

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/21/1057

**8/1 Murdoch Terrace, Edinburgh EH11 1AZ
("the Property")**

The Parties:-

**Mr William Webster, Ardess, Wallace Road, Bathgate EH48 1DN
("the Homeowner")**

**Lowther Homes Limited, Wheatley House, 25 Cochrane Street, Glasgow G1
1HL
("the Factor")**

**Tribunal Members:
Graham Harding (Legal Member)
Elaine Munroe (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 2.5 and 7.2 of the Code.

The decision is unanimous.

Introduction

1. 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"
2. This decision should be read in conjunction with the Minute of Hearing dated 31 August 2021 in respect of the hearing that took place on 30 August 2021.

3. By emails dated 24 September 2021 the Factor submitted a response to the directions issued by the Tribunal on 31 August 2021.
4. The Homeowner submitted further written representations by email dated 4 October 2021.

Hearing

5. A hearing was held by teleconference on 8 October 2021. The Homeowner attended in person. The Factor was represented by Ms Michelle Rush.
6. By way of a preliminary matter the Tribunal indicated that the Factor's explanation for its failure to attend or be represented at the previous hearing lacked clarity as it was being suggested that the paperwork had not been received when that was not the case as Sheriff Officers had delivered the case papers and intimation of the hearing to the Factor's head office in Glasgow. Ms Rush accepted the papers may have been delivered but that due to Covid and personnel working from home there had been challenges with documents reaching the correct person. She explained that the situation had now been rectified. She explained that she had queried with the Tribunal administration if in future documents could be served by email but this was not possible.
7. The Tribunal then queried if the Homeowner had submitted a copy of his title deeds in compliance with the Direction and noted that he had. The Homeowner advised the Tribunal that the Factor had now accepted that his contribution towards the cost of maintenance of the common parts should be 1/16 and not 1/15 as previously calculated. Ms Rush confirmed that this was the case. The Tribunal queried if the rebate of charges due to the Homeowner had now been credited to his account and Ms Rush explained that her colleague Ms Aitken was still working this out but the Homeowner's account would be credited in due course.
8. The Tribunal then referred the Homeowner to his most recent submission and explained that it could not consider any new complaint the Homeowner might have at this stage. That would have to be dealt with through the Factor's complaints procedure and if the Homeowner was still not satisfied then he could make a fresh application to the Tribunal. The Homeowner suggested that the submission should be seen as just another example of the Factor failing to respond to correspondence.
9. The Tribunal noted that the Factor had in its written response provided submissions in respect of Sections 1, 2.4, 2.5, 7.1 and 7.2 of the Code however the Homeowner had only made a complaint in respect of Sections 2.5, 6 and 7.2 of the Code together with a complaint that the Factor had failed to carry out its property factor's duties and the Tribunal would only make a decision in respect of these issues. The Homeowner submitted that he had only received a copy of the Written Statement of Services after months of asking in response to the Tribunal's direction to the Factor and that therefore Section 1 of the Code was relevant however the Tribunal pointed out that he

had not ticked the relevant box in his application and therefore it could not consider this section of the code in the current application.

Summary of submissions

Section 2.5 of the Code

10. The Tribunal noted that the Factor in its written representations had accepted that the Homeowner's enquiries were not handled in line with the Factor's policies and that correspondence had not been responded to appropriately. The Factor had accepted that it was in breach of Section 2.5 of the Code and had gone on to say that Ms Vicky Aitken had been appointed to engage with the Homeowner to resolve his issues.
11. For his part the Homeowner acknowledged that the current issues were it appeared being addressed by Ms Aitken and that was fine but he remained concerned as to what might happen in the future and how the Factor's actions would have on other owners less persistent than himself.

Section 6 of the Code

12. The Homeowner did not specify a particular subsection with which he was taking issue. However, it would appear from the Homeowner's written representations that the Homeowner's complaint centred on the failure of the Factor to ensure that the common area at the Development and particularly the entrance hall and floors were kept clean and free from the smell of cats' urine.
13. Given that the Factor had reimbursed the Homeowner for the cleaning costs and undertaken to carry out a deep clean at the property at its own expense it would seem that the Factor although not addressed in its written submission acknowledged some failing in this regard. However, the issue was not addressed during the hearing.

