



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 17(1) of the Property Factors (Scotland) Act 2011 (Act)

Chamber Ref: FTS/HPC/PF/23/2533

Re: Property at 12/6 Leven Terrace, Edinburgh, EH3 9LW (“the Property”)

Parties:

Mr Christopher Pimbley, 12/6 Leven Terrace, Edinburgh, EH3 9LW (“the Applicant”)

Edinburgh Block Management, 25 Nicolson Square, Edinburgh EH8 9BX (“the Respondent”)

Tribunal Member:

Alan Strain (Legal Member) and Andrew Murray (Ordinary Member)

Decision

The application is dismissed as premature.

Background

This is an application under Rule 43 and section 17(1) of the Act in respect of the Respondent’s alleged breach of the Code of Conduct.

The Tribunal had regard to the following documents:

1. Application received 31 July 2023 and supporting documents;
2. Written Representations from the Parties;
3. Direction of the Tribunal dated 5 March 2024;
4. Parties’ responses to the Direction application;
5. Tribunal email to the Parties dated 26 March 2024;
6. Parties’ written submissions in response to Tribunal email of 26 March 2024.

Procedural History

This case has some history having originally been received on 31 July 2023. It was sifted by a Legal Member of the Tribunal and accepted for further procedure on 13 September 2023. The case then called for a CMD by conference call on 27 November 2023. At that CMD the Tribunal fixed a Hearing for 20 March 2024 and explained further procedure to the Parties.

The Applicant subsequently applied for the Tribunal to issue a Direction to obtain further documentation/information on 26 January 2024. The request was substantial. The request was copied to the Respondent and further information was requested from the Applicant to support the application. Further information was received from the Applicant and the Tribunal granted the application for a Direction on 5 March 2024. Given the amount of information requested the Tribunal postponed the Hearing fixed for 20 March 2024 and fixed a new Hearing for 10 July 2024.

On 21 March 2024 the Tribunal received a response from the Respondent to the Direction which raised the issue of non-compliance with their complaints procedure which is a requirement under 17 of the **Property Factors (Scotland) Act 2011** and paragraph 7.2 of the **Code of Conduct for Property Factors (Code)**. The Respondent queried why the Tribunal had accepted the application without allowing the Respondent the opportunity to exhaust their complaints procedure as required by the Code.

The Tribunal responded to the Parties by email of 26 March 2024 which requested (amongst other things) Parties' written submissions on whether or not the complaints procedure had been exhausted within 14 days and informed Parties that following receipt of submissions then the Tribunal would make a Decision on the point.

The Respondent provided written submissions by email of 4 April 2024 and the Applicant by email of 28 March 2024.

Respondent's Submissions

The Respondent's Complaints Procedure stated:

"Step 1: If you wish to complain about any aspect of our service, or that of a contractor instructed by us on your behalf, you can do so by contacting the Property Manager in writing, by email in the first instance. The Property Manager will investigate and get back to you within 3 working days. Send your email to info@edinburghblockmanagement.com and mark it for the attention of Martin McKeown.

Step 2: If you feel you have done all you can to resolve the issue with the Property Manager and cannot resolve the issue, the complaint will be investigated by another member of our team within 5 working days.

Step 3: If the response still does not provide the satisfaction you require, we would respectfully request that you provide us with written confirmation of the reasons you deem that the complaint has not been resolved. The complaint will then be

reconsidered by a Senior Management Team within 20 working days. If the final decision does not resolve your complaint, you may at that stage apply to our governing body, once the internal complaints procedure has been exhausted.”

The Respondent's submit that the first email received from the Applicant on 12 May 2023 was not a first complaint (Step 1) and was not deemed as such. The Applicant had written “*I am writing to you as a concerned resident of 12 Leven Terrace to formally address and emphasize significant safety concerns regarding the ongoing roof repair activities.*”

This was an expression of concern and not a complaint.

The Applicant then wrote on 7 June 2023 asking that this communication be treated as the second step in the Respondent's Complaints Procedure.

The Respondent submits that it did not accept that this email was classed as a second step in their complaints process. This was due to the fact that the first email received on 12 May 2023 was not classed as the first level of complaint as it was not headed as a “complaint” and was not responded to by the Respondent on 17 May 2023 as a “complaint” as CP had stated he was formally addressing the matter as a concern but not requesting that it was dealt with as a complaint. “A concern may be defined as an expression of worry or doubt over an issue considered to be important for which reassurances are sought”. “A complaint may be defined as an expression of dissatisfaction however made about actions taken or lack of action”.

The Respondent's position was that the email of 7 June 2023 was the first step in the Complaints Procedure. The Respondent responded to that complaint by email of 12 June 2023 and enclosed detailed findings and responses to the Applicant's complaint.

The Applicant responded by email of 20 June 2023 intimating that he did not accept the Respondent's response and sought mediation.

The Applicant did not engage in mediation.

The Applicant failed to exhaust the Respondent's Complaints Procedure and accordingly the application should not have been accepted by the Tribunal.

Applicant's Submissions

The Applicant submitted that the email of 12 May 2023 was the first formal complaint. This was followed up by the second formal complaint of 7 June 2023.

The second formal complaint served to escalate the complaint to the second stage of the Respondent's Complaints Procedure.

Following attainment of authority to act from a number of residents a collective letter of complaint was issued on 26 June 2023.

