



Written Decision with Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and Rule 17 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules")

Reference numbers:

FTS/HPC/PF/22/4021 and FTS/HPC/PF/23/0004

Re: 47/3, Sassoon Grove, Edinburgh, EH10 5FB ("the Property")

The Parties:

Mr. Anthony Jemmett residing at the Property ("the Homeowner")

James Gibb Residential Factors having a place of business at 4, Atholl Place, Edinburgh, EH3 8HT ("the Property Factor")

Tribunal Members

Karen Moore (Chairperson) Mary Lyden (Ordinary Member)

Outcome of CMD

The Tribunal refused and dismissed the Applications FTS/HPC/PF/22/4021 and FTS/HPC/PF/23/0004 for the reason that they do not comply with Section 17 of the Act.

Background

1. The Homeowner made two applications to the First-tier Tribunal for Scotland (Housing and Property Chamber) for determinations that the Property Factor had failed to comply with the Code of Conduct for Property Factors 2012 ("the 2012 Code"), the Code of Conduct for Property Factors 2021 ("the 2021 Code") and had failed to comply with the Property Factor's duties.

2. The applications were set out as follows:
 - i) PF/22/4021 dated 30 October 2022.
This application was on Form C1 and complained of breaches of the 2012 Code at Financial Obligations at paragraphs 3.1 and 3.2 and Insurance at paragraphs 5.3 and 5.8. The application also complained of a failure to comply with Property Factor's duties, which complaint was later withdrawn.

 - ii) PF/23/0004 dated 27 December 2022

This application was on Form C2 and complained of breaches of the 2021 Code at Financial Obligations at paragraphs 3.1 and 3.2 and Insurance at paragraphs 5.3 and 5.8.

3. Copy emails between the Parties, copy invoices and a copy of the Property Factor's Written Statement of Services (WSS) accompanied the applications.
4. Also, submitted by the Homeowner were two emails of intimation from the Homeowner to the Property Factor as follows:
 - a) Email dated 8 October 2022 in respect of Application PF/22/4021 stating that the "*complaint refers to the excessive costs of Factors against the original quoted by Quartermile. Responsibility for mis-selling of the factors has not been taken and a resolution has not been met. Attempts to resolve the issues have largely been ignored.*"
 - b) Email dated 28 December 2022 in respect of Application PF/23/004 stating that the "*service charge for the 1st year was quoted as £542.55 and the second year £590.28...the actual cost has come through almost three times this amount. The explanation is that the insurance for the building was under quoted...the Factor's invoice is now over £130 per month and in excess of £1,500 per year*".
5. A legal member of the Chamber with delegated powers of the Chamber President accepted the applications and a Case Management Discussion (CMD) was fixed for 15 May 2023 at 10.00 by telephone conference call.
6. Prior to the CMD, the Property Factor submitted detailed written representations. With regard to application PF/22/4021, the Property Factor made a preliminary plea that this should be dismissed as the intimation letter does not relate to the content of the application. With regard to application PF/23/0004, Property Factor made a preliminary plea that the application does not demonstrate breaches of the 2021 Code and that no prior intimation was made before the application was lodged.

Case Management Discussion

7. The CMD took place on 15 May 2023 at 10.00 by telephone conference call. The Homeowner was present and accompanied by his co-owner, Miss Isla Menzies. The Property Factor was represented by Mr. Roger Bodden, one its directors.
8. The Tribunal advised the Parties that the purpose of the CMD was to identify if matters were disputed or could be resolved and if a Hearing on evidence is required. The Tribunal advised the Parties that although the tribunal process is less formal than court proceedings it is a judicial body and that the applications must comply with the legislation.

Application PF/22/4021

9. With regard to the Property Factor's preliminary plea, the Tribunal noted that the Code breaches are:

3.1 If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

3.2 Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor.

5.3 You must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider. You must also disclose any other charge you make for providing the insurance.

5.8 You must inform homeowners of the frequency with which property valuations will be undertaken for the purposes of buildings insurance, and adjust this frequency if instructed by the appropriate majority of homeowners in the group.