Section 7.2 of the Code

14. There was some discussion as to how easy it would have been for the Homeowner to have found details of the Factor's complaints procedure if he did not have a copy of the Written statement of Services ("WSS"). Ms Rush explained that any significant changes to the WSS were sent annually to owners by post and in any event, they were also easily accessible on the Factor's website.
15. The Homeowner referred the Tribunal to various emails he had sent to the Factor which he said should have made it clear he was instigating a formal complaint and which had not been responded to by the Factor. In particular the Homeowner referred the Tribunal to his email of 30 September 2020 (Homeowner's Production 29) in which he made reference to numerous calls and correspondence and the limited responses received. In the email he

stated that he had twice in telephone calls said that he wished to escalate his complaint but that these had not been acknowledged and that he wished to proceed to the next stage of the process. He also referred the Tribunal to his letters of 4 June 2021 sent to the Factor advising of his intention to make an application to the Tribunal.

16. For her part Ms Rush said that she did not have the correspondence before her but did not dispute it had been sent. It was the Factor's position that the Homeowner had not exhausted the complaints process prior to making his application to the Tribunal. It was for the Tribunal to determine if the Factor was in breach of this section of the Code.

Section 7.4 of the Code

17. The Tribunal did not have any evidence before it either from the Homeowner or the Factor with regards to this section of the Code.

Property Factor's Duties

18. It was the Homeowner's position that the Factor was self-appointed as a result of its parent company owning a majority of properties in the building and that this led to a monopolistic situation. In discussion the Homeowner accepted that this was not an issue that fell within the jurisdiction of the Tribunal and the Homeowner indicated that he had sought legal advice with regards to raising court proceedings. With regards to other issues, it was the Homeowner's position that it did appear that steps were now being taken to carry out a deep clean of the close at the property and he had a detailed conversation with Ms Aitken as to what was required to treat the Linotol floor to bring it back to good condition. He was uncertain if the work had been completed or not as he had not been able to inspect the property.
19. For her part Ms Rush said that she was aware the deep clean had been instructed and may have been carried out the previous week or was going to be done in the next week. She confirmed the Homeowner's account had been credited with all management charges and cleaning charges from April 2020 and that the deep clean was being carried out at the Factor's expense.
20. The Tribunal queried if there was anything else in addition to what the Factor had already offered to do that the Homeowner thought would be appropriate. The Homeowner said that he had been put to a great deal of stress and inconvenience as a result of the Factor's failure to deal with his communications and enquiries and had been forced to resort to making the application to the Tribunal. He felt that some recognition of this by way of a financial award should perhaps be made. He did not wish to ask for a specific amount but thought that the Factor ought to have offered to make some payment.
21. For her part Ms Rush left it to the Tribunal to determine if any financial award was appropriate although she did indicate that an ex-gratia payment had

previously been offered to the Homeowner. The Homeowner pointed out that had been in respect of a separate unrelated complaint.

The Tribunal make the following findings in fact:

22. The Homeowner is the owner of 8/1 Murdoch Terrace, Edinburgh EH11 1AZ ("the Property")
23. The Property is a flat within the tenement forming 8 Murdoch Terrace, Edinburgh (hereinafter "the Development").
24. The Factor performed the role of the property factor of the Development.
25. The Homeowner is liable for a 1/16 share of the cost of repair and maintenance of the common parts of the Development.
26. A majority of the flats in the Development are owned by Dunedin Canmore Housing Association.
27. The Factor and Dunedin Canmore Housing Association are part of the Wheatley Group of companies.
28. The Factor failed to respond adequately to the Homeowners telephone calls and emails over a period from December 2019 to February 2021.
29. The Factor failed to engage its complaints procedures with the Homeowner despite being requested to do so by the Homeowner.
30. The Factor failed in its duty to keep the common areas at the Development clean over a prolonged period.
31. The Factor has acknowledged its failings with regards to its poor communication with the Homeowner and has undertaken to learn lessons from it.
32. The Factor has reimbursed the Homeowner for all management and cleaning charges from April 2020 amounting to £481.95.
33. The Factor has undertaken to carry out a deep clean of the common areas at the Development at no charge to the Homeowner.
34. The Factor has undertaken to recalculate previous charges to reflect the charge of 1/15 wrongly claimed from the Homeowner in respect of his share of factoring fees and costs.

