixtieth, one-fortieth or one-fourteenth.

4. The management charges annually are £120 plus VAT. These are billed quarterly at a rate of £30 plus VAT, plus any additional charges which are made.
5. The respondent operates with no debt from homeowners on this development. The vast majority of homeowners on the development are happy with the respondent's services.
6. There is an owners association in operation at the development. This is a voluntary organisation and not one regulated by the relevant Title Deeds. Around one-half of the owners in the development are members of that voluntary organisation.
7. Until around October 2020 the applicants were content with the actions and level of service offered by the respondent. The applicants had been in the habit of making numerous enquiries with the respondent by telephone which had always been dealt with satisfactorily to a conclusion.
8. Due to the enforced lockdown and continued effects of the Covid-19 pandemic, the respondent's physical office continued to be closed in late 2020. The respondent's business was still operating, but with a much reduced staff level. Mr Harry Miller, Director of the respondent company, was the only person attending physically at the office and attempting to continue with the work of the business in priority order.
9. The applicants issued correspondence to the respondent by hardcopy letter on 12 October 2020. On 22 October 2020, the applicants sent a reminder email to the respondent. Further reminder emails were sent by the applicants on 6 November and 23 November 2020. The respondent's first response to all these communications was on 8 December 2020. The first sentence from the respondent refers to the respondent's organisation getting back to work (after forced closure) and working through correspondence. A response was then provided. The delay in the respondent's reply was longer than normal anticipated business timescales. There was nothing urgent or pressing regarding the content of the applicants' emails.
10. Comprised within the applicants email of 23 November 2020 there is a stated intention to lodge an application to the First-tier Tribunal. This stated intention clearly irritated the respondent and the former cordial relations between the parties soured thereafter. On occasions, in subsequent emails, the respondent's explanations regarding their actions were defensive. Multiple questions were posed by the respondent to the applicants by way of part response to their enquiries. The terms of the respondent's emails were not however intimidating or threatening, nor were they of such a nature that the objective reader would consider them to be unprofessional or discourteous.

11. Quarterly invoices issued by the respondent are very detailed and contain thorough specification of the charges which are made and their apportionment. All charges incurred on the applicants factoring account have been clear and transparent. When requests have been made for further clarification of charges incurred, all such requests have been answered.
12. The Written Statement of Services, which forms the contract between the respondent and all homeowners, stipulates that the delegated authority per homeowner is £100. The Written Statement of Services does not differentiate between emergency and non-emergency works. It is unnecessary for the respondent to seek tenders or approval for works which will cost any particular homeowner £100 or less.
13. Moss clearing works were identified as requiring attention in the development throughout the course of 2020. This had been brought to the attention of the respondent by a number of homeowners. An existing cleaning contractor who provides services to the development was asked to undertake the work which resulted in the applicants being charged two sums totalling £16.41 (£14.33 and £2.08). That work was not tendered for and did not require to be tendered for. The contracted gardener incurred some additional costs in 2020 beyond the agreed contract price in place. These works were enhancements at a total cost of £8.55 per homeowner. A full explanation has been provided to the applicants about these charges.

Reasons for Decision

The Tribunal was satisfied that it had sufficient detailed evidence upon which to reach a fair determination of the application.

The Tribunal's decision is based upon the Tribunal's detailed findings in fact which were established on the basis of the documentary evidence together with clarifications in the oral submissions from the parties representatives. The primary facts were not the subject of dispute. Credibility was not a material factor. The applicants were not present and did not offer any direct written or oral evidence.

The Tribunal has considered all the evidence and submissions and made findings in fact in relation to the relevant live disputes between the parties. It is not necessary to make findings in facts in relation to every element of the application. The failure to make more extensive findings in fact does not carry with it any assumption that the Tribunal has failed to consider the whole evidence or that the Tribunal's reasoning was based upon a consideration of only parts of the evidence.

The Tribunal determined the applicants Code complaints with reference to its primary findings.

- 2.2 "You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action)."

The email communications complained of have all been lodged for the Tribunal's consideration. The Tribunal did not find any of the respondent's communications intimidating or abusive, having regard to the ordinary definition of what such terms would describe.