On 28 July 2023 the Applicant wrote to the Respondent indicating his intention to proceed with a claim to the Tribunal.

The Applicant contends that he complied with the Complaints Procedure.

Decision and Reasons

Regulatory Framework

Section 17 of the **Property Factors (Scotland) Act 2011** provides that a homeowner may apply to the Tribunal for determination that a property factor has failed to perform their duties or breached the Code of Conduct but that:

(3) No such application may be made unless—

- (a)the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, and*
- (b)the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern.*

The Respondent's Complaints Procedure

There was no dispute that the complaints procedure was as follows:

"Step 1: If you wish to complain about any aspect of our service, or that of a contractor instructed by us on your behalf, you can do so by contacting the Property Manager in writing, by email in the first instance. The Property Manager will investigate and get back to you within 3 working days. Send your email to info@edinburghblockmanagement.com and mark it for the attention of Martin McKeown.

Step 2: If you feel you have done all you can to resolve the issue with the Property Manager and cannot resolve the issue, the complaint will be investigated by another member of our team within 5 working days.

Step 3: If the response still does not provide the satisfaction you require, we would respectfully request that you provide us with written confirmation of the reasons you deem that the complaint has not been resolved. The complaint will then be reconsidered by a Senior Management Team within 20 working days. If the final decision does not resolve your complaint, you may at that stage apply to our governing body, once the internal complaints procedure has been exhausted."

Sequence of Events and Tribunal's Findings

There equally appeared to be no dispute with regard to the sequence of events and the correspondence between the Parties. All of the correspondence has been produced and referred to by the Parties.

The material correspondence for the purposes of the Tribunal's determination was:

1. The Applicant's email to the Respondent of 12 May 2023.

The Applicant contends this was Step 1 in the complaints procedure which is disputed by the Respondent.

The Tribunal considered the terms of the email of 12 May 2023.

The email does not use the term "complaint" or refer to the complaints procedure. The Applicant writes as a "concerned resident" and asks that the Respondent address safety concerns regarding roof repair activities. He requests 3 items of information/documentation. He asks that the Respondent take responsibility for overseeing necessary repairs and asks for a prompt response.

The Tribunal consider that the email of 12 May 2023 could not be reasonably interpreted as an expression of a complaint nor could it constitute compliance with Step 1 of the complaints procedure.

2. The Applicant's email to the Respondent of 7 June 2023

This email was clearly labelled as a complaint and there was no dispute between the Parties that it was. The dispute was whether or not this constituted Step 2 of the complaints procedure.

In light of the fact the Applicant relied upon the email of 12 May 2023 as constituting Step 1 and the email of 7 June 2023 it was clearly the case that the complaints procedure had not been followed.

The Tribunal find and determine that the email of 7 June 2023 constituted the first formal complaint under Step 1 of the Respondent's complaints procedure.

The Respondent comprehensively responded to the email of 7 June 2023 by email of 12 June 2023.

The Applicant did not accept the response as allaying his concerns and wrote a further email of 20 June 2023 to that effect. The terms of the email of 20 June 2023 are informative as there is no reference to escalation of the complaints procedure. Instead there is reference to mediation to avert the need to refer the matter to the Tribunal.

3. The email of 26 June 2023 from the Applicant and other homeowners to the Respondent

The Applicant describes this email in his submissions as a "comprehensive letter of complaint".

Once again the content of this email is informative. Nowhere in the email is the term “complaint” used. Nor is there any reference to the complaints procedure. Instead there are references to residents’ “collective concerns” and “clarification” is sought regarding recent works. There then follows a list of “key concerns” and the email finishes with a request that these concerns be addressed promptly and comprehensively.

The Tribunal do not consider this email to constitute a letter of complaint. The Tribunal do not consider the email to form part of the complaints procedure.

Notwithstanding that finding the Tribunal note that the Respondent once again comprehensively responded by email of 1 July 2023 to this email in any event.

The Applicant did not accept that response and informed the Respondent by email of 28 July 2023 of his intention to proceed with an application to the Tribunal.

4. The Applicant lodged his application with the Tribunal on 31 July 2023

The Tribunal received the Applicant’s application on 31 July 2023. It was considered by a Legal Member and he was asked to give notification to the Respondent of the paragraphs of the Code that were claimed to have been breached.

The Applicant did so by email of 17 August 2023.

Conclusion

The Tribunal understands and appreciates that the Parties have put considerable effort into the preparation of this case, however, a preliminary matter has been raised which goes to the competence of the application. The Respondent has insisted upon a determination of this preliminary matter and the Tribunal have no option other than to deal with it.

Having considered the productions (which are not in dispute) and the Respondent’s Complaints Procedure (which is not in dispute) the Tribunal find that the Applicant has failed to exhaust the Respondent’s Complaints Procedure and has failed to give the Respondent a reasonable opportunity to resolve the Applicant’s complaints.

The Applicant only engaged Step 1 of the complaints procedure to which he received a comprehensive response from the Respondent. He then appears to have precipitously applied to the Tribunal.

Further, and in any event, there had been no unreasonable delay or refusal by the Respondent to resolve the Applicant’s complaint of 7 June 2023 at the point of application to the Tribunal on 31 July 2023.

In light of those findings the Tribunal consider the application to be premature.

The Tribunal dismiss the application.

Right of Appeal

In terms of Section 46 of the Tribunal (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.



15 May 2024

Legal Member

Date