

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 ("the Rules").

Reference number:

FTS/HPC/PF/22/1140

Re: Property at 13 Joseph Cumming Gardens, Broxburn, EH52 5AN ("the Property")

The Parties:

Mr. David McLeod residing at the Property ("the Homeowner")

Charles White Limited having an 65 Haymarket Terrace, Edinburgh, EH12 5HD("the Property Factor")

Tribunal Members

Karen Moore (Chairperson) and Helen Barclay (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Property Factor :-

- (i) has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Property Factor Code of Conduct 2021 ("the 2021 Code")
 - at Section OSP at OSP1, OSP2, OSP4, OSP6, OSP10 and OSP11;
 - Section1 at 1.14
 - Section 2 at 2.2, and 2.7;
 - Section 3 at 3.1;
 - Section 4 at 4.4 and 4.6;
- (ii) has failed to comply with the Property Factor's Duties and

- (iii) has not failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the 2021 Code at OSP12.

Background

1. By application received between 20 April 2022 and 31 May 2022 ("the Application") the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Factor had failed to comply with the 2021 Code and had failed to comply with the Property Factor's Duties.
2. The Application comprised details of the nature of the alleged breaches, copy correspondence between the Parties, a copy of the Property Factor's Written Statement of Services, a timeline summarising the Homeowner's position and copy formal intimations of the complaints to the Property Factor.
3. On 6 June 2022, a legal member of the Chamber with delegated powers of the Chamber President accepted the Applications and referred them to the Tribunal. A case management discussion (CMD) was fixed for 11 August 2022 at 10.00 by telephone conference call.
4. Prior to the CMD, the Property Factor submitted written representations accepting part of the Homeowner's complaint to the extent that advice to the Homeowner that the Property Factor had spoken with his daughter was given in error. Also, prior to the CMD, the Homeowner submitted an amendment to the details of the Application.

CMD

5. The CMD took place on 11 August 2022 at 10.00 by telephone conference call. The Homeowner took part and was not represented. The Property Factor was represented by Ms. C. Borthwick, one of its employees with authority to act on its behalf before the Tribunal.
6. The Tribunal explained that, in terms of Rule 17 of the Rules, the purpose of the CMD was to explore how the Parties' dispute may be efficiently resolved by identifying the issues to be resolved, the facts which are agreed, any issues which require to be addressed between the Parties, to determine if a hearing or further procedure is necessary and the evidence required at any hearing.
7. The Tribunal noted that although the Application specifies numerous breaches of the 2021 Code, the matters complained of all arise from the Property Factor's advice to the Homeowner that the Property Factor had spoken with his daughter and its general conduct in delays in responding, in respect of issuing invoices and pursuing accounts.
8. The Homeowner briefly outlined the main complaints of the Application. Ms. Borthwick of the Property Factor fairly and unequivocally advised the Tribunal

that the Property Factor accepted the complaints as set out in the Application and so did not oppose them. She confirmed that no discussion had taken place with the Homeowner's daughter and that this was an error made by a former employee. She accepted that there had been delays in correspondence and that the debt procedures had been applied too strictly.

9. The Tribunal asked the Parties if they wished an opportunity to settle the Application but the Homeowner advised that he did not want to do so.
10. The Tribunal explained that in terms of Rule 17 (4) of the Rules, the Tribunal may do anything at a CMD which it may do at a hearing including making a decision. The Tribunal adjourned briefly to decide if it could make a decision on the information before it. The Tribunal took into account the detailed information provided in the Applications and the submissions made by Ms. Borthwick. The Tribunal had regard to Rule 2 of the Rules and the application of the Overriding Objective and took the view that, as the Application was not opposed and as the Tribunal had sufficient information, it was appropriate to proceed to determine the Application at the CMD. Having so decided, the Tribunal advised the Parties that it would proceed on that basis.
11. The Tribunal then heard the Parties more fully on the heads of complaint and breaches as outlined in the Applications. The Homeowner's position on each head of complaint is set out fully in the Application. Mr. McLeod explained the position further when it was appropriate to do so. The Property Factor's position was submitted by Ms. Borthwick from her knowledge of dealing with Property.

Overarching Standards of Practice.

