

Housing and Property Chamber

First-tier Tribunal for Scotland



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

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 (“the Act”) and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended

Chamber Reference: FTS/HPC/PF/21/1425

Property address: 165/11 Slateford Road, Edinburgh, EH14 1PD (“the House”)

The Parties

Mr Michael Smith, 165/11 Slateford Road, Edinburgh, EH14 1PD (“the Homeowner”)

James Gibb, Bellahouston Business Centre, 423 Paisley Road West, Glasgow, G51 1PZ (“the Property Factor”)

Tribunal Members

Ms H Forbes (Legal Member)

Mrs E Dickson (Ordinary Member)

Decision

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with sections 3.3 and 7.1 of the Property Factor Code of Conduct (“the Code”) as required by section 14(5) of the Property Factors (Scotland) Act 2011 (“the Act”).

The decision is unanimous.

Background

1. By application received in the period between 14th June and 14th July 2021, the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with the introduction to section 3 and paragraphs 3.1 and 7.1 of the Code. The Homeowner also alleged a breach of the Property

Factor's duties. Details of the alleged failures were outlined in the Homeowner's application and associated documents.

2. By decision dated 11th August 2021, a Convenor on behalf of the President of the Tribunal (Housing and Property Chamber) decided to refer the application to a Tribunal for a hearing.
3. Both parties lodged written representations and productions.
4. By Direction dated 28th September 2021, the Tribunal ordered the Property Factor to lodge copy invoices. The Direction was complied with.

Hearing

5. A hearing was held by teleconference on 11th October 2021. The Homeowner was in attendance. The Property Factor was represented by Mr Roger Boden and Ms Jeni Bole.

Preliminary Matters

6. The Tribunal raised the issue of whether an alleged breach of the introduction to a section of the Code was competent. The Tribunal heard representations on this point from parties and decided to hear the evidence on this matter, reserving judgement as to its competence.

Introduction to Section 3 of the Code

The Homeowner's position

7. The Homeowner submitted that the Property Factor had breached the stated requirement of clarity and transparency in all accounting procedures by (1) removing the VAT column from invoices; and (2) using consolidated entries in invoices. Factoring invoices had a VAT column up until early 2020. In 2018, the Homeowner had discovered errors in invoices relating to electricity charges from Eon, whereby the wrong rate of VAT had been applied. The Property Factor had not noticed the error. It was the Homeowner's position that such errors would not now be picked up without the VAT column. There had been a considerable delay in refunding the overpaid VAT to homeowners. There had been a further issue with an incorrect split of energy costs between blocks within the development that also required a refund. When refunds were finally made in April 2019, the full sum was not refunded, and correspondence on the issue had still not been answered by the Property Factor. The Homeowner said there had been a long and painful journey to get the refunds although the errors were in full sight. Such errors could no longer be seen on invoices and he felt it unlikely that the Property Factor would pick up such errors.
8. The Homeowner referred to a further issue on an invoice dated 9th March 2021, where the Property Factor had added VAT twice on an invoice for rock salt. It was his belief that the Property Factor would have spotted this error if

there was a VAT column on the invoices. The Homeowner had discovered the error by sourcing the invoice on the Property Factor's portal. The invoice showed the correct sums, and the error was an administrative error on the part of the Property Factor. The Homeowner explained that he has recently learned how to access invoices on the portal, but not all invoices are available. The Homeowner had notified the Property Factor of this error but was yet to receive a response.