Reasons for Decision

Section 2.5 of the Code

35. Given that the Factor accepted that it was in breach of Section 2.5 of the Code it follows that the Tribunal should find the Factor to be in breach. In any event it was self-evident from the Homeowner's written representations and productions that the Factor was not providing an adequate response to the Homeowner's queries. It may be that there was confusion with regards to the role of the Factor being expected to deal with some of the Homeowner's queries where they should be more properly directed to the Housing Association to deal with its anti-social tenants but that is perhaps an unfortunate consequence of the apparent link between the organisations to a third party such as the Homeowner. That aside the Factor clearly fell far short in its response to enquiries and complaints from the Homeowner.

Section 6 of the Code

36. In light of the Homeowner not specifying which subsection he was referring to the Tribunal considered it more appropriate to address this issue with regards to any failure on the part of the Factor to carry out its property factor's duties rather than a specific breach of this section of the Code.

Section 7.2 of the Code

37. The Tribunal was not persuaded by the Factor's submissions that the Homeowner's application was premature. The Homeowner had over a prolonged period attempted to escalate his complaint with the Factor without any significant progress being made. This in effect resulted in a breakdown in the Factor's complaints process and was therefore a breach of this section of the Code.

Section 7.4 of the Code

38. The Tribunal did not consider any significant submissions from either party with regards to the retention of correspondence by the Factor and in the circumstances did not find that the Factor was in breach of this section of the Code.

Property Factor's Duties

39. The Homeowner accepted that the Tribunal did not have jurisdiction to interfere with the decision of Dunedin Canmore Housing Association as the majority owner of properties at the Development to appoint the Factor.

40. The Tribunal acknowledged that the Factor had reimbursed the Homeowner the management charges and cleaning costs for the period from April 2020 amounting to £481.95. The Tribunal considered this was indicative of the Factor accepting that there had been a failure to maintain the property to the required standard. The Tribunal acknowledged the Factor had agreed that the

Homeowner should only be contributing a 1/16 share of the cost of repairs and maintenance of the common areas but was concerned that this had previously gone unnoticed. There was clearly an obligation on the Factor to ensure that each owner in the Development paid their correct share of common charges and in this regards the Factor had failed in its duty. The Tribunal was satisfied from the undertaking given my Ms Rush that the Factor would correctly calculate and reimburse the Homeowner's account in due course with the sum to be credited without the need for this to be included as part of a PFEO.

41. The Tribunal noted that the Factor had agreed to carry out a deep clean at the Development at its own expense but that this may not yet have been carried out. Again, this was indicative of an acceptance on the part of the Factor of a failure to carry out its duties. However, it was important that this should be carried out to a standard acceptable to the Homeowner and the Tribunal considered that in this regard it was appropriate to issue a PFEO.

42. The Tribunal acknowledged that the Homeowner had been put to a substantial amount of trouble and inconvenience as a result of the Factor's failure to communicate in any meaningful way. Had the Factor addressed the Homeowner's complaints through its complaints process as it should have done then matters could have been resolved much earlier. Furthermore, even once the Homeowner gave notice that it was his intention to raise these proceedings it appeared that no meaningful engagement was forthcoming. Finally, despite intimation of the proceedings being served on the Factor by Sheriff Officers it had at that time, no process in place to ensure the documents were acted upon. This resulted in further inconvenience to the Homeowner who attended a CMD that had to be adjourned as the Factor was not present. The Tribunal was therefore satisfied that it would be appropriate in the circumstances to make a financial award to the Homeowner in the sum of £300.00 in respect of his stress and inconvenience.

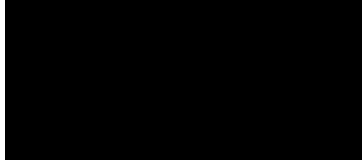
Proposed Property Factor Enforcement Order

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

Date: 11 October 2021