12. The 2021 Code imposes Overarching Standards of Practice (OSP) with which the Property Factor must comply. The Application sets out seven complaints in respect of the OSP.
13. OSP1 states: "*You must conduct your business in a way that complies with all relevant legislation.*" The Homeowner's complaint is that the Property Factor breached the General Data Protection Regulation by speaking to his daughter who had no authority to act on his behalf. He stated that he was not aware that this was an error until the Property Factor lodged its written submission to this effect. He did not accept that this was a simple error as he understood that the member of staff who made the comment to him had been supervised by senior staff. On behalf of the Property Factor, Ms. Borthwick explained that the error had been the incorrect noting of a phone call against the Homeowner's records and that no contact had been made with the Homeowner's daughter. She explained that the record was an internal secure record within the Property Factor's organisation and that no information had been passed to any other parties.
14. OSP2 states: "*You must be honest, open, transparent and fair in your dealings with homeowners.*" The Homeowner's complaint is that the Property Factor ignored his correspondence relating to accounts and invoicing and wrote to him

stating that he had not responded when he had done so. The matter of speaking with his daughter also fell under this head of complaint. On behalf of the Property Factor, Ms. Borthwick accepted that the Property Factor had not had regard to the Homeowner's emails and again explained the error of the incorrect noting of a phone call against the Homeowner's records.

15. OSP4 states: "*You must not provide information that is deliberately or negligently misleading or false.*" The Homeowner's complaint is broadly similar to that made in respect of OSP 2 above. On behalf of the Property Factor, Ms. Borthwick again accepted that the Property Factor had not had regard to the Homeowner's emails in correspondence with him and again accepted that there had been an error of the incorrect noting of a phone call against the Homeowner's records which had been wrongly advised to the Homeowner.
16. OSP6 states: "*You must carry out the services you provide to homeowners using reasonable care and skill and in a timely way, including by making sure that staff have the training and information they need to be effective.*" The Homeowner's complaint is way in which the Property Factor dealt with his questions about its invoicing. He did not receive a response for 7 months and the Property Factor did not deal with the enquiry but added a late payment charge of £30.00 to his account. On behalf of the Property Factor, Ms. Borthwick accepted that the Property Factor had delayed in corresponding with the Homeowner and had applied its late payment charge too rigorously and without regard to the circumstances.
17. OSP10 states "*You must ensure you handle all personal information sensitively and in line with legal requirements on data protection*" The Homeowner's complaint is broadly similar to that made in respect of OSP 1 above. On behalf of the Property Factor, Ms. Borthwick again explained the error and reinforced that no information had been passed to any other parties.
18. OSP11 states "*You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure.*" The Homeowner's complaint is broadly similar to that made in respect of OSP 6 above. On behalf of the Property Factor, Ms. Borthwick accepted that the Property Factor had delayed in corresponding with the Homeowner and not adhered to its timescales.
19. OSP12 states "*You must not communicate with homeowners in any way that is abusive, intimidating or threatening.*" The Homeowner's complaint is similar to that made in respect of OSP6 above and way in which the Property Factor threatened court action in respect of accounts which he had clearly disputed and which should have been put on hold until resolved. He stated that he and his wife found the references to court action and notices being registered against his title deeds distressing and unwarranted. On behalf of the Property Factor, Ms. Borthwick accepted that the Property Factor had delayed in corresponding with the Homeowner and, although it had applied its late payment charge without regard to the circumstances, it had acted within its policy. She explained that the

late payment charges had been removed from the Homeowner's account and confirmed that the account was not in arrears.

Written Statement of Services

20. The 2021 Code at Section 1 impose an obligation on the Property Factor to provide a Written Statement of Services (WSS) and imposes an obligation to comply with the WSS as part of that Code. Section 1.14 of the 2021 Code deals with timescales for correspondence. The Homeowner's complaint is that set out at OSP6 and OSP11 above that the Property Factor had not corresponded with him in line with its set timescales. On behalf of the Property Factor, Ms. Borthwick accepted that the Property Factor did not comply with its WSS in respect of response timescales.

