



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

Decision issued under s19 of the Property Factors (Scotland) Act 2011

Chamber Ref: Reference number: FTS/HPC/PF/22/0559

FTS/HPC/PF/22/0810

Property: Flat 7, 11 Durie Loan, Edinburgh, EH17 8TT (“The property”)

Parties:

Ms Rhona MacMichael, residing at Flat 7, 11 Durie Loan, Edinburgh, EH17 8TT (“the Applicant”)

And

James Gibb Property Management Ltd, a company incorporated under the companies Acts and having their registered office at Bellahouston Business Centre, 423 Paisley Road West, Glasgow, Scotland, G51 1PZ (“the Respondent”)

Tribunal Members:

Paul Doyle (Legal Member)

Andrew Murray (Ordinary Member)

Unanimous Decision of the Tribunal

The Tribunal, having made such enquiries as it saw fit for the purposes of determining whether the property factor has failed to comply with the code of conduct as required by Section 14 of the Property Factors (Scotland) Act 2011, determined that the property factor has not breached the code of conduct for property factors.

Background

1. By applications dated 25 February 2022 and 18 March 2022, the applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination of her complaint that the respondent has breached the code of conduct imposed by Section 14 of the 2011 Act and breached the Property Factor’s duties.

2 The application dated 25 February 2022 stated that the applicant considered that the respondent failed to comply with Sections 2.4, 2.5, and 6.1 of the code of conduct for property factors effective from 1 October 2012 to 15 August 2021.

3. The application dated 18 March 2022 stated that the applicant considered that the respondent failed to comply with Sections 2.1, 2.6, 2.7 and 6.4 & 6.6 of the code of conduct for property factors effective from 16 August 2021.

4. Both applications say that the respondent has failed to carry out the Property Factor's duties.

5. By interlocutor dated 24 August 2022, both applications were referred to this tribunal. On 1 September 2022 the First-tier Tribunal for Scotland (Housing and Property Chamber) served notice of referral on both parties, directing the parties to make any further written representations.

6. The respondent lodged detailed written representations on 21 September 2022. The applicant submitted further representations on 11 September 2022

7. A Case Management Discussion took place before the Tribunal by telephone conference at 10.00am on 4 November 2022 at which it was established that the dispute to be resolved between the parties is

(a) Has the respondent failed to comply with Sections 2.4, 2.5, and 6.1 of the code of conduct for property factors effective form 1 October 2012 to 15 August 2021?

(b) Has the respondent failed to comply with Sections 2.1, 2.6, 2.7 and 6.4 & 6.6 of the code of conduct for property factors effective from 16 August 2021?

(c) Has the respondent has failed to carry out the Property Factor's duties?

(d) Is the applicant personally barred from pursuing her applications because she accepted the respondent's offer to settle in April 2022?

8. On 20 November 2022 the applicant lodged a supplementary written submission with additional documentary evidence. On 29 November 2022 the respondent lodged a written response to the applications.

9. A substantive hearing took place on at 10am on 24 January 2022. The applicant was present and unrepresented. The respondent was represented by Mr R Bodden. He was accompanied by Mr F McIntosh.

10. Both parties agreed that they have provided adequate documentary evidence for this application to be determined without further enquiry. Neither party has anything of relevance to add to their written submissions. Mindful of regulations 2, 17, and 18 of The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017, we proceed to determine this application on the documentary evidence placed before us.

Findings in Fact

11. The tribunal finds the following facts to be established:

(a) The applicant is the heritable proprietor of flat 7, 11 Durie Loan, Edinburgh ("the property"). She purchased the property in May 2018. The property is part of a development of houses known as "The Kilns".

(b) Life Property Management Ltd were appointed as property factor to the Kilns by the developer, Barratt Homes, on 30 October 2013. Life Property Management Ltd became part of James Gibb Residential Factors Ltd, and so the respondent has been the property factor to the Kilns throughout the applicant's ownership of the property.

(c) The applicant has never been happy with the maintenance of the common areas in the development. She is unhappy with

- (i) The quality of gardening services
- (ii) The quality of routine maintenance of common areas, including the bin store
- (iii) The use of parking spaces by commercial vehicles.
- (iv) The method of billing and the details in invoices

(d) In July 2021 the applicant sent photographs of the garden ground and common areas surrounding the property to the respondent. The applicant contacted the respondent between May 2021 and January 2022 to complain about the quality of maintenance of the common areas of ground surrounding the property.

(e) On 20/09/2021 the respondent emailed the applicant saying

There has been a lot of discussion regarding the ground maintenance at the Kilns. I have passed the issue to one of the senior managers to organise a new grounds maintenance contract to present to the proprietors in your development.

What I suggest for now is you pay your invoice but withhold the grounds maintenance charge and I can put this on hold until I can come back to you with a solution. This will ensure you avoid any late payment fees.

(f) On 9 December 2021, 21 December 2021, and 04 January 2022 the applicant sent the respondent email to which the respondent did not reply.