10. The Homeowner accepted that these parts of the Code are not consistent with the facts of the complaint which relate to the discrepancy between the insurance and factoring costs as indicated by the selling agents and that actual costs incurred.

11. Section 17(3) of the Act states: “*(3)No 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.”*

12. The Homeowner accepted that application PF/22/4021 does not comply with this part of the Act and so the Tribunal advised that the application would require to be dismissed.

Application PF/23/0004

13. With regard to this application, the Tribunal noted that the Code breaches are:

3.1 While transparency is important in the full range of services provided by a property factor, it is essential for building trust in financial matters. Homeowners should be confident that they know what they are being asked to pay for, how the charges were calculated and that no improper payment requests are included on any financial statements/bills. If a property factor does not charge for services, the sections on finance and debt recovery do not apply.

3.2 The overriding objectives of this section are to ensure property factors:

protect homeowners' funds; provide clarity and transparency for homeowners in all accounting procedures undertaken by the property factor; make a clear distinction between homeowners' funds, for example a sinking or reserve fund, payment for works in advance or a float or deposit and a property factor's own funds and fee income.

5.3 A property factor must provide an annual insurance statement to each homeowner (or within 3 months following a change in insurance provider) with clear information demonstrating: the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, the main elements of insurance cover provided by the policy and any excesses which apply, the name of the company providing insurance cover, and any other terms of the policy.

This information may be supplied in the form of a summary of cover, but full details must be made available if requested by a homeowner.

5.8 On request, a property factor must be able to demonstrate how and why they appointed the insurance provider, including an explanation where the factor decided not to obtain multiple quotes.

14. The Homeowner explained that matter here is a trust issue with the Property Factor and that the Homeowner has no trust in the Property Factor. He accepted that the Property Factor has put the insurance details on their Portal but that there has been no explanation as to why the costs have tripled from the quote given by the developer's selling agent. The Homeowner explained that he had been misled on how insurance is obtained. He maintained that the breach of 3.1 of the 2021 Code had been established in the application.
15. In response to questions from the Tribunal, Mr. Bodden for the Property Factor explained that they had tendered in 2017 to Quartermile, the developer, before the development began and so costs were estimated. He explained that the development is a complex one comprising an old listed building and new builds, that construction has been continuing since 2017 and is expected to continue for a further three years. The Homeowner confirmed that the cost which had been quoted were provided by the developer. The Homeowner stated that he felt there was mis-selling as the developer is still using out of date costings.

issue for the Tribunal

16. The issue for the Tribunal was to consider the Property Factor's preliminary plea that the application should be dismissed as the intimation letter does not relate to the content of the application and that no prior intimation was made before the application was lodged.

17. *The Tribunal had regard to Section 17 of the Act which states:- "(1)A homeowner may apply to the First-tier Tribunal for determination of whether a property factor has failed (a)to carry out the property factor's duties, (b)to ensure compliance with the property factor code of conduct as required by section 14(5) (the "section 14 duty"). (2)An application under subsection (1) must set out the homeowner's reasons for considering 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. (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."*
18. This is a matter of fact and law. The Tribunal had regard to the content of the intimation letter as narrated above in respect of identifying the failings of the Property Factor and stating why these failings are breaches of the parts of the 2021 Code as set out in the application. The Tribunal took the view that the fact that the intimation letter complains of dissatisfaction with the costs estimated by the developer and does not raise issues relevant to the parts of the 2021 Code complained of in the application. Moreover, the intimation letter postdates the date of the application and was issued only two days before the application was lodged with the tribunal chamber. The purpose of Section 17(3) is to allow the Property Factor an opportunity to resolve any alleged more breaches, and, on this occasion no such opportunity was given. Therefore, the Tribunal is satisfied that Section 17 has not been complied with.

Decision of the Tribunal

19. The Tribunal then had regard to Rule 17(4) of the Rules which states that the Tribunal "may do anything at a case management discussionincluding making a decision" and so proceeded to refuse and dismiss both applications.
20. The decision of the Tribunal is unanimous.

Right of Appeal

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. Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will

be treated as having effect from the day on which the appeal is abandoned or so determined.

Karen Moore

Legal Member

15 May 2023

Date