Communications and Consultation

21. The 2021 Code at Section 2.2 imposes an obligation on the Property Factor to comply with current data protection legislation. The Homeowner's complaint is that set out at OSP1 above that the Property Factor had breached the General Data Protection Regulation by speaking to his daughter who had no authority to act on his behalf. On behalf of the Property Factor, Ms. Borthwick reiterated that this had been a simple error and that no information had been passed to any other parties.
22. The 2021 Code at Section 2.7 imposes an obligation on the Property Factor to respond within the timescales set out in its WSS. The Homeowner's complaint is that set out at OSP6 and OSP11 above that the Property Factor had not corresponded with him in line with its set timescales. On behalf of the Property Factor, Ms. Borthwick again accepted that the Property Factor did not comply with its WSS in respect of response timescales.

Financial Obligations

23. Section 3 of the 2021 Code imposes obligations relating to financial obligations and accountability. Section 3.1 states "*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.*". The Homeowner's complaint in this regard is that the Property Factor issues accounts in advance for works which might or might not be carried out and proceeds to threaten court action if these estimated accounts are unpaid or queried. The Homeowner stressed that he paid the sums agreed with him but that this arrangement had been ignored by the Property Factor and the Property Factor failed to deal with his queries in respect of the accounts. On behalf of the Property Factor, Ms. Borthwick explained that the Property Factor fixes an annual budget for the development of which the Property forms part with estimates for routine and emergency works which are payable in advance. She explained that the accounts are reconciled six-monthly when the actual costs are known. She

accepted that debt recovery procedures are implemented in respect of unpaid estimated accounts.

Debt Recovery

24. Section 4 of the 2021 Code imposes obligations relating to debt recovery procedures. Section 4.4 states that a property factor must be consistent in its application of its procedures and Section 4.6 states that a property factor must also issue timely written reminders to inform a homeowner of any amounts they owe. The Homeowner's complaint in this regard is similar to that set out at OSP12 above in that the Property Factor did not apply its procedure consistently as it failed to put a hold on his disputed accounts and took over 7 months from issuing a first reminder to issuing a second reminder, at which time a late payment penalty was applied. He stated that the Property Factor failed to deal with his queries in respect of the accounts and did not act reasonably in applying its procedures as the Property Factor should have treated his queries as a dispute of the account. On behalf of the Property Factor, Ms. Borthwick accepted that the Property Factor had delayed in corresponding with the Homeowner and, again stated that although the Property Factor had acted in line with its policy, it should not have imposed the late payment charges.

Property Factor's Duties.

25. The Homeowner's complaint in this regard is the way in which the Property Factor acted in complying with the 2021 Code and its WSS. These are the Property Factor's failure to comply with its duties as agent for the Homeowner in its application and compliance with data protection regulations, its failure to comply with the WSS in respect of (i) dealing with correspondence appropriately or timeously and (ii) its policy of issuing and pursuing estimated accounts in advance of work being instructed. These matters and the Property Factor's response are dealt with at length in the foregoing paragraphs and so are not repeated in detail here.

Findings in Fact.

26. The Tribunal had regard to the Application in full and to the oral submissions and statements made at the CMD, whether referred to in full in this Decision or not, in establishing the facts of the matter and that on the balance of probabilities.

27. The Tribunal found the following facts established:

- i) The Parties are as set out in the Application;
- ii) The Homeowner is a homeowner in terms of the Act;
- iii) The Property Factor is a property factor in terms of the Act and is bound by Sections 14 and 17 of the Act, being the duty to comply with the statutory codes of conduct and the duty to comply with the Property Factor's Duties;
- iv) The Property Factor advised the Homeowner that it had discussed his affairs with his daughter by telephone;

- v) The Property Factor recorded the above mentioned telephone call against the Homeowner's file;
- vi) The Property Factor's advice to the Homeowner of the telephone call and the record it made against the Homeowner's file were both in error as no telephone call had been made or received;
- vii) The Property Factor issues accounts in advance with estimated costs for works which might or might not be carried out;
- viii) The Property Factor pursues unpaid estimated accounts;
- ix) The Property Factor did not comply with its WSS in respect of response times for communications and correspondence and
- x) The Property Factor did not treat the Homeowner's querying of the invoices issued as a dispute.

Issues for Tribunal

28. The issues for the Tribunal are: has the Property Factor breached those parts of the 2021 Code as complained of in the Applications and has the Property Factor failed to comply with the Property Factor's Duties.

Decision of the Tribunal with reasons.

29. Section 19 of the Act states: “*(1)The First-tier Tribunal must, in relation to a homeowner’s application referred to it ... decide (a)whether 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)if so, whether to make a property factor enforcement order.*” Having heard the Parties, the Tribunal proceeded to make a decision in terms of Section 19 (1)(a) of the Act.