(g) In December 2021 the applicant telephoned the respondent three times and could not be connected to the person she wanted to speak to.

(h) On 24 March 2022, the respondent offered to pay the applicant £100 as an acknowledgement that they had not responded to enquiries and complaints within the timescale set out in their written statement of services. The applicant accepted that offer. The respondent placed £100 to the creditor of the applicant's account on 30 August 2022.

(i) By invoice dated 7 June 2022 the respondent charged the applicant £330 for the erection of an aerial.

(j) As part of their services, the respondent undertakes grounds maintenance twice per month between April and October each year. The works include grass cutting and edging, and cleaning the common areas of the development of litter, leaves, and debris. Between November and March the same work is to be undertaken once per month.

(k) The respondent undertakes to carry out both weekly and monthly cleaning of the common parts and communal areas.

(l) The respondent issued a written statement of services to all proprietors in the development. The most recent written statement of services is dated August 2021.

(m) The respondent sends quarterly invoices to the applicant.

Reasons for decision

12. The applicant submits two applications because on 16 August 2021. The code of conduct for property factors changed, and the applicant's complaint spans the period from May 2021 until March 2022.

13. The application dated 25 February 2022 says that the respondent failed to comply with Sections 2.4, 2.5, and 6.1 of the code of conduct for property factors effective from 1 October 2012 to 15 August 2021 ("the 2012 code of conduct").

14. Section 2.4 of the 2012 Code of Conduct says

You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).

15. The applicant's complaint does not relate directly to section 2.4 of the 2012 code of conduct. The only detail given by the applicant is an allegation that she has been incorrectly invoiced for work to an aerial. The vague allegation made by the appellant lacks specification and the respondent simply responds with a denial.

16. The evidence placed before us demonstrates that invoices are rendered quarterly by the respondent. The written statement of services contains specific details of maintenance and response arrangements, including provision for planned & preventative maintenance, emergency repairs, major projects, and additional fees. The applicant does not produce reliable evidence of a breach of section 2.4 of the 2012 code of conduct.

17. Section 2.5 of the 2012 Code of Conduct says

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).

18. It is the paucity of evidence which creates difficulty in this case. The applicant makes vague reference to numerous unanswered communications, but only provides evidence of three emails (in December 2021 and January 2022) which she says went unanswered. The respondent candidly admits that they fell short of the response times set out in their written statement of services, and in August 2022 credited the applicants account with agreed compensation of £100.

19. The respondent denies breaching section 2.5 of the 2012 code. The respondent's position is that £100 compensation was paid for a breach of the 2021 code.

20. The only reliable evidence of communications which were not timeously responded to occurred after August 2021. There is no reliable evidence of a breach of section 2.5 of the 2012 code of conduct.

21. Section 6.1 of the 2012 Code of Conduct says

You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.

22. The respondent's written statement of services makes it clear that they have procedures which comply with section 6.1 of the 2012 code of conduct. The weight of reliable evidence indicates that the applicant does not have difficulty contacting the respondent, but she is dissatisfied with the response that she receives. There is no reliable evidence driving at section 6.1 of the 2012 code of conduct. The applicant says in submissions that she is confused by entries on invoices and has asked for

clarification of charges. The applicant does not say that she has not been informed of progress of work, nor that she has not been given timescales for completion, nor that any works have exceeded an agreed cost threshold.

23. There is no reliable evidence of a breach of the 2012 code of conduct.
24. The application dated 18 March 2022 alleges that the respondent failed to comply with Sections 2.1, 2.6, 2.7 and 6.4 & 6.6 of the code of conduct for property factors effective from 16 August 2021 ("the 2021 code of conduct").
25. Section 2.1 of the 2021 code of conduct for property factors says

2.1 Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes and promoting mutual respect. It is the homeowners' responsibility to make sure the common parts of their building are maintained to a good standard. They therefore need to be consulted appropriately in decision making and have access to the information that they need to understand the operation of the property factor, what to expect and whether the property factor has met its obligations.
26. The applicant offers no evidence of a breach of section 2.1 of the 2021 code of conduct. The applicant says that her messages are not responded to on time, that she is dissatisfied with the gardening, cleaning and maintenance works carried out by the respondent, and that she has unanswered queries about charges on an invoice. None of those complaints engage section 2.1 of the 2021 code of conduct.
27. There is no reliable evidence of a breach of section 2.1 of the 2021 code of conduct.
28. Section 2.6, of the 2021 code of conduct for property factors says

A property factor must have a procedure to consult with all homeowners and seek homeowners' consent, in accordance with the provisions of the deed of condition or provisions of the agreed contract service, before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where there is an agreed level of delegated authority, in writing with homeowners, to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies). This written procedure must be made available if requested by a homeowner.
29. None of the evidence produced by the applicant engages with section 2.6 of the 2021 code of conduct. The applicant complains about an incorrect charge on an invoice and having to ask for clarification about entries on invoices, but that complaint is not relevant to section 2.6 of the 2021 code of conduct.
30. The respondent has a written statement of services which sets out the procedure to consult with homeowners, in relation to works which are not included in the core services.

