

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland Housing and Property Chamber

In an Application under section 17 of the Property Factors (Scotland) Act 2011

By

James Brydie, 10 Kingsmere Road, Wimbledon, London SW19 6PX ("the Applicant")

First Port Property Services Scotland, 3rd Floor, Troon House, 199 St Vincent Street, Glasgow G2 5QD ("the Respondent")

Chamber Ref: FTS/HPC/PF/18/2318

Re: 2/9 Wishaw Terrace, Edinburgh EH7 6AF ("the Property")

Tribunal Members:

John McHugh (Chairman) and Andrew Murray (Ordinary (Surveyor) Member).

DECISION

The Respondent has failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

- 1 The Applicant was, until January 2018, the owner of The Property.
- 2 The Property was a flat at 2/9 Wishaw Terrace, Edinburgh EH7 6AF.
- 3 The Property is part of a larger development ("the Development")
- 4 The Respondent was at all relevant times the factor of the Development.
- 5 On 13 November 2017 the Applicant's solicitors wrote to the Respondent requesting certain information be provided to them to assist in the sale of the flat.
- 6 On 15 November 2017 the Respondent replied indicating that it would provide the requested information in return for advance payment of its fees. It enclosed its invoice in the sum of £144.67 plus VAT and a schedule of charges.
- 7 On 11 January 2018 the Applicant's solicitors paid the Respondent's invoice.
- 8 The requested information was provided to the Applicant's solicitors immediately.
- 9 On 12 January 2018 the Applicant sold the Property.
- 10 The Applicant has, by his correspondence, including his emails of 20 August 2018, notified the Respondent of the reasons as to why he considers the Respondent has failed to carry out its obligations to comply with its duties under section 14 of the 2011 Act.
- 11 The Respondent has failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at George House, Edinburgh on 19 November 2018.

The Applicant was neither present at the hearing nor represented, having indicated that he would rely on written submissions.

The Respondent was represented by its Credit Control Manager, Steven Maxwell and its Area Manager, Richard Montgomery.

There were no other witnesses called by either party.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as “the 2011 Act”; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as “the Code”; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 as “the 2016 Regulations”.

The Respondent became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Tribunal had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent.

The documents before us included the Respondent's "Statement of Services & Delivery Standards" which we refer to as the Written Statement of Services.

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant does not complain of failure to carry out the property factor's duties.

The Code

The Applicant complains of failure to comply with Sections 3.1 and 5.2 of the Code.

The elements of the Code relied upon in the Application provide:

"...SECTION 3: FINANCIAL OBLIGATIONS

While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.

The overriding objectives of this section are:

Protection of homeowners' funds

Clarity and transparency in all accounting procedures

Ability to make a clear distinction between homeowners' funds and a property factor's funds

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)...

***... If your agreement with homeowners includes arranging any type of insurance,
the following standards will apply:***

5.2 You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this."

The Matter in Dispute

The single factual matter complained of relates to the imposition of charges by the Respondent in relation to the provision of information to the Applicant's solicitors in the context of the sale of the flat by the Applicant.

The factual history is that on 13 November 2018 the Applicant's solicitors wrote to the Respondent requesting certain information. On 15 November 2018 the Respondent responded by letter enclosing its Administration Fee Invoice in the sum of £144.67 plus VAT. This consisted of a fee for apportionment of service charges of £73.15; a charge for providing a copy of the insurance certificate of £30.88; and a fee for confirmation of common repairs of £40.64.

The Respondent's letter indicated that the requested information would be provided promptly upon receipt of the invoice.

The Applicant's solicitors paid the invoice without protest on 11 January 2018 and the Respondent provided the requested information.

The Applicant complains that the Respondent's Written Statement of Services makes "no mention of incremental charges of this magnitude" and that no menu of charges was available.

He considers that charging is inappropriate since Code Section 3.1 provides an obligation to provide all information to a homeowner regarding his account and no mention is made there of any charge being imposed.

He considers Code Section 5.2, which requires the provision of a summary of insurance cover to be provided without charge, to include provision of the certificate of insurance and objects that a charge was made for this service.

The Respondent's representatives advised that their Written Statement of Services contains the following wording:

"Additional Management Services Available

The following services are additional to our standard management service and for which additional fees may be due:

Apportionment at the time of sale

Provided a sale is intimated to us, we make the necessary apportionment of insurances, repairs and other outgoings between the seller and the purchaser and provide detailed information to solicitors."

They advise that the rates charged which are set out as an appendix to their invoice are standard rates of charge which have subsisted for some years and which they consider to be reasonable. They could not say exactly how those precise fee amounts had come to be set. The fee rates are not published anywhere.

The Respondent's policy is only to deal with sellers and their agents and never purchasers. They will provide any information requested directly by the seller himself free of charge but where the request comes from a third party such as a solicitor they would always impose the standard charges.

There seems to be no particular logic for that position beyond that it is the Respondent's policy. The Respondent has to recover the costs of dealing with providing this information, which is a time consuming process, and so it has operated this system which offers a way to cover the cost of providing information.

The Respondent's representatives advise that the Respondent has an online portal accessible free of charge by all customers including the Applicant. The portal allows a copy of the insurance certificate and repairs information to be downloaded free of charge.

The Respondent's distinction between a homeowner customer and his solicitor seems an unusual one. The solicitor is known by the Respondent to be the homeowner's agent. The solicitor is therefore only a third party in the strict sense that he is a different person from his client, but he is making the request for information for and on behalf of his client. There, therefore, seems to us to be no logical basis to treat a homeowner's solicitor differently from a homeowner himself. That said, the Respondent is, in the absence of any specific prohibition on doing so, entitled to impose charges for providing this information.

Code Section 3.1 does not impose such a prohibition and we do not imply one into its terms. It is silent on the right to charge. It envisages information being provided up to three months after a sale which is not of assistance in a case such as the

present one where the information is required in advance of a sale to allow it to be completed. We identify no breach of Code Section 3.1.

Code Section 5.2 does however, in our view, include a prohibition upon charging for the provision of information falling within the first sentence of that Section. We consider that the certificate of insurance falls within the description contained in that first sentence. The second sentence describes fuller information which seems to include full policy documentation and allows the imposition of a reasonable charge for providing a copy. No mention is made of a right to impose a reasonable charge for provision of the information contained in the first sentence such as the Certificate of Insurance and we therefore infer that such a charge is not permitted.

We accordingly find that the imposition of a charge for providing a copy of the insurance certificate to the Applicant's solicitor (who we regard for this purpose as equivalent to the Applicant) is prohibited by Code Section 5.2 and we find there to have been a breach of the Code in this respect.

We bear in mind that the Certificate was at all times in fact available free of charge to the Applicant by other means but we do not think this affects the fact that a charge was made when it was not permitted.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order (“PFEO”). The terms of the proposed PFEO are set out in the attached document.

APPEALS

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.

JOHN M MCHUGH

CHAIRMAN

DATE: 4 December 2018