30. OSP1 states: “*You must conduct your business in a way that complies with all relevant legislation.*” The Homeowner’s complaint is that the Property Factor breached the General Data Protection Regulation. The Tribunal accepted that the Property Factor had acted in error by advising the Homeowner of a conversation and had recorded this against his file, again, in error. The Tribunal accepted that this was a clerical mistake and that personal information had not been released to third parties. However, the General Data Protection Regulation covers not just the release of information but the handling and storing of information and the Tribunal is satisfied that the Property Factor is in breach of those regulations to this extent. Accordingly, the Tribunal decided that the Property Factor did not comply with this part of the 2021 Code.

31. OSP2 states: “*You must be honest, open, transparent and fair in your dealings with homeowners.*” As Ms. Borthwick accepted that the Property Factor had not had regard to the Homeowner’s emails and had given erroneous information in respect of the telephone call, the Tribunal decided that the Property Factor did not comply with this part of the 2021 Code.

32. OSP4 states: “*You must not provide information that is deliberately or negligently misleading or false.*” Again, as Ms. Borthwick accepted that the Property Factor had not had regard to the Homeowner’s emails and had given erroneous information in respect of the telephone call, the Tribunal decided that the Property Factor did not comply with this part of the 2021 Code as it had acted negligently in its dealings with the Homeowner.
33. OSP6 states: “*You must carry out the services you provide to homeowners using reasonable care and skill and in a timely way, including by making sure that staff have the training and information they need to be effective.*” Again, as Ms. Borthwick accepted that the Property Factor that the Property Factor had delayed in corresponding with the Homeowner and had applied its late payment charge too rigorously and without regard to the circumstances, the Tribunal decided that the Property Factor did not comply with this part of the 2021 Code.
34. OSP10 states “*You must ensure you handle all personal information sensitively and in line with legal requirements on data protection*” The Homeowner’s complaint is broadly similar to that made in respect of OSP1 above. Again, although the Tribunal accepted that this was a clerical mistake and that personal information had not been released to third parties, the Tribunal’s view is that the General Data Protection Regulation go beyond the release of information and apply also to handling and storing of information. Accordingly, the Tribunal decided that the Property Factor did not comply with this part of the 2021 Code.
35. OSP11 states “*You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure.*” As Ms. Borthwick accepted that the Property Factor that the Property Factor had delayed in corresponding with the Homeowner, the Tribunal decided that the Property Factor did not comply with this part of the 2021 Code.
36. OSP12 states “*You must not communicate with homeowners in any way that is abusive, intimidating or threatening.*” The Homeowner’s complaint is similar to that made in respect of OSP6 above and way in which the Property Factor threatened court action in respect of accounts. The Tribunal accepted that the Property Factor had acted within its policy and took the view that its debt recovery letters used standard terminology for debt collection procedures. However, the letters should not have been sent to the Homeowner in these circumstances. On balance, the Tribunal took the view that the letters, whilst extremely upsetting to the Homeowner and his wife, were not abusive, intimidating or threatening. Accordingly, the Tribunal decided that the Property Factor did not fail to comply with this part of the 2021 Code.

Written Statement of Services

37. The 2021 Code at Section 1 impose an obligation on the Property Factor to provide a Written Statement of Services (WSS) and imposes an obligation to comply with the WSS as part of that Code. Section 1.14 of the 2021 Code deals with timescales for correspondence. As Ms. Borthwick accepted that the Property

Factor did not comply with its WSS in respect of response timescales, the Tribunal decided that the Property Factor did not comply with this part of the 2021 Code.

Communications and Consultation

38. The 2021 Code at Section 2.2 imposes an obligation on the Property Factor to comply with current data protection legislation. The Homeowner's complaint is that set out at OSP1 and OSP10 above, and as narrated in the foregoing paragraphs, the Tribunal view is that the Property Factor had breached the General Data Protection Regulation. Accordingly, the Tribunal decided that the Property Factor did not comply with this part of the 2021 Code.
39. The 2021 Code at Section 2.7 imposes an obligation on the Property Factor to respond within the timescales set out in its WSS. The Homeowner's complaint is that set out at OSP6 and OSP11 above that the Property Factor had not corresponded with him in line with its set timescales. As Ms. Borthwick accepted that the Property Factor did not comply with its WSS in respect of response timescales, the Tribunal decided that the Property Factor did not comply with this part of the 2021 Code.

