



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

**Decision on Homeowner's application: Property Factors (Scotland) Act 2011
Sections 17(1)(a) and 17(1)(b)**

Chamber Ref: FTS/HPC/PF/21/1836

Re: Property at 58 Bowen Craig, Largs KA30 8TB ("the Property")

The Parties:

Mr Neil Aitken, 58 Bowen Craig, Largs KA30 8TB ("the Home Owner")

Ross and Liddell Limited, 60 St. Enoch Square, Glasgow G1 4AW ("the Property Factor")

Tribunal Members:

Neil Kinnear (Legal Member) and Mike Links (Ordinary Member)

DECISION

The Tribunal dismissed the Homeowner's application upon the basis that the Homeowner failed to notify the Property Factor in compliance with Section 17(3) of the *Property Factors (Scotland) Act 2011* ("the 2011 Act").

The Decision of the Tribunal is unanimous.

Introduction

In this Decision the *Property Factors (Scotland) Act 2011* is referred to as "the 2011 Act"; the *Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors* is referred to as "the Code"; and *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended are referred to as "the Rules".

The Property Factor was a Registered Property Factor and had a duty under section 14(5) of the 2011 Act to comply with the Code.

Background

By application dated 29th July 2021 the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to carry out its property factor duties in terms of section 17(1) of the 2011 Act and had failed to comply with Sections 2.1, 2.5, and 5.2 of the Code as required by Section 14(5) of the 2011 Act.

On 13th September 2021 a Convenor on behalf of the President accepted the application and referred it to a Tribunal for a hearing. By letters dated 29th September 2021 both parties were notified that a Case Management Discussion by conference call would take place at 10.00 on 16th November 2021.

Prior to the Case Management Discussion both parties lodged helpful written submissions outlining their respective positions.

A Case Management Discussion was held at 10.00 am on 16th November 2021 by conference call. The Homeowner participated, and was not represented. The Property Factor did not participate, but was represented by Mrs Glendinning, solicitor.

As a preliminary matter, the Ordinary Member advised the parties that he had realised that he had acted as an Ordinary Member of a previous Tribunal in June 2019, which Tribunal had issued a decision in a previous application made by the Homeowner against the Property Factor seeking a determination on whether the Property Factor had failed to carry out its property factor duties. The Ordinary Member advised the parties that due to the passage of time, he had no recollection of the previous application and that he did not feel that his impartiality in this application would be affected. He however drew this to the parties' attention lest they might have any concerns or objections to his involvement in this application.

Both parties advised the Tribunal that they had no such concerns or objections, and that they were content for the Tribunal as constituted to deal with this application.

Thereafter, the Tribunal discussed with the parties the preliminary issue raised by Mrs Glendinning that the Homeowner had not complied with section 17(3) of the 2011 Act with respect to notifying the Property Factor in writing as to why he considered that the Property Factor has failed to carry out its property factor duties and has failed to comply with the Code of Conduct for Property Factors prior to lodging his application with the Tribunal. In consequence of that non-compliance, the Property Factor had not refused to resolve or unreasonably delayed in attempting to resolve the concerns set out in any such notification.

The Homeowner had not appreciated that the answer to the question of whether he had complied with section 17(3) of the 2011 Act or not might mean that the Tribunal has no jurisdiction to hear this application, and the Tribunal considered that in these circumstances it was in the interests of justice to continue the Case Management Discussion to allow the Homeowner to consider his position on that question and to provide his written submissions upon it.

The Tribunal informed the parties that it would issue a direction to the Homeowner to provide his written submission with regard to the matter in advance of the continued Case Management Discussion to be set.

Prior to the continued Case Management Discussion the Homeowner lodged written submissions in response to the Tribunal's direction.

Continued Case Management Discussion

A continued Case Management Discussion was held at 10.00 am on 11th February 2022 by conference call. The Homeowner participated, and was not represented. The Property Factor did not participate, but was represented by Mrs Glendinning, solicitor.

The Homeowner referred to his written submission, which explained that after he had obtained no satisfaction from the Property Factor in dealing with his complaints, he did not send a notification to the Property Factor in writing giving notice as to why he considered that the Property Factor had failed to carry out its property factor duties and had failed to comply with the Code of Conduct for Property Factors prior to lodging his application with the Tribunal.

However, he had sent a draft copy of his application to the Property Factor on 19th July 2021 and invited it to provide a written response. Having received no response, he proceeded to lodge the application with the Tribunal ten days later on 29th July 2021.

Mrs Glendinning argued that the draft copy of the Application was not a notification in writing to the Property Factor as to why the Homeowner considered that the Property Factor had failed to carry out its property factor duties and had failed to comply with the Code of Conduct for Property Factors prior to lodging his application with the Tribunal.

Even if the draft application were to be treated as a valid notification in terms of section 17(3)(a) of the 2011 Act, the Homeowner had not complied with section 17(3)(b) of the 2011 Act which provides that no application may be made to the Tribunal unless the Property Factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern. As the Homeowner had lodged his application with the Tribunal only ten days after sending the draft copy to the Property Factor, the Property Factor did not have time to either refuse to resolve nor to unreasonably refuse to resolve the Homeowner's concern detailed in the draft application.

Indeed, the Property Factor had responded to the Homeowner on 23rd July 2021 to confirm that it was treating the draft application as stage one of the Property Factor's property management complaint process as set out in its written Service Level Agreement. In these circumstances, the Homeowner was not entitled to make this application.

Statement of Reasons

Section 17 of the 2011 Act provides:

“17 Application to the First-tier Tribunal

(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.

(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.”

The Tribunal required to decide it upon its interpretation of the requirements imposed by section 17 of the 2011 Act, and whether these have been met in this application.

Section 17(3) provides that no application may be made to the Tribunal unless 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 the Property Factor has refused to resolve, or unreasonably delayed in attempting to resolve, the Homeowner's concern.

It appears to the Tribunal that the purpose of this provision is for the Homeowner who intends to make the application to be required to bring his or her concern to the Property Factor's attention identifying the specific Code breaches and breaches of the Property Factor's duties the Homeowner relies upon, and to allow the Property Factor's complaints procedure to be engaged.

It is once that procedure has been engaged, and in the event that it fails to resolve the complaint by the Property Factor's refusal or delay in doing so, that the Tribunal's jurisdiction is in turn engaged.

The discreet question in this application is whether the sending of the draft application to the Property Factor ten days before submitting it to the Tribunal is sufficient to meet this requirement.

The Tribunal, after very careful consideration, concludes that it is not for the following reasons.

In this application, the Homeowner did not send notification in terms of section 17(3)(a) of the 2011 Act to the Property Factor of the Homeowner's concern prior to submitting his application. The Tribunal does not consider sending an advance copy of the application to the Tribunal as satisfying the provisions of section 17(3)(a), which clearly envisages separate written notification being given before an application is prepared.

In the event that the Tribunal is incorrect in that conclusion, and that sending the Property Factor an advance copy of the application is sufficient to comply with section 17(3)(a) of the 2011 Act, then in any event the Homeowner has not complied with section 17(3)(b) of the 2011 Act. Ten days is clearly on any view an entirely insufficient period of time to allow the Property factor to attempt to resolve the Homeowner's concern.

For these reasons, the Tribunal considered that the Homeowner failed to notify the Property Factor in compliance with Section 17(3) of the *Property Factors (Scotland) Act 2011* ("the 2011 Act"), and accordingly this application must be dismissed.

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.

16/02/2022

Legal Member

Date