9. In regard to consolidated entries, the Homeowner referred to an issue with energy bills from January to March 2021. The Property Factor had consolidated entries for communal electricity on an invoice dated 8th June 2021. The charges should have related to four blocks within the development; however, on perusing the electricity bills, the Homeowner discovered that the charges only related to three blocks. Before the consolidation of entries in invoices, each block would have shown up as a single line and such an error would have been immediately obvious. The Homeowner now has to go to the portal to view the invoices to check for errors, which is taking extra time and effort. The Homeowner referred to two instances where employees of the Property Factor had stated that consolidated entries were causing problems.
10. There was an error in relation to car park electricity on a factoring invoice dated 2nd March 2020 whereby the Property Factor had invoiced the Homeowner for electricity for a different block. This error has happened before.
11. There was an issue in relation to energy bills for the period from 1st April to 30th June 2020. The Homeowner had asked for individual energy bills and found that the consolidated entry on the factoring invoice was incorrect. A bill for another development had been added to the invoice. There was further confusion when a refund was included in a consolidated entry. VAT charged in error was not refunded and this remains outstanding, with no explanation given by the Property Factor.
12. The Homeowner referred to entries for cleaning charges on factoring invoices. He had identified a charge made in error. This was refunded to homeowners, then the Property Factor said they had credited it in error and recovered the refund. The Property Factor also got the dates mixed up on invoices. It was the Homeowner's position that these errors had occurred as a result of consolidating entries

The Property Factor's position

13. Mr Boden submitted that mistakes can and do happen. The VAT error with regard to electricity costs was a mistake of the contractor. The Property Factor had made an administrative error. The Code does not require a VAT column to be added to invoices. Responding to questions from the Tribunal, Mr Boden accepted there were a number of issues remaining outstanding and he suggested the Homeowner write to him listing the issues. The Property Factor is complying with the Code by issuing detailed breakdowns, with descriptions and the availability of supporting documentation. The majority of

invoices are available on the portal, unless they refer to charges such as cleaning or gardening that remain the same throughout the year. It was Mr Boden's submission that consolidation of invoices and the lack of a VAT column had not diminished the Homeowner's understanding of the issues involved.

Paragraph 3.3 of the Code

14. Paragraph 3.3 of the Code states: *You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.*

The Homeowner's position

15. The Homeowner requested copy energy invoices from the Property Factor by email dated 20th February 2020. He requested them again on 25th June 2020. He then made a formal complaint on 8th December 2020. He did not receive the invoices. They were lodged by the Property Factor in response to the Tribunal Direction, which indicated that they were available.
16. On 28th September 2020, the Homeowner requested copy energy invoices which were not provided until after 22nd December 2020, when he informed the Property Factor of his intention to withhold payment.
17. On 24th March 2021, the Homeowner requested copy invoices and did not receive them. He was later able to view them on the portal.
18. On 21st March 2018, the Homeowner requested copy energy invoices, which were not received.

The Property Factor's position

19. Mr Boden said the Homeowner was owed an apology for these issues. He explained that there has been historical issues with energy provision and there was an 18 month period with no invoices, when no charges were made. The Property Factor was in the process of changing broker. There are other ongoing administrative internal changes. Property Finance Assistants have been recruited. A new system is being introduced and the Property Factor will now have local control over the production of invoices. It was Mr Boden's position that this would help to avoid the problems seen in this case.

Paragraph 7.1 of the Code

20. Paragraph 7.1 of the Code states: *You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable*

timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.

The Homeowner's position

21. By email dated 4th April 2021 to the dedicated complaints email address, the Homeowner stated that he wished to register a formal complaint. The complaint was not replied to within five working days, as required by section 7.5 of the Property Factor's Written Statement of Services. They replied within six or seven working days. By email dated 18th June 2021, the Property Factor informed the Homeowner that his email had been deemed an enquiry rather than a complaint. The Written Statement of Services makes clear that there are two scenarios when a complaint is submitted – it is accepted and registered or rejected with reason for rejection provided. In this case, the Property Factor did neither. It was clearly a complaint, and the Homeowner expressed surprise that the Property Factor had dealt with it in this way, as there had been a previous Tribunal decision on this point which had been found in the Homeowner's favour. The Homeowner submitted that he had not been afforded the benefit of the complaints procedure. If the matter had been treated as a complaint, it may not have ended up before the Tribunal. He was left with no place to go but to the Tribunal.

The Property Factor's position

22. Mr Boden accepted that the Property Factor had not achieved the five day target. However, the Property Factor had provided a full response. The individual involved in this case viewed it as an enquiry. The Homeowner had not been prejudiced at all as the matter was now being addressed by the Tribunal. The Property Factor is now looking at its complaints process with a view to clarifying it.