Financial Obligations

40. Section 3 of the 2021 Code imposes obligations relating to financial obligations and accountability. Section 3.1 states "*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.*". The Homeowner's complaint in this regard is the way in which the Property Factor issues accounts in advance for works and its lack of explanation when the accounts are queried. The Property Factor's explanation is that it fixes an annual budget for the development of which the Property forms part with estimates for routine and emergency works which are payable in advance. The Tribunal had regard to the WSS which forms part of the Application. Nowhere in the WSS, which is specific to the development of which the Property forms part, does the Property Factor state or explain that it takes this estimated approach to invoicing in advance of works being carried out. In fact, the WSS at paragraph 11.2 explicitly states that the accounts are "payable quarterly in arrears". The Tribunal had no hesitation in deciding that the Property Factor did not comply with this part of the 2021 Code.

Debt Recovery

41. Section 4 of the 2021 Code imposes obligations relating to debt recovery procedures. Section 4.4 states that a property factor must be consistent in its

application of its procedures and Section 4.6 states that a property factor must also issue timely written reminders to inform a homeowner of any amounts they owe. The Homeowner's complaint in this regard is similar to that set out at OSP 6 and OSP12 above. Again, as Ms. Borthwick accepted that the Property Factor that the Property Factor had delayed in corresponding with the Homeowner and had applied its late payment charge too rigorously and without regard to the circumstances, the Tribunal decided that the Property Factor did not comply with this part of the 2021 Code

Property Factor's Duties.

42. The Homeowner's complaint in this regard is the way in which the Property Factor acted in complying with the 2021 Code and in complying with its WSS. These are the Property Factor's failure to comply with its duties as agent for the Homeowner in its application and compliance with data protection regulations, its failure to comply with the WSS in respect of (i) dealing with correspondence appropriately or timeously and (ii) its policy of issuing and pursuing estimated accounts in advance of work being instructed. Having determined that the Property Factor has repeatedly failed in its compliance with the 2021 Code, the Tribunal had no hesitation in deciding that the Property Factor has not complied with the Property Factor's Duties.

Property Factor Enforcement Order (PFOE)

43. Having made a decision in terms of Section 19(1)(a) of the Act that the Property Factor has failed to carry out the Property Factor's Duties and has failed to comply with the Section 14 duty, the Tribunal then proceeded to consider Section 19(1) (b) of the Act which states "*(1)The First-tier Tribunal must, in relation to a homeowner's application referred to it ... decide ... whether to make a property factor enforcement order.*"
44. The Tribunal had regard to the fact that, although the Property Factor's breaches of the 2021 Code are many, they emanate from the same issues. The failure to comply with the Property Factor's Duties also emanate from the breaches of the Codes. Therefore, the Tribunal is mindful not to penalise the Property Factor for this duplication of failings. These failings and breaches have caused the Homeowner unnecessary stress and worry about his financial dealings with the Property Factor.
45. Therefore, the Tribunal proposes to make a PFOE.
46. Section 20 of the Act states: "*(1) A property factor enforcement order is an order requiring the property factor to (a) execute such action as the First-tier Tribunal considers necessary and (b) where appropriate, make such payment to the homeowner as the First-tier Tribunal considers reasonable. (2) A property factor enforcement order must specify the period within which any action required must be executed or any payment required must be made. (3)A property factor enforcement order may specify particular steps which the property factor must*

take.”

47. The Tribunal proposes to make a PFEO to order the Property Factor to apologise to the Homeowner for its failings and to make reasonable payment to the Homeowner to compensate the Homeowner for inconvenience, stress and time spent in dealing with his complaints.
48. Section 19 (2) of the Act states: - *“In any case where the First-tier Tribunal proposes to make a property Respondents enforcement order, it must before doing so (a)give notice of the proposal to the property Respondents, and (b)allow the parties an opportunity to make representations to it.”* The Tribunal, by separate notice intimates the PFEO it intends to make and allows the Parties fourteen days to make written representations on the proposed PFEO.
49. The decision is unanimous.

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.

Karen Moore,

Chairperson

22 August 2022