31. There is no reliable evidence of a breach of section 2.6 of the 2021 code of conduct.

32. Section 2.7 of the 2021 code of conduct for property factors says

A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in their WSS. Overall a property factor should aim to deal with enquiries and complaints as quickly and as fully as possible, and to keep the homeowner(s) informed if they are not able to respond within the agreed timescale.

33. The respondent accepts that section 2.7 of the 2021 code of conduct was breached because the applicant's messages were not responded to timeously. The applicant accepted an offer of £100 in compensation. There has been an admitted breach of section 2.7 of the 2021 code of conduct, but almost seven months before it the application was raised the applicant accepted the respondents' offer of compensation for that breach.

34. Sections 6.4 of the 2021 code of conduct for property factors says

Where a property factor arranges inspections and repairs this must be done in an appropriate timescale and homeowners informed of the progress of this work, including estimated timescales for completion, unless they have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required. Where work is cancelled, homeowners should be made aware in a reasonable timescale and information given on next steps and what will happen to any money collected to fund the work.

35. The applicant produces no evidence of a failure in the property factor's arrangement of inspections and repairs. The applicant produces no evidence driving at section 6.4 of the 2021 code of conduct. The applicant's position is that she is not happy with scheduled gardening, maintenance, and cleaning work carried out to the common areas. That is not a complaint of a breach of section 6.4 of the 2021 code of conduct.

36. Sections 6.6 of the 2021 code of conduct for property factors says

A property factor must have arrangements in place to ensure that a range of options on repair are considered and, where appropriate, recommending the input of professional advice. The cost of the repair or maintenance must be balanced with other factors such as likely quality and longevity and the property factor must be able to demonstrate how and why they appointed contractors, including cases where they have decided not to carry out a competitive tendering exercise or use in-house staff. This information must be made available if requested by a homeowner.

37. The applicant produces no evidence driving at section 6.6 of the 2021 code of conduct. The applicant's position is that she is not happy with gardening, maintenance, and cleaning work carried out to the common areas. That is not a complaint of a breach of section 6.6 of the 2021 code of conduct.

38. The applicant complains about the quality of scheduled maintenance work, a lack of response to her communications, and confusion over entries on invoices. The applicant remains dissatisfied with the service offered by the respondent, but the applicant's dissatisfaction does not engage the sections of the 2021 code of conduct that the applicant claims the respondent has breached.

39. What cannot be avoided is that there is a paucity of evidence in this case. The applicant's complaints are vague and lacking in specification. Although the applicant produces evidence of four emails, five photographs of the common parts and garden ground adjacent to the property, and a sequence of invoices with highlighted entries, the applicant does not produce reliable, cogent, evidence of a breach of either the 2012 or 2021 codes of conduct.

40. There is an admitted breach of section 2.7 of the 2021 code of conduct, but it is an admitted fact that that was dealt with when an offer of £100 compensation was accepted in March 2022. The accepted offer of compensation was credited to the applicants account in August 2022. We therefore find that that admitted breach of section 2.7 of the 2021 code of conduct is not competently before us because the applicant compromised her claim almost seven months before lodging her application with the First-tier Tribunal.

41. The applicant says that the Property Factor breaches the property factors' duties. Section 17(1), (4) and (5) of the Property Factors (Scotland) Act 2011 say

(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").

(4) References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard.

(5) In this Act, "property factor's duties" means, in relation to a homeowner—

- (a) duties in relation to the management of the common parts of land owned by the homeowner, or
- (b) duties in relation to the management or maintenance of land—
 - (i) adjoining or neighbouring residential property owned by the homeowner, and
 - (ii) available for use by the homeowner.

42. In both application forms the applicant says that the respondent has failed to carry out the property factors duties in relation to ground maintenance and cleaning works. The first sentence of her typewritten detailed complaint is

A range of ground maintenance and cleaning specifications (detailed earlier in section 7) have not been carried out over the past 10 months.

43. The applicant produces five photographs of garden ground and says that they demonstrate that the grass has not been edged and leaves, moss and weeds have not been removed.

44. The details of the regular maintenance work that the respondent undertakes to carry out are not disputed. The problem is the paucity of evidence. Only two of the photographs the applicant relies on are dated. After considering each strand of evidence it is still not clear if the photographs were taken immediately after a maintenance visit, or immediately before a maintenance visit.

45. There is no reliable evidence of a breach of the property factors duties.

Decision

46. The Property Factor breached s.2.7 of the 2021 Code of Conduct but has already taken sufficient steps to remedy the breach of the code of conduct. There has been no breach of the property factors duties.

47. A Property Factor Enforcement Order is not necessary and would serve no meaningful purpose.

Right of Appeal

48. 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.

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.

Signed



24 January 2023

Legal Member