Failure to carry out Property Factor's Duties

23. In response to questions from the Tribunal regarding the overlap in the alleged breach of paragraph 7.1 and the alleged failure to carry out Property Factor's duties by failing to register and acknowledge a formal complaint in accordance with section 7.5 of the Written Statement of Services, the Homeowner said the complaints were linked. The breach of section 7.5 came first and was followed by the breach of paragraph 7.1 of the Code. Mr Boden said that he struggled to follow this argument.

Summary by Homeowner

24. The Homeowner submitted that the Property Factor had not identified any benefits from removing the VAT column and consolidating entries. It was his position that he had demonstrated that having the VAT column and not consolidating entries brings clarity and transparency. The Property Factor had said it reduced paper usage, but that is not the overriding objection of the Code. Clarity and transparency take priority over paper usage. There are

difficulties in getting copy invoices, and not all invoices are available on the portal, and not all homeowners have access to it.

Summary on behalf of Property Factor

25. Mr Boden accepted that mistakes had been made and life had been made difficult for the Homeowner. He reiterated his submission that the Code does not require a VAT column, or address issues in relation to consolidation of entries.

Findings in Fact

- 26.
- i. The Homeowner is the proprietor of the Property, which is part of the Development known as The Maltings.
 - ii. The Property Factor registered as a Property Factor on 23rd November 2012 under registration number PF000103.
 - iii. The Property Factor manages the common parts of the Development.
 - iv. The Property Factor amended their invoices in or around 2020 to remove a VAT column and to consolidate entries.
 - v. The Homeowner has identified errors in invoices, some of which errors are attributable to the Property Factor.
 - vi. The Homeowner has requested copies of invoices on several occasions and the Property Factor has failed to provide the invoices on request.
 - vii. On 4th April 2021, the Homeowner emailed the Property Factor with a formal complaint.
 - viii. The Property Factor did not respond within the 5 working days set out in their complaints procedure in their Written Statement of Services.
 - ix. The Property Factor responded to the email within 7 business days.
 - x. The Property Factor did not treat the complaint as a complaint, but deemed it an enquiry.
 - xi. The Property Factor did not follow their own procedure for handling complaints, as set out in their Written Statement of Services.

Determination and Reasons for Decision

Failure to comply with introduction to section 3 of the Code

27. The Tribunal took the view that the introduction to section 3 of the Code is merely a preamble that outlines the overriding objectives of the section, the substance of which is found within the numbered paragraphs. Complaints under the Code should be made with reference to a numbered paragraph; therefore it would not be appropriate to make a finding of failure in relation to the introduction.

Failure to comply with paragraph 3.3 of the Code

28. The Tribunal found that the Property Factor failed to comply with this paragraph of the Code by failing to provide the requested invoices in response to reasonable requests from the Homeowner.

Failure to comply with paragraph 7.1 of the Code

29. The Tribunal found that the Property Factor failed to comply with this section of the Code by failing to progress what was clearly a complaint from the Homeowner in line with its complaints procedure, thereby failing to follow its complaints procedure.

Observations

30. The Tribunal made an observation that there was a concerning lack of clarity and transparency in the accounting procedures of the Property Factor, given the considerable and concerning number of issues identified by the Homeowner. The Tribunal observed that these issues may have been appropriately alleged as complaints under other paragraphs of the Code, or under a failure to carry out Property Factor duties.

31. The Tribunal observed that the problems appeared to lie with the Property Factor's operational and administration systems, rather than with the removal of the VAT column and the consolidation of entries. However, no findings were made in this regard.

Proposed Property Factor Enforcement Order (PFEO)

32. Having determined that the Property Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO. The Tribunal decided to make a PFEO.

33. In considering the terms of the PFEO, the Tribunal took into account the distress, frustration and inconvenience caused to the Homeowner by the Property Factor's failure to comply with the Code.

34. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the Property Factor and allow parties an opportunity to make representations.

35. A proposed PFEO accompanies this decision. Comments may be made in respect of the proposed PFEO within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

Right of Appeal

36. 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 and Chairperson

19th October 2021