- 2.5 "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers)."

There was a delay in the respondent returning to the applicants in connection with their initial request which were made in a letter dated 12 October 2020. The delay was clearly occasioned by the continuing effects of the Covid-19 pandemic. Once the respondent did reply attempts were made to answer the applicants enquiries which, in part, involved asking the applicant additional questions.

3. "While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved."

All invoicing issued by the respondent is detailed providing a thorough explanation of the charges made, and how they were calculated. The applicants' particular complaints relate to the charges for gardening. The annual contract is £5,400. This is a very competitive price in which the scope of works agreed fall somewhat short of the anticipated scope of work set out in the Title Deeds. However, the terms of the contract and identity of the contractor were approved by the owners association which had the status of a quorum of all owners. Additional charges were made by the gardening contractor in 2020 relative to enhancements. Full disclosure has been made by the respondent as to what these additional charges relate to. The additional charges total £513 which equates to a total cost to a homeowner of £8.55. The additional charges relate to marginal enhancement works, including the provision of additional hedges between the two blocks on the development. The respondent's actions appear to the Tribunal to be entirely reasonable. The complaint is not about the authority to act here but whether homeowners received value for money. The Tribunal concluded that the additional costs could not be considered to be excessive.

- 6.3 "On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff."

The respondent does not seek tenders for work which would cost any particular homeowner in the development £100 or less. This is in

accordance with their Written Statement of Services. It is this Written Statement which forms the basis of the contract between the applicants and the respondent. The applicants' particular complaints relate to the instruction of moss removing works in 2020. These were justified and the respondent's identification of a relevant contractor has been open and transparent. The cost of these services (a total of £16.41 to the applicants) could not be considered to be excessive.

The Tribunal thereafter determined the applicants' duty complaints with reference to its primary findings.

The duty complaints are ring fenced to the same Code complaints regarding the respondent's email communications for the purposes of section 2.2. Within the respondent's Written Statement of Services, it specifies that communications by the respondent will be "polite, courteous and professional". The applicants' position is that even if the Tribunal does not find a breach of the Code the terms of service sets a lower bar in terms of the quality and standard and the communications are a breach of the respondent's duties.

The Tribunal found that Mr Miller, Director of the respondent's company had, regrettably, at times, taken comments made by the applicants personally. This had led to a degree of defensiveness being seen in the terms of his communications. At times, Mr Miller has been determined in his pursuance of the applicants to disclose what may or may not have been said by them to the caretaker on site which had caused the respondent's organisation some concern. The Tribunal has not heard any direct evidence from the applicants regarding this matter. Whilst the Tribunal was told that the applicants had found the communications less than professional, the Tribunal did not find that the terms of the communications were in breach of the factors duties to ensure that all communications were polite, courteous and professional. They were, at times, perhaps nearing the territory of being unprofessional, but were not overtly so that the Tribunal could find that they were. The applicants representative conceded in her own submissions that part of the background problem was that the applicants are both in their 80s with health difficulties and it seemed to the Tribunal that the applicants have perhaps been more sensitive than the average homeowner regarding the terms of the respondent's emails. The Tribunal requires to consider the terms of the emails on an objective basis.

Concluding comments

The Tribunal concluded overall that there has been an unfortunate breakdown of relations between the parties due to the perception which both have had regarding the written communications of the other. This is unfortunate given the historical positive relationship which existed.

The applicants' underlying concern has been about whether best value for money is being received. They can take comfort in knowing the Tribunal finds that they are.

In terms of the written application made to the Tribunal the applicants indicated a desire to seek a remedy by having the Tribunal exercise its authority to ensure that

the respondent complies with the 2011 Act and that there are consequences by failing to do so. The suggestion of such an open remedy is not available. The respondent is bound by law to so comply in the absence of any interference by the Tribunal. In respect of all matters brought in this application the Tribunal has found that the respondent has complied with both the Code and their duties. In the circumstances no Property Factor Enforcement Order is necessary.

Appeals

In terms of section 46 of the Tribunals (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:

Date: